



LORD RUSSELL OF KILLOWEN, C.J.

(From a photograph by the London Stereoscopic Company.)

BUILDERS OF OUR LAW

DURING THE

REIGN OF QUEEN VICTORIA.

BY

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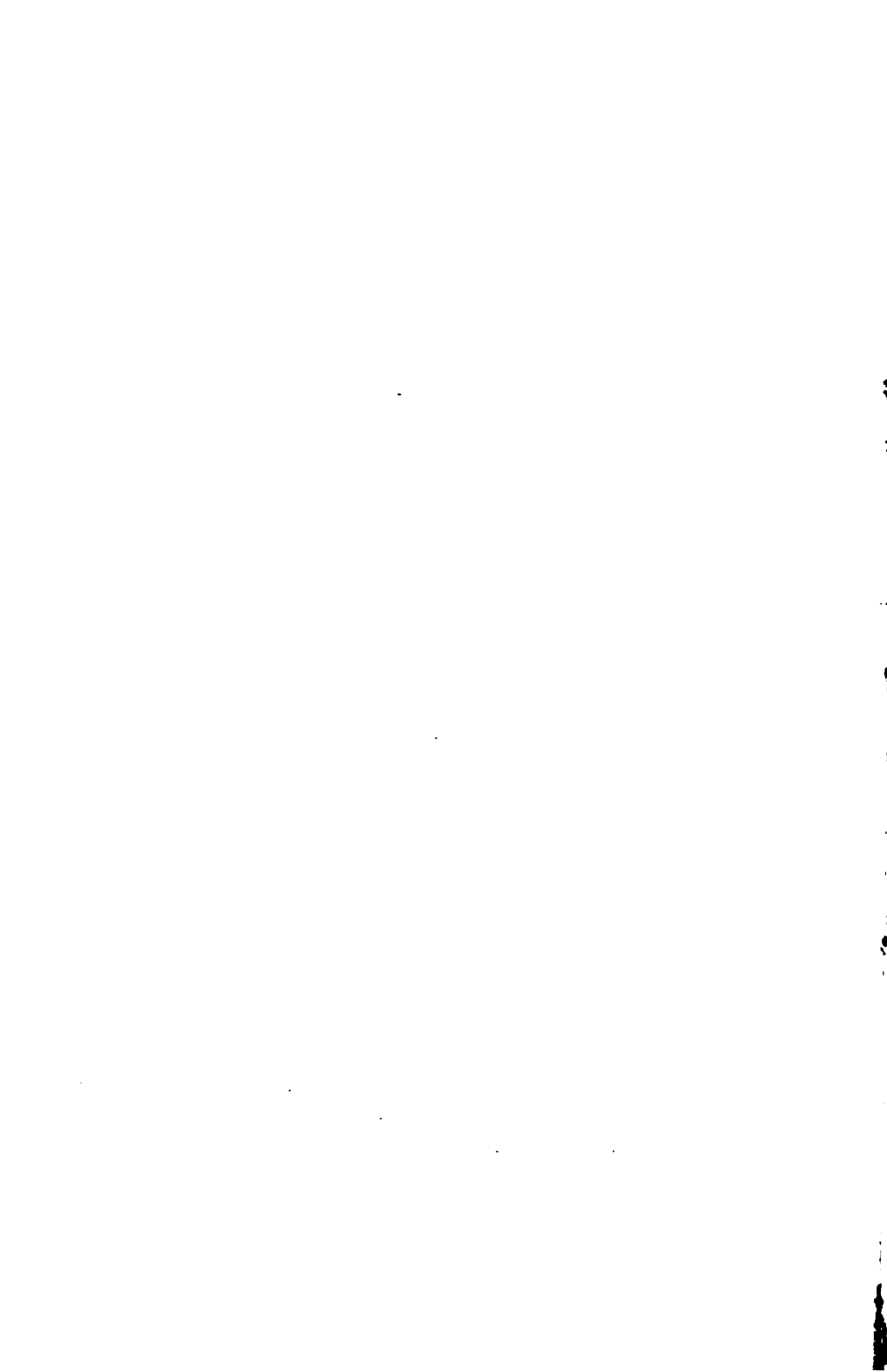
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Dedicated
TO
LORD DAVEY.



PREFACE TO THE SECOND EDITION.

THE author's aim in these pages has been to sketch the lives of some of the greatest of modern English Judges—taking up the tale where Lord Campbell left it—and in doing so to give the reader some idea of their several contributions to the making of English law—to show

How in the vast, the laboured whole,
Each mighty master poured his soul.

The first edition contained thirty-five names; to these thirteen more have now been added: Lord Langdale, Vice-Chancellor Kindersley, Vice-Chancellor Bacon, Lord Hannen, Sir James Fitzjames Stephen, Lord Coleridge, Lord Selborne, Lord Justice Chitty, Lord Esher, Lord Bowen, Lord Herschell, Lord Russell of Killowen, and Lord Watson. At the same time the earlier sketches have been revised and enlarged.

The author has to thank Sir Harry Poland, K.C., for many valuable suggestions and emendations, and also his Honour Lumley Smith, K.C., for similar help.

He also desires to express his thanks to Mr. G. J. Lush and Messrs. Sweet and Maxwell for kindly lending him portraits.

E. M.

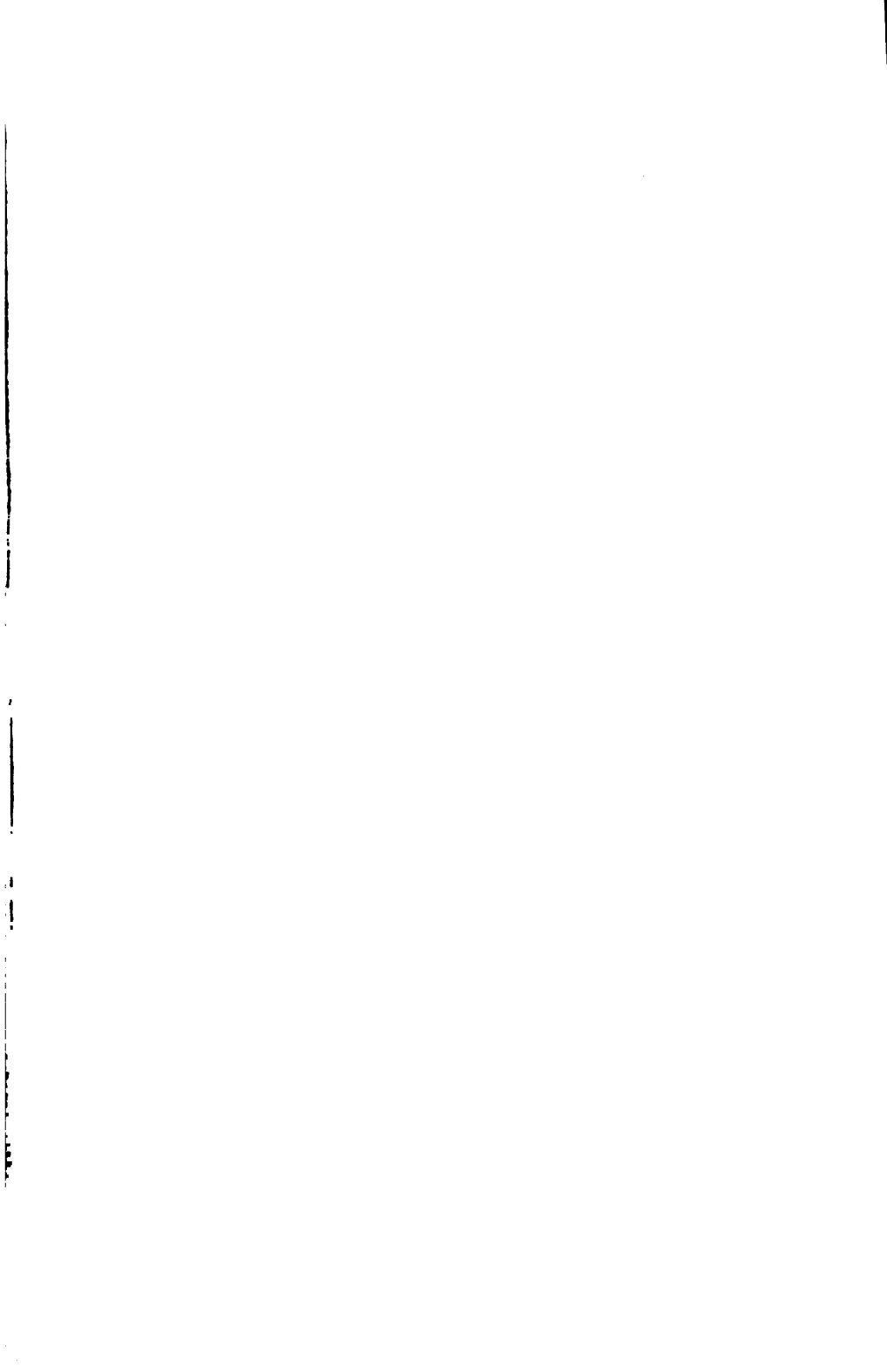
8, Old-square, Lincoln's Inn.
January, 1904.



TABLE OF CONTENTS.

	PAGE
Lord Cottenham	1
Lord Langdale	8
Chief Justice Tindal	18
Lord Justice Knight Bruce (<i>with Portrait</i>)	27
Baron Parke—Lord Wensleydale	34
Right Honourable Stephen Lushington, the	41
Chief Justice Jervis	50
Lord Cranworth (<i>with Portrait</i>)	58
Mr. Justice Maule	66
Lord Abinger	73
Lord Truro... ..	83
Baron Alderson	91
Lord Denman (<i>with Portrait</i>)	100
Lord St. Leonards	108
Chief Baron Pollock	116
Sir Cresswell Cresswell	124
Lord Campbell	133
Mr. Justice Patteson (<i>with Portrait</i>)	141
Lord Westbury (<i>with Portrait</i>)... ..	148
Chief Justice Cockburn (<i>with Portrait</i>)	157
Mr. Justice Wightman	167
Lord Hatherley	175
Mr. Justice Willes	184
Lord Bramwell (<i>with Portrait</i>)	192
Lord Cairns (<i>with Portrait</i>)	203
Baron Martin (<i>with Portrait</i>)	215
Sir George Jessel (<i>with Portrait</i>)	224

	PAGE
Sir Robert Phillimore (<i>with Portrait</i>)	234
Lord Justice Mellish (<i>with Portrait</i>)	242
Lord Justice Lush	250
Lord Blackburn	258
Lord Justice James (<i>with Portrait</i>)	266
Chief Justice Erle (<i>with Portrait</i>)	276
Sir Edward Vaughan Williams	285
Mr. Justice Crompton	294
Chief Baron Kelly	302
Vice-Chancellor Bacon	311
Vice-Chancellor Kindersley	323
Lord Hannen	332
Sir James Fitzjames Stephen	344
Lord Chief Justice Coleridge	355
Lord Selborne	368
Lord Justice Chitty (<i>with Portrait</i>)	381
Lord Esher (<i>with Portrait</i>)	391
Lord Bowen	405
Lord Herschell (<i>with Portrait</i>)	417
Lord Russell of Killowen (<i>with Portrait, Frontispiece</i>)	429
Lord Watson	440





WESTMINSTER HALL.

THE
BUILDERS OF OUR LAW DURING
QUEEN VICTORIA'S REIGN.

LORD COTTENHAM.

WHEN her late Gracious Majesty ascended the throne, the holder of the Great Seal was Lord Cottenham. He was of the elder branch of the same Cambridgeshire family, from which Samuel Pepys, the immortal diarist, was descended. Yet it would be difficult to find two greater contrasts than the "cold and sedate" Charles Christopher Pepys and the "gossipy pleasure loving" Samuel. If they had anything in common, it was the faculty of getting on. Young Campbell, who was then in Mr. Tidd's chambers, writes to his father in 1802: "There is a society among the pupils which meets once a week exclusively for the discussion of questions of law. It is modelled upon the plan of the Courts of Westminster—a chief justice, counsel for the plaintiff and defendant, &c. The great ornament of our bar is a Mr. Pepys, a nephew of Sir Lucas." "Slow rises worth," however, at the Chancery Bar, especially with a man whose parts, like Pepys, were rather solid than brilliant. Though a pupil of Tidd and Samuel Romilly, the most distinguished practitioners of the day, and the glory of a mimic bar, it was twenty-two years after his call before he obtained silk—he was forty before he felt himself in a position to marry. In the usual course of professional ambition, he

entered Parliament as member for the borough of Malton, but his unadorned oratory made little impression on the House of Commons. That House is said to be strewn with the wrecks of lawyers' reputations, and one can hardly wonder at it. Lawyers, to begin with, are not favourites, and they labour under special disadvantages. The successful advocate, as some one has observed, after a series of exhausting conflicts in a court of law, comes late at night to engage in a struggle hand to hand with officials trained to statesmanship from their youth, to debate currency questions with bankers, agricultural and commercial affairs with country gentlemen and merchants, or foreign policy with members of the "Corps Diplomatique." To do this successfully, a man must be a Brougham, or a consummate sophist and rhetorician; and Pepys was neither. He owed his advancement to be the Master of the Rolls to Lord Brougham, whom he afterwards supplanted, much to that worthy's chagrin, in the Chancellorship. Yet he cannot be charged with ingratitude or any unworthy acts. His own merit, his mastery of equity, pointed him out for the post. Brougham declared that his appointment of Pepys to the Mastership of the Rolls was his own best title to the gratitude of the profession. So, too, it was the judicial ability he displayed as Master of the Rolls which led to his being offered the Chancellorship, though it was also hoped that his authority would counter-vail the ascendancy of Lord Lyndhurst. Campbell calls it a "most unfortunate choice"—he means having regard to the exigencies of the political situation—for excellent lawyer as Lord Cottenham was, he was no debater, could hardly, according to Campbell, "put two words together," and would as soon have faced his exasperated rival Brougham as an evil spirit. The real truth of the case was that Lord Melbourne could stand Lord Brougham no longer. "It is impossible to act with him," he said, and he accordingly chose Lord Cottenham as a steady, unobtrusive personage not likely to give trouble. It was said at the time that Melbourne must have felt like a man who had got rid of a capricious mistress and married his housekeeper.

From a legal point of view the appointment was unexceptionable, for Lord Cottenham was, as Campbell admits, a consummate equity lawyer. When the aged Lord Eldon entered the House of Lords for the last time, his first act was to make his way to the Woolsack, on which Lord Cottenham, then newly appointed, was seated :

"My Lord," he said, "I am happy to take the opportunity of assuring you that everything I hear of you entitles you to my sincere respect."

The value of this compliment is enhanced when we remember that Lord Cottenham was as staunch a Whig as Lord Eldon was a Tory.

Roundell Palmer—afterwards Lord Selborne—was then a Chancery junior, and he has left on record in his "Reminiscences" his impressions of Lord Cottenham. "Lord Cottenham," he says, "was not brilliant, but he was one of the best lawyers who after Lord Eldon's time sat in the Court of Chancery. He heard arguments patiently, and the public had confidence in his judgment. He was a silent, reserved, and not very sociable man: by no means free from personal antipathies and political prejudices; but of myself he took kind notice, though I was not on his side in politics. I was one of the few juniors sometimes honoured by invitations to his house."

"His (Lord Cottenham's) skill in deciding cases," says Lord Campbell, "arises from a very vigorous understanding, unwearied industry in professional plodding, and a complete mastery over all the existing practice and all the existing doctrines of the Court of Chancery. He considers the system which he has to administer as the perfection of human wisdom. Phlegmatic in everything else, here he shows a considerable degree of enthusiasm. Admiration for equity did not, however, blind him to the defects of our legal system, and many of these defects he sought to remedy. Thus he tried to facilitate the administration of justice by transferring the Equity jurisdiction of the Exchequer to Chancery. He carried a bill in the session of 1837 for the relief of insolvent debtors, and in 1846 he moved the second reading of the Small Debts Bill, by which the modern County Court was first established."

"Oliver," wrote Lord Eldon once, "let me warn you never to be ambitious of the highest honours of the law. Believe me, when I give you my word that I have not known a single day of freedom from anxiety since I have held the Great Seals." Lord Cottenham's health gave way under the strain of his second Chancellorship. At the end of November, 1847, he broke a blood-vessel, and the restless and intriguing Brougham at once suggested to Campbell that this was his opportunity.

Campbell: "But one difficulty is that Cottenham is recovering

and talks of sitting in court again next week." Brougham: "If he makes that attempt, a commission of lunacy ought to be sealed against him. The blood-vessel, though a small one, was in his lungs. Now is your time."

But the plotters were discomfited. Lord Cottenham did not die just then, though he had to be kept in a dark room, fed on iced whey, and was not suffered to talk to anyone. When he did resign and go abroad in the vain hope of restoring his shattered health by travel, Wilde, the Chief Justice of the Common Pleas, was chosen to succeed him on the Wool-sack. A few months later Lord Cottenham died at Pietra Santa, in the Duchy of Lucca, April 19th, 1851.

It is significant of the estimation in which his services were held that he was before his death advanced two steps in the Peerage.

Lord Cottenham's decisions are to be found in House of Lords Cases (Clark and Finelly) 1-3, Cooper Ch. Rep., Mylne and Craig, and Macnaghten and Gordon.

One of the most important is *Wilson v. Wilson* (1 H. of L. 538), recognising the enforceability of agreements between husband and wife for separation. It furnishes a curious instance of how judge-made law may be completely reversed under changed conditions of public policy. Such agreements were at one time wholly invalid, "thought horrible," as Jessel, M.R. said in *Besant v. Wood* (12 Ch. Div. 600), "as being against the inherent condition of the married state as well as against public policy." "It is quite inexplicable," says Lord Eldon in *Westmeath v. Westmeath* (Jacob, 133), "how courts of equity got any jurisdiction with respect to these articles." They did, however, and a very salutary jurisdiction it has proved.

"Why," as Lord Cottenham said in *Wilson v. Wilson*, "is not the compromise of such a suit (nullity for impotence) to afford consideration for an agreement? Is it desirable that the parties should be compelled to bring such a suit to public discussion?"

He was wise enough to see that law, if it is to remain living, must grow with the growth of Society. "It is the duty of courts of equity," he said (and the same is true of all courts and of all institutions) "to adapt their practice and course of proceedings as far as possible to the existing state of Society, and to apply its jurisdiction to all those new cases which from the progress daily making in the affairs of men must continually arise, and not

from too strict adherence to forms and rules established under very different circumstances to decline to administer justice and to enforce rights for which there is no other remedy."

Le Fanu v. Malcolmson (1 H. of L. 637) was another important decision of the House of Lords on the law of libel, given in the Chancellorship of Lord Cottenham. The defendant had denounced the cruelties practised "in some of the Irish factories," meaning the plaintiff's, and Lord Cottenham laid it down that, though defamatory matter may appear to apply only to a class of individuals, yet, if the descriptions in such matter be capable of being by innuendo shown to be directly applicable to any one individual of that class, an action may be maintained by such individual in respect of the publication of such matter." If it were not so, it would be easy to veil a libel, which everybody understood, under general language.

We have lately had our courts refusing jurisdiction over an independent sovereign, who had been masquerading incognito in England as Mr. Baker, and making promises of marriage. In the *Duke of Brunswick v. King of Hanover* (2 H. of L. 1) we have the same principle affirmed by Lord Cottenham. The odd thing in this case was that the independent sovereign, the King of Hanover, was also a British subject, but the acts done by him were done in his sovereign capacity. If sovereigns have privileges they have also disabilities. Probably not many persons are aware that the sovereign cannot hold a peerage. So it was decided in *Lord Oranmore's claim* (2 H. of L. 910), Cottenham Cancellore. One of the decisions which is always identified with the name of Lord Cottenham is that of *Thynne v. Earl of Glengall* (2 H. of L. 131) on the equitable doctrine of satisfaction. It lays down the very sensible rule, based on the leaning of equity against double portions, that when a father agrees to settle a sum on his daughter and then gives her by will a legacy or share of residue, the gift by will is to be taken *prima facie* to be in satisfaction of the portion. That is what he is presumed to intend, but if the settlement precedes the will the intention must of course be subject to the rights of the portioner. I give it, the testator in effect says, to my daughter if she will accept it in lieu of that which by the settlement I am bound to give her. The portioner nay of course refuse, then a case of election is raised. *Pym v. Locker* (5 Myl. & Cr. 29), deciding that an advancement subsequent to a will if less in amount than the sum given by the will

is to be considered a satisfaction *pro tanto*, is another sensible contribution of Lord Cottenham's to this doctrine of satisfaction.

Foley v. Hill (2 H. of L. 28) also deserves mention. It decides the important point that the relation between a banker and customer who pays money into the bank, is the ordinary relation of debtor and creditor—not principal and agent or trustee and *cestui que trust*—with a super-added obligation arising out of the custom of bankers to honour the customer's drafts. *Piers v. Piers* (2 H. of L. 331) is another House of Lords decision under Lord Cottenham's Chancellorship, of first-rate importance. It lays down that there is a strong legal presumption in favour of marriage, particularly after the lapse of a great length of time. This is a very salutary and comforting doctrine, especially having regard to the recent revelations as to the keeping of parish registers in the past. In one important case (*Allan v. McPherson*, 1 H. of L. 191) Lord Cottenham went wrong, and Lord Langdale too. They thought that, if fraud had been practised on a testator, the Court of Chancery could take cognisance of it and declare the executor a trustee for the party defrauded. But to do this would, as the other law lords pointed out, be to usurp the jurisdiction of the Court of Probate. "Boni judicis est ampliare *justitiam*," not *jurisdictionem*.

The occasion on which Lord Cottenham revealed himself at his best was in Mr. Lechmore Charlton's case (2 Myl. & Cr. 316). This gentleman, a barrister and a Member of Parliament for Ludlow, under the influence of some strange excitement about the appointment of charity trustees, wrote a letter threatening one of the masters and using very insulting language to the Chancellor. Lord Cottenham accordingly ordered him to be attached for contempt (rather on the ground of his threats to the master as an interference with the administration of justice, than of the personal insult to himself), and he was, after skulking for some time, arrested and conveyed to the Fleet. There he addressed a letter to the Speaker complaining of the breach of privilege, and a Committee of Inquiry was appointed. Parliamentary privilege, it was well settled even then, was no bar to arrest for felony or treason, but contempt was new. The result was that, as Lord Cottenham put it, "for contempt of this court the House of Commons most properly do not consider a member of their House as privileged," any more than a solicitor—we may now add—is privileged (*Be Preston*, 11 Q. B. Div. 557); the

attachment is ordered by way of punishment and is not mere process for enforcing obedience. Mr. Charlton remained three weeks in durance vile in the Fleet, and was only released on a second petition. Throughout the proceedings Lord Cottenham bore himself with great firmness and dignity, and vindicated, in a manner worthy of Chief Justice Gascoigne,

The majesty and power of law and justice.

LORD LANGDALE.

GOLD MACE OR PESTLE AND MORTAR.

THE poet Gray, musing in Stoke Poges Churchyard, thought how

Some mute, inglorious Milton here may rest,
Some Cromwell, guiltless of his country's blood,
Some village Hampden—

and a kindred thought often rises in our minds, in following the career of those who have achieved greatness, how nearly many of them were being consigned to obscurity—how nearly the light failed. Lord Langdale is an instance. There seemed at one time every probability that the destined Master of the Rolls, peer, and Privy Councillor would live and die an obscure country doctor, going his professional rounds in a gig, and making up prescriptions in his dispensary. This was the life his father, Mr. Bickersteth—surgeon and apothecary of Kirkby Lonsdale, in Westmorland—had led before him, and Henry Bickersteth, the third son—as his destined successor—began by serving an apprenticeship of five years to the same business; but a happy accident changed the whole tenour of his career. He was engaged by Lord Oxford to accompany him and his family on a tour in Italy, and the experience of foreign travel, the new scenes and new society to which it introduced him, widened his mental horizon and disenchanted him for ever with the narrow sphere and dull routine of a village doctor. He could not, he felt, be “buried alive in a small country town”; he was born to higher things. “Character,” as Novalis well says, “is destiny.” Bickersteth had a very strong character, and he owed much of it, like so many great men, to his mother—a remarkable woman. She had all the housewifely virtues for which the Vicar of Wakefield chose his spouse, and for the graciousness of her welcome to guests she was

pointed out as a model by all the husbands in Kirkby Lonsdale. What was more, she was a woman of exemplary probity. An anecdote will illustrate this.

“IT IS NOT YOURS!”—A MORAL TALE.

As Henry and his brother John, when mere children, were returning one evening from a visit to their grandmother, they found in the road a large log of wood which they dragged home with considerable difficulty, thinking it would make an excellent plaything.

“Where did you get it?” asked their mother, as they triumphantly showed her their prize.

“We found it in the road,” was the reply.

“Then it is not yours,” she said; “so you must take it back again and replace it where you found it.”

The lesson was never forgotten; Lord Langdale often related it in after years, and it passed through his mind when he adopted the significant and appropriate motto *Sum cuique*.

Conscientiousness was indeed his most marked characteristic through life. It made him, when he went to Cambridge, a “desperately hard student,” that he might not be a burden to his parents, and his filial piety had its reward. He came out Senior Wrangler and First Smith’s Prizeman (1808).

MATHEMATICS AND LAW.

The mathematical mind has always had an affinity for law, and there is nothing strange in the fact. Clearness of head and the logical faculty are the prime requisites in both. They are the qualities which alike solve the abstruse problem and shine in the argument *in banc* or the nice refinements of equity. If any proof of the connection is needed, it is afforded by the number of judges who have also been eminent mathematicians. There is Chief Baron Pollock, Senior Wrangler in 1806; Baron Alderson, Senior Wrangler in 1809; Mr. Justice Maule, in 1810. There is Baron Graham and Lord Alvanley and Lord Manners, Mr. Justice Littledale and Lord Lyndhurst, Chief Justice Tyndal and Vice-Chancellor Shadwell and Baron Parke—all of them high Wranglers. At the present moment we have two Senior Wranglers on the bench—Lords Justices Romer and Stirling. The Bar, therefore—the *carriere ouverte au talent*—was clearly the destiny of

Bickersteth, the Senior Wrangler, and he entered at the Inner Temple and chose the Chancery side.

We all know the old *jeu d'esprit* :

Mr. Leach made a speech,
 Pretty, neat, and wrong;
 Mr. Hart for his part
 Was tedious, dull, and long.
 Mr. Parker made that darker
 Which was dark enough before;
 Mr. Bell spoke so well
 That the Chancellor said I doubt.

It was this Mr. Bell who "spoke so well" in whose chambers Bickersteth became a pupil, and by whose advice he, instead of practising under the Bar, as so many prudent ones in those days did, took the bold step of being called to the Bar at once. His chambers were at 3, Fig Tree-court, Temple, overlooking the gardens.

CONSCIENTIOUSNESS AND A SMOKY CHIMNEY.

A propos of these there is an anecdote worth quoting because it illustrates his fastidious sense of honour. There was a little room in the chambers a favourite of his in summer, but in which he could never sit in winter because the chimney smoked beyond endurance, though he had tried all manner of expedients to cure it. On being made, later on, a King's Counsel, he found it necessary to remove to a more eligible position, and of course wished to let the chambers he then occupied, but his conscientiousness kept him in a state of perpetual excitement lest the laundry-woman should not tell every person who applied for them that the chimney smoked; so he wrote in large letters on a sheet of paper and placed it over the mantelpiece in the room: "The chimney of this fireplace smokes incurably, and every experiment has been tried to remedy the evil and no expense spared."

EARLY YEARS AT THE BAR.

Anxious they were, these early years—we all know them—years when he had to part with his treasured volumes of Tasso and Ariosto to buy Year Books and Term Reports; but everybody told him, "you are certain of success in the end, only persevere," and he tried to believe it, and buoyed himself up with the examples of Lord Camden, who, after starving for several years

at the Bar, had risen to the head of the Profession, and of Sir Samuel Romilly, who was making £15,000 a year after being for many years little thought of and in great difficulties. He was assiduous in his attendance at chambers and in court—listening to the luminous judgments of Lord Eldon and Sir William Grant. A little anecdote, related by his clerk, shows what an important element of success at the Bar he considered attention to business. One day, immediately after his departure from London for his week's holiday during the Long Vacation—that was all he allowed himself—an old client called to inquire if Mr. Bickersteth was in town, as he wished him to draw a bill for him. "I said that he was out of town, but would return immediately on receiving a communication from me. 'Oh, no! I will not have him called back for a trifle like this; he does not often take a holiday. Now, don't write to him, and I will find someone else to do it.' I did not, therefore, communicate to Mr. Bickersteth Mr. Holme's visit, but on his return I told him what had passed. He gave me a gentle reproof for not writing, and concluded, saying, 'Remember, though it was of no consequence to Mr. Holme whether I or someone else drew the bill, yet it might be of much importance to me—and to you, too.'"

As the clock struck nine he was invariably at his desk, either "drawing" or studying his case and preparing materials for his argument. His habit was to read through every case that was reported which bore upon or had any analogy to that before him—reports, luckily for him, had not multiplied to the extent they have now—noting every point or shade of difference. The result was a large mass of manuscript, and of this he again made a series of analyses, narrowing the whole into the smallest compass, generally in a tabular form. He had thus every point of his case at his fingers' end, and had no occasion to refer to his brief either at consultation or in court. In one respect the young Chancery barrister was handicapped.

THE BAR SINISTER OF RADICALISM.

He was a Radical, a disciple of Bentham and a friend of Sir Francis Burdett and the elder Mill, and, as Sydney Smith said, it was an awful period then for those who had the misfortune to entertain Liberal opinions. Many a solicitor remarked to his clerk, "I should like to give your master business, for I hear he is a very rising man; but he is such a Radical I can't, for fear I should

offend my clients." But success came as his friends had prophesied, and sixteen years after his call—in 1827—he was made a King's Counsel. Here, again, we have occasion to note his conscientiousness. He felt that he could not do his duty to his clients if he practised in all the courts, and he accordingly resolved to confine himself to one—the Rolls—though the resolution cost him the loss of £2000 a year, and he was exposed to much urgent solicitation by clients eager for his services. "Tell Mr. Bickersteth," said one, "he shall have the same fee as the other side has given Sir Edward Sugden—three thousand guineas." It was in vain; Bickersteth was not to be bribed.

LITTLE LADY JANE.

But it was not, happily, all fees and cases and equity pleadings. There was a golden thread of romance running through the dull woof of the lawyer's routine. Among the family of the Earl of Oxford, with whom he had travelled in Italy in his early days, was a little girl—Lady Jane Elizabeth Harley. She was only seven years old at the time; but she made a strong impression on Bickersteth. He watched her with a tender solicitude, advised about her studies, kept up a constant correspondence with her, and at last, when he thought his position justified his pretensions, he offered her marriage (1835), she being then thirty-seven and he fifty-two—with no time, as he says, "to dawdle." Six months after his marriage dispelled any doubt he may have felt as to "birth's invidious bar." Fortune turned her wheel and Bickersteth, K.C., became at once Master of the Rolls, a peer, and a Privy Councillor, and this without ever having mingled in political life, or either sat in the House of Commons or held the office of a legal adviser to the Crown—a most unusual thing in the records of the Bar. To what—one naturally asks—did he owe this sudden elevation? The answer is that the Government was bent on legal reform, in particular on the reform of the Court of Chancery, and no one—as Lord Melbourne, the then Prime Minister, knew—was so well qualified to initiate and preside over such a reform as Bickersteth. The cause of law reform had from the first been his dearest ambition. It was the one thing which flushed his cheek and kindled him to enthusiasm, and the abuses of Chancery procedure came home to him in a peculiar manner from experience. He felt, as only one of his conscientiousness could feel, how much the security of property

and the happiness of all ranks of people depend on the due execution of trusts—the specific performance of agreements, the settlement of accounts, the administration of the estates of deceased persons, the guardianship of infants, the protection of the separate property of married women, and other such matters with which Chancery jurisdiction is concerned, and the enormous suffering, the distress and ruin, and sometimes madness, which ensue—or once did—from the undue delays and costs in the administration of justice there.

LAW REFORM—IDEALS AND ACTUALITY.

His pet project of legal reform was to sever the political and judicial functions of the Chancellor—which he thought no one man could adequately perform—to relieve the Chancellor of his judicial duties and to make him simply a Minister of Justice; but political necessities and professional ambitions and animosities were too strong for him, and he had to content himself with doing all he could to perfect the administration of justice in his own court. Nature had undoubtedly qualified him for a judge; the whole tendency of his mind was the pursuit of truth and the detection of error—to award to everyone his full due—*sum cuique*—after his own motto, and he showed it in his scrupulous care of the rights of parties, his strict attention to the correctness of money accounts, his stern denunciation of anything like fraud or chicanery.

“Well, how are they getting on at the Rolls this morning?” asked one solicitor of another he met coming from Lord Langdale’s court.

“Oh! much as usual,” was the answer; “the Master of the Rolls is opposing all the consent petitions.” It was a characteristic touch.

Care sat on his brow on petition days, and he was haunted throughout by an uneasy suspicion that counsel and solicitor were leagued together to overreach the vigilance of the court and accomplish some purpose prejudicial to an infant, a married woman, a *cestui que trust*, or an absent party.

PRESUMPTION OF DEATH—AN ANECDOTE.

To show the danger of admitting presumptive evidence of death, he was in the habit of referring to a very singular case

which happened within his own knowledge while he was on the bench. A sum of money in court was subject to a trust for a particular individual for life, and after his death was to be divided between certain parties. These parties petitioned for payment of the fund to them on the ground that the individual in question—the tenant for life—was dead. No positive evidence could be adduced of his death, but it was said that his death must be presumed inasmuch as the evidence showed that he had gone abroad some twenty or thirty years before under circumstances of difficulty, and that no human being had heard any tidings of him from that day. This did not satisfy Lord Langdale, and he desired the case to stand over, intimating that if further evidence could be produced to corroborate the already strong presumption, he would attend to it. Additional affidavits were accordingly filed after the lapse of some time, and the case then appeared so strong that he made the order for division of the fund as prayed. The extraordinary portion of the case remains to be told. The order, when drawn up according to his Lordship's directions, was carried to the proper office to be entered, and the clerk whose duty it was to enter it turned out to be the very individual on whose presumed death the order for payment was made. He had been involved in early life in a scrape which led him to fly his country and keep his residence a secret, and had in time returned under a fictitious name and obtained a situation in the office.

SOME JUDICIAL TRAITS.

Lord Langdale would never allow a case to stand over for the absence of counsel.

"The dignity of the court!" he exclaimed *à propos* of the £10 rule. "The dignity of the court is best consulted by doing justice, however small the amount." The Long Vacation moved him to indignation. "The court," he said, "is now about to close for a quarter of a year" (the 2nd Aug. to the 2nd Nov. it then was); "it is a scandalous shame. The door of Justice never should be closed."

His defects were the defects of his qualities. He thought it was the function of a judge to administer the law, not to make it. That must be done by the Legislature. Hence his disposition was to abide too much by the letter, instead of moulding the law like his great successor, Sir George Jessel, on the lines of progressive judicial policy. To him the inquiry was what the law is, not

what it ought to be. His over-scrupulousness as to evidence, too, at times retarded the administration of justice.

ROEHAMPTON.

His home was at charming Roehampton, and it was to him—for all his tastes were domestic—a veritable haven of rest. His chief happiness consisted in riding with Lady Langdale and his little daughter and in cultivating his garden—which he laid out—reminiscent of the Senate House—in true geometrical figures from Euclid. His little daughter—his only child—was, in Ambrose Phillips' charming lines to Miss Charlotte Pulteney :

Every day and every night
His solicitous delight.

She perched on the library steps, engrossed by a book, while he worked before breakfast, deep in papers, and she was again his companion in the library after dinner, when he would amuse her by playing at the game of "hide and seek" or "follow my leader" through "the intricacies of chairs and tables—a pretty picture!

"NOLO EPISCOPARI."

On the resignation of the Chancellor, Lord Cottenham, in 1850, the Great Seal was strongly pressed upon Lord Langdale by Lord John Russell, but as firmly declined. What lawyer with the Great Seal dangled before him ever, we wonder, paused to balance so calmly and conscientiously the *pros* and *cons*? Here they are as they were set down by his own hand :

Contra.

Persuasion that no one can perform all the duties that are annexed to the office of Chancellor. Certainly that I cannot.

Unwilling to seem to undertake duties, some of which must (as I think) be necessarily neglected.

No reason to think that the extensive reform which I think necessary will meet with any support.

No particular party zeal, and no capacity to acquire any

Declining health.

Pro.

Salary £14,000 instead of £7000.

Pension of £5000 assured (instead of £3750 not assured).

Patronage for benefit of connections much needing it.

Some, though small and doubtful, hope of effecting some further reform in Chancery.

The *contras* in the end prevailed. "Declining health" had a more serious significance than probably even he, at the time, imagined. "The plough," in Burns' phrase, "was nearing the end of the furrow." He went in March, 1851, to Tunbridge Wells in hopes to recruit, but the springs of life were exhausted. "Is it paralysis you fear?" he said to the doctors, thinking of his early medical experience. It was; and a few weeks afterwards his laborious and distinguished career in this world ended.

SOME OF LORD LANGDALE'S DECISIONS.

Lord Langdale's decisions are to be found reported in Beavan, Keen, and Mylne and Craig.

One of the first points which he had to decide was the well-known case of *Tullett v. Armstrong* (4 My. & Cr. 377), dealing with what is known to lawyers as the "restraint on anticipation." It was the bold invention of Lord Thurlow—this restraint—his sagacity perceiving that it was useless to let a married woman have separate property of her own unless she was to be protected against the insidious influence of a husband—against being "kissed or kicked" out of her property. To Lord Langdale belongs the credit of discerning and decreeing that the need of protection is the true measure of the doctrine, and therefore that when a married woman is discovered—free from marital influence—the restraint drops, while on her remarriage it revives.

A mere misdescription of a legatee will not defeat a legacy—that is clear. It is equally clear that a legacy given to a person in a character which the legatee does not fill, and by the fraudulent assumption of which character the testator has been deceived, will not take effect; but suppose a testator gives a legacy to his "wife" when she has a husband still living? This was *Giles v. Giles* (1 Keen, 685). Lord Langdale saw no reason for imputing guilty knowledge to the "wife," and, if both had guilty knowledge, no fraud was committed upon the testator, so the legacy was upheld. It is no part of the duty of courts of equity to punish parties for immoral conduct by depriving them of their civil rights.

Taking another person's well-established trade name is such an obvious way of getting on in the world that there is no wonder it is resorted to by enterprising persons. Few names are—or were—better known than Day and Martin, the blacking manufacturers. What, therefore, more natural than that a person with the name of Day should get the loan of the name Martin

from a friend and start making blacking in similar bottles: only it so happens that the law does not allow a man to sell his own goods as the goods of another. Lord Langdale points out the true ground of the court's intervention. It is not any exclusive right to a particular name, but the right to be protected against fraud: (*Croft v. Day*, 7 Beav. 84).

One of the best known of his decisions is *Whicker v. Hume* (28 L. J. 396, Ch.)—a leading case on domicile. Domicile is there defined as a person's "permanent home." Refine for ever, you cannot better this definition. *Duke of Brunswick v. King of Hanover* (2 H. of L. Cas. 1) supports with much learning the proposition that a Sovereign Prince resident in the dominions of another country is exempt from the jurisdiction of the courts there—a proposition recently illustrated in the breach of promise action against the Sultan of Johore.

THE GORHAM CASE.

But the matter with which the name of Lord Langdale is more particularly associated is the celebrated *Gorham* case (1848)—a case which fanned religious controversy to white heat. Mr. Gorham, who was a clergyman of the Church of England, was presented by Her Majesty to the vicarage of Bramford Speke, in the diocese of Exeter, and applied to the bishop for admission and institution. The bishop thereupon informed Mr. Gorham that he felt it his duty to examine him to see whether he was sound in doctrine—in particular, the doctrine of baptismal regeneration—and he accordingly examined Mr. Gorham at great length for five days in December and three more in the following March—it reminds us of Bishop Bonner dealing with a heretic—and in the result refused him institution. Mr. Gorham sought redress in the Arches Court, and, being unsuccessful there, appealed to the Queen in Council. The point of doctrine between them was this: Mr. Gorham held the Church's doctrine to be that baptism is a sacrament generally necessary to salvation, but that the spiritual grace of regeneration does not so necessarily accompany the act of baptism that regeneration invariably takes place at baptism—that the grace may be granted before, in, or after baptism. The bishop held this to be unsound—that, according to the true doctrine, regeneration invariably and unconditionally accompanies the rite. In the end the Judicial Committee decided in favour of Mr. Gorham. The judgment was delivered by Lord

Langdale, and it is a judicial masterpiece—a model of learning, lucidity, patience, research, absolute impartiality—rendered all the more striking from the background of sectarian bitterness and bigotry. As Macaulay says of Hallam, he sums up calmly and dispassionately, turning neither to the right nor to the left, glossing over nothing, exaggerating nothing, while the advocates on both sides are alternately biting their lips to hear their conflicting misstatements and sophistries exposed. It is judgments such as these which are the cornerstones of British justice and British greatness.

CHIEF JUSTICE TINDAL.

WHEN the future Chief Justice Tindal gave rings on being made a serjeant, the motto he chose was "Quid leges sine moribus." The motto was characteristic of the man. His life was better even than his law. There never was a more considerate, humane, and intelligent judge. He was, as one who knew him said, "the very embodiment of kindness." Once, after having passed sentence of death on a prisoner convicted of murder, he had to call him back on account of some trifling informality. In pronouncing the sentence the Chief Justice, in a voice tremulous with emotion, feelingly apologised to the man for adding to his distress by subjecting him again to the public gaze.

Nicholas Comyngham Tindal was born at Coval Hall, near Chelmsford, December 12th, 1776.

After a distinguished career at Cambridge, ending with a fellowship at Trinity, he entered at Lincoln's Inn, and began practice as a special pleader. In this vocation he was remarkably successful, and among his pupils were Brougham and Wensleydale; but he was thirty-three before he ventured on being called to the Bar and marrying the lady of his choice, Miss Merelina Symons. His chance of distinction came with Queen Caroline's trial. His old pupil, Brougham, selected him to be one of the counsel for the Queen, and he amply justified the choice. We get a glimpse from him of the haughty, or "royal" spirit, as he calls it, which sustained the Queen at this time in the midst of her destitution and desolation. "Never can I forget," said Tindal, "the look and gesture with which she said to us (her counsel) in her miserable back drawing-room in Portman-street, 'I will be crowned.'" It is said that Lord Liverpool had endeavoured, but too late, to get Tindal as counsel for the Crown. Certain it is that that nobleman appreciated his merit, for in 1826 he created him Solicitor-General, at the age of fifty. He sat in Parliament

as member for Harwich, and afterwards as the representative of his old university, and he did what a lawyer in Parliament should do; he never put himself forward in party contests, but assisted the debates by his legal and historical acquirements.

During his career at the Bar it fell to his lot to uphold the ancient form of trial by wager of battel. The last time this extraordinary judicial process had been granted was in Queen Elizabeth's reign, and then, as Dyer tells us, "non sine magna perturbations jurisconsultorum." In *Ashford v. Thornton* (1 Barn. and Ald. 405) the point was again raised, 250 years afterwards. A country girl was found violated and drowned, and her brother appealed the defendant, a labourer, of the crime under circumstances of strong suspicion. The defendant pleaded "Not guilty, and I am ready to defend the same by my body," and thereupon taking his glove off he threw it upon the floor. Tindal's learned argument for the ancient right occupies fourteen pages of *Barnwell and Alderson*, and convinced the robust intelligence of Chief Justice Ellenborough that "the usual and constitutional mode of trial must take place." It did not take place because the appellant declined to proceed, but it had one good effect—it led to the prompt abolition of that anachronism, the duellum (59 *Geo. 3*, c. 46). (a) On the resignation of Chief Justice Best, and his elevation to the peerage, Tindal took his place as Chief Justice of the Common Pleas, and for seventeen years dispensed justice in a way which won him the esteem and admiration of all. He was not only a most able, but a most painstaking judge, never irritable, and never impatient.

One of the most celebrated trials at which he presided was that of Courvoisier, the valet who murdered his master, Lord William Russell, at 14, Park-lane. The excitement was intense, and Ballantine describes Chief Justice Tindal as sitting so

(a) "Am I to understand," said Chief Justice Downes, "this monstrous proposition as being propounded by the Bar, that we, the judges of the Court of King's Bench—the recognised conservators of the public peace, are to become not merely the spectators, but the abettors, of a mortal combat? Is this what you require of us?"

"Beyond all doubt," said Allen, "your Lordship is to be elevated on a lofty bench, with the open air above you, the public before you, in which the combatants are to do battle, till both or one of them dies."

"Aye," shrilly squeaked MacNally, "from daylight to dusk, until your Lordship calls out to us, 'I see a star'": (*Curran and his contemporaries*, p. 412)

hemmed in by the extensive draperies of the surrounding ladies, with their lorgnettes, fans, and bouquets, that he had scarcely room to move, and looking disgusted (as well he might) at the indecency of the spectacle. Another interesting case which he tried was the action of crim. con. brought by Mr. Norton against the then Prime Minister, Lord Melbourne. Mrs. Norton was one of the most beautiful and accomplished women of her age, and she and Lord Melbourne were undoubtedly on terms of great intimacy, but Lord Melbourne was old enough to be her father, and the jury unhesitatingly found a verdict for him. The only thing, indeed, which gave any colour to the charge was Lord Melbourne's reputation for gallantry.

Tindal had a vein of grave sly humour, and many anecdotes are related of him. There was a certain Serjeant B. (could it have been Buzfuz?) gifted with a stentorian voice and most boisterous demeanour. Tindal was asked whether he considered Serjeant B. to be a sound lawyer. "I must suspend my judgment," he said, "until it is authoritatively decided whether roaring in a horse constitutes unsoundness or not." When Lady Rollo on her husband's death refused to let the hounds go out, a learned sergeant asked the Chief Justice whether there would be any harm if they were allowed to do so with a piece of crape round their necks. "I can hardly think," said Tindal, "that even crape is necessary; it ought surely to have been sufficient that they were in full cry." An inquiry was being held as to the appointment to a sinecure worth some thousands a year by the Chief Justice. His Lordship himself was called to give evidence as to the possibility of reducing the expense created by this sinecure. "If there were any duties connected with the position," he said with an ingenious show of logic, "it would be possible to reduce these and cut down the salary proportionately. As, however, there are no duties, I do not see how the salary can possibly be reduced." Another story is eloquent of Lord Campbell's reputation among his contemporaries. He was then Attorney-General and had his eye on Tindal's place. "I was one day," said Tindal, "gently riding in the park when Jock Commell (as he always called himself) rode up to me and we jogged on together side by side for some distance. After a little commonplace talk, he cast a look of admiration on my poor steed and said, 'I have always envied you the possession of that horse of yours, Chief Justice, he seems so firm and sure footed.' 'But he is

getting rather old,' I observed. 'Age is nothing,' he replied, 'it only confirms an animal in his good habits. If I were you I should not part with him on any account. He will carry you with perfect safety for years yet.' I pondered over Jock's words when we separated, and " he continued, with a smile on his venerable face, " I parted with my poor beast to a friend, a light weight, who I knew would take care of him, the very next day."

Tindal's decisions are to be found reported in *Moore & Paine* 3 to 5, *Moore & Scott*, *Scott's New Reports*, *Bingham's New Cases*, *Manning & Grainger*, and the earlier volumes of *Common Bench Reports*. It has been well said that no more improving or instructive course could be adopted by a student than to read through the whole series of his judgments from the sixth volume of *Bingham's Reports*, when they begin, to the final ones of the *Common Bench*. *Flight v. Booth* (1 Bing. N. C. 377) is an important vendor and purchaser decision on the right of rescission for misdescription, where the conditions of sale provide for compensation. It lays down a rule which has ever since been accepted as a criterion in such cases, viz., "that where the misrepresentation, although not proceeding from fraud, is in a material and substantial point so far affecting the subject-matter of the contract that it may reasonably be supposed that but for such misdescription the purchaser would never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation." *Flight v. Booth* was itself a good instance of the reasonableness of the rule. The purchaser was only told by the conditions that he could not carry on any offensive trade on the premises. When he came to examine the lease, it precluded nearly every trade, offensive and inoffensive.

Cook v. Ward (4 M. & P. 99) lays down what is at first sight a paradoxical, but really a sound proposition of law, namely, that it is a libel to publish a ludicrous story of an individual in a newspaper, if it tend to render him the subject of public ridicule, though he has previously told the story of himself. The story in question was, that while the plaintiff, a respectable deputy overseer, was taking a glass in the taproom of an inn, someone came up to him and said, "Pray, sir, aren't you the gemman that's come down to hang Corder?" The overseer used to enjoy telling this to his friends. But it is one thing, as Chief Justice Tindal pointed out, to confide to a select party of friends at home how

you have been mistaken for Jack Ketch, and another thing to have the *contretemps* blazoned abroad in the newspapers.

Tindal's judgments are not only lucidly expressed, but they are always rational and convincing. Witness the well-known case of *Kemble v. Farren* (3 M. & P. 425). The parties there had expressly agreed that the sum of £1000 to secure performance of the articles was to be liquidated damages, not as penalty. But Tindal held nevertheless that you cannot change the thing by changing the name. "That a very large sum," he said, "should become immediately payable in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms, the case being precisely that in which courts of equity have always relieved."

Loneragan v. The Royal Exchange Company (5 M. & P. 810) is another instance of Tindal's preference for common sense. Lord Ellenborough had just been laying down the rule that where witnesses attend under a subpoena a compensation for loss of time could only be allowed to attorneys and medical men. Tindal could not see the rationality of this. "I cannot see," he says, "how any true distinction is to be drawn between persons in those professions and surveyors or engineers or other scientific men who gain their livelihood by their own skill and exertions."

By the common law a wife's adultery is no bar to her right of dower (Co. In. 435). This seems odd, but the reason is that adultery was an offence of ecclesiastical jurisdiction only. The Statute of Westminster (13 Ed. 1, c. 34) corrected this anomaly and provided that, "if a wife willingly leave her husband and go away and continue with her advouter, she shall be barred for ever of action to demand her dower." In *Hetherington v. Graham* (3 M. & P. 403) the Court of Common Pleas had to determine whether the statute applied when a husband and wife agreed to separate and the wife had subsequently been living with an adulterer. They held that it did. Chastity is not impliedly stipulated for in such an agreement for separation (*Hart v. Hart*, 18 Ch. Div. 670), but the matrimonial relation is nevertheless virtually at an end.

The Court of Appeal were not long since deciding (*Page v. Midland Railway Company*, (1894) 1 Ch. 11) that if a purchaser buys land, knowing of a defect of title, he may still bring his action on the vendor's covenants for title, if the defect comes within them. It is interesting to contrast with this the decision

of the Common Pleas under Chief Justice Tindal in *Margetson v. Wright* (5 M. & P. 606), that if a horse has manifest and visible defects at the time of sale they are not included in a general warranty—if, for instance, a person bought a horse, knowing it to be blind, he could not sue, though the seller had warranted the animal to be sound in every respect. But it is impossible to more than sample, so to speak, Tindal's decisions. That you must not drag a trespasser through a pond by way of punishing him (*Bush v. Parker*, 1 Bing. N. S. 72); that in deceit motive does not matter (*Fisher v. Charles*, 4 M. & P. 69); that a landlord cannot, under 11 George 2, c. 19, sect. 1, distrain goods fraudulently and clandestinely removed before the rent has become due (*Rand v. Vaughan*, 1 Bing. N. C. 767); that you must not be too strict in construing instruments drawn up on the spur of the moment (*Newbery v. Armstrong*, 3 M. & P. 513); that a plaintiff may compromise with the defendant without the knowledge of the attorney if it is not done collusively to deprive the attorney of his costs (*Nelson v. Wilson*, (4 M. & P. 355); that the publication of reports of proceedings in court are privileged if fair and *bonâ fide* (*Saunders v. Mills*, 3 M. & P. 520); that a married woman trading alone may be made a bankrupt (*Ex parte Franks*, 7 Bing. 762); that a clergyman cannot while officiating be arrested on civil process (*Goddard v. Harris*, 5 M. & P. 122); that a testator's intention is "the polar star" by which the court must be guided (*Wilce v. Wilce*, 5 M. & P. 694), are but a few out of a vast variety of decisions which we owe to this great master of the law.

How delightfully characteristic is the following (*Jackson v. Adams*, 2 Bing N. C. 402) of our admirable common law. It was an action for slander. The plaintiff was a churchwarden, and according to his own pleading had always faithfully and honestly demeaned himself in his office: nevertheless the defendant well knowing the premises, but derisively and maliciously intending to injure the plaintiff in his said good name, fame, credit, and reputation with all his neighbours and other good and worthy subjects of this realm, etc., etc., in the hearing of divers good and worthy subjects of this realm uttered of and concerning the plaintiff the following words: "Who stole the parish bell ropes, you scamping rascal?" Now imputing an indictable offence like stealing is slander, but the plaintiff had overlooked the fact that an indictment for larceny in stealing the bell ropes of the parish

cannot be supported against a churchwarden, for a churchwarden has the possession of the goods of the church and a man cannot steal from himself, for the definition of larceny is "cepit et asportavit," and so the plaintiff found himself to his chagrin without a cause of action.

To Tindal is ascribed the saying that "whereas Scarlett had contrived a machine, by using which, while he argued, he could make the judges' heads nod at his pleasure, Brougham had got hold of it, but not knowing how to manage it, when he argued the judges, instead of nodding, shook their heads." Tindal was no such judicial puppet to have his strings pulled by counsel. If he shook his head it was at bad law; if he nodded it was only at good law; and good law was with him synonymous with truth and justice.

LORD JUSTICE KNIGHT BRUCE.

THE atmosphere of a Chancery Court is calculated to damp any wit, but it seems to have made Lord Justice Knight Bruce's only burn the brighter. So vigorous and original was his mind, so animated and epigrammatic his style, so constant his flow of humour, that even such dreary matters as the marshalling of assets and the tacking of mortgages were enlivened, and the driest statement of facts became, as he told it, an interesting narrative.

One of his most remarkable gifts, retentiveness of memory, discovered itself when he was a mere child of six or seven years old. According to an anecdote current in his family, a wager was made one evening that he would continue any passage in Shakespeare, of which any person present would give him the first few words. The child was fetched from his bed, and the bet won. A tradition also exists that while he was "serving" his seven years articles in Lincoln's Inn-fields (he was thinking then of being a solicitor) with Mr. Bigoe Charles Williams, the founder of the firm of Warlters, Young, and Warlters, he would recite whole chapters of Blackstone by heart. In after life he often argued cases on appeal, involving complicated dates and figures, merely on his recollection of the facts as mastered by him on the original hearing, sometimes after as long an interval as two years. This is as wonderful as anything related of Macaulay or Scott.

James Lewis Knight—he did not add the Bruce till shortly before his elevation to the bench—was called to the Bar in 1817, and like others he had his early struggles, the more anxious because he had married at the early age of twenty-one. In after years, when he was making more than £18,000 a year at the Bar, he was walking one day into London from his house near Ealing with Mr. C. J. Russell, Q.C., when he stopped at the Tyburn Turnpike (now the Marble Arch) and said to his companion:



LORD JUSTICE KNIGHT BRUCE.

(From photograph by the London Stereoscopic Company.)

“ This walk reminds me of my first years at the Bar, when I used to walk to my chambers every morning because my health was so delicate that I did not know how soon the sixpence I saved by walking might be of use to my family.” He had no occasion to fear his future long. So rapid was his progress at the Bar that only twelve years after he was called he was made a King’s counsel. It is a pleasing trait in his character that, shortly after receiving this distinction, being asked to advise in consultation with Mr. Phillimore, a Chancery barrister in whose chambers he had read, he insisted on the consultation being held in Mr. Phillimore’s chambers, so that his old master should not be obliged to come to him. He had indeed at all times a most warm and sympathising heart, which made him greatly beloved in private life, and his charity was unbounded. As a King’s Counsel he had many formidable rivals in Sir John Leach’s court—Pepys (afterwards Lord Cottenham), Preston, and Jacob, all men of high reputation, but the greatest was Sugden. With him Knight Bruce engaged in daily contests to the mutual advantage of both, as “ iron sharpeneth iron,” but he never succeeded in wresting the leadership of the court from the great real property lawyer. In court he was distinguished by his classical style, by the copiousness, and yet terseness, of his language, by his readiness in reply and his never-failing flow of humour. Besides these he had a quality, humble indeed in comparison, but which may have no less contributed to his success—industry. He made it a rule never to keep ordinary cases for opinion more than twenty-four hours in his chambers.

It was at this time, in the full tide of his prosperity at the Bar, that he adopted the name of Bruce, his mother’s maiden name, in addition to Knight.

In 1841 two new Vice-Chancellorships were created to cope with the growing Chancery business, and Knight Bruce and James Wigram were selected for the posts. It is a remarkable instance of his energy that on one occasion when Vice-Chancellor Wigram was unable to sit owing to the weakness of his eyesight, and the Vice-Chancellor of England had also fallen ill, Vice-Chancellor Knight Bruce transacted single handed the whole business of the three Vice-Chancellors’ Courts from May until the rising of the Court for the Long Vacation, and transacted it in such a way as to command the respect and admiration of the Bar. Ten years after his appointment as Vice-Chancellor, when

the Court of Appeal in Chancery was organised, Knight Bruce, then the senior Vice-Chancellor, and Lord Cranworth were appointed the first Lords Justices. Of all Knight Bruce's judicial qualities the most characteristic and creditable was his dislike of technicality when it stood in the way of justice. "If this sad case," he said in allusion to some informality in docketing a judgment, "had arisen in a case in a court of justice in Japan we should have laughed at them." His aim invariably was to get at the merits, tear off the "string and brown paper" as he called it. He would allow a plaintiff, for instance, to amend the bill at the hearing to meet a new issue raised by the defendant's answer, and he constantly settled drafts himself in court to save a suitor the expense of a reference to the master. In doing so he somewhat scandalised the formal Chancellor, Lord Cottenham, who by no means approved always of these "short cuts." Nevertheless, they paved the way for some of the most salutary Chancery reforms. The same largeness of mind prevented his ever "sticking in the bark." He sought the spirit underlying the letter. To take an instance. A wine merchant (*Turner v. Evans*, 2 De G. M. & G. 740) had sold his business in Carnarvon, and covenanted not to "carry on business" as a wine merchant within the county, notwithstanding which he went about soliciting orders. Vice-Chancellor Kindersley and Lord Justice Cranworth thought the case too doubtful for an injunction. Not so Knight Bruce. "Does he not," he said, "carry on that business, not necessarily where his home, his counting-house, his cellar is, but where he does the essential act?" He was not above asking help of the Bar; especially he would ask the authors of law books, "Perpetuity Lewis" for instance, or Lewin, if they knew of any recent case bearing on the question before him. One morning, after he had decided a point in which a Mr. Lee, an old Q.C., had taken an interest the day before as "*amicus curiæ*," the Vice-Chancellor addressed him in a conversational manner: "Mr. Lee, I decided that point yesterday in favour of ——. That seems right?"

Mr. Lee: "I think your Honour was wrong for two reasons. The first is——"

Vice-Chancellor: "Thank you, Mr. Lee, thank you. I will hear you some other time. Well, Mr. ——"

He had a rare gift of sarcasm. When a young barrister was asserting very positively some bad law, Knight Bruce turned to

the leading counsel of his court and gravely asked each of them successively whether he was aware of the doctrine in question, as it was new to him.

A well-known counsel, in the course of a long, dry speech cited the maxim "Expressio unius exclusio alterius," making the "i" in unius short. The false quantity roused the Lord Justice from a half slumber into which he had been lulled by the speech, and he at once exclaimed "unius! Mr. —, unius! We always pronounced it 'unius' at school."

"Oh yes, my Lord," replied Mr. —, "but some of the poets use it short for the sake of the metre."

"You forget, Mr. —," rejoined the Lord Justice, "that we are prosing here."

The Lord Justice was, as Sir George Jessel once said, "a very learned judge," using the term in no conventional sense; and his knowledge of foreign systems of jurisprudence and of the civil law (he frequently cites Paulus and Marcellus, and other civilians in his judgments), made him a very valuable and influential member of the Judicial Committee of the Privy Council. The celebrated Gorham case was one at which he assisted.

After twenty-five years on the bench failing eyesight and the loss of his beloved wife, his partner for over fifty years, led to his resignation. "Cave resignationibus" was the saying of a wise man. Its truth was illustrated in Knight Bruce's case. Within a fortnight of his retirement he died at his house, the Priory at Roehampton, on November 7th, 1866.

Lord Justice Knight Bruce's decisions will be found reported in De Gex, Macnaghten, and Gordon, De Gex and Jones, De Gex, Fisher, and Jones, De Gex, Jones, and Smith, De Gex and Smale, Collier, and Younge and Collier. One of the best known of them is *Walter v. Selfe* (4 De G. & Sm. 315). It was an action to restrain nuisance arising from the smell of burning bricks, and the Vice-Chancellor lays down the true criterion of nuisance in language which has never been improved on since: "Ought this inconvenience," he says, "to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among English people?" The nuisance

he goes on to say need not be injurious to health. "A smell may be sickening, though not in a medical sense."

Kekewich v. Manning (1 De G. M. & G. 176) is another decision always identified with Knight Bruce. To appreciate its importance we must remember that Lord Eldon had long before laid down the principle that there is no equity to perfect an imperfect gift. Pushed to its logical result the principle might operate very unfairly. Thus, if A. is trustee of a fund for B. for life with remainder to C. and C. makes a voluntary assignment to D., D. would acquire no title, for the assignment is not complete, wanting the legal estate. *Kekewich v. Manning* qualifies the principle in a very sensible and obvious way by laying down that it is enough if the donor has done all in his power to pass the property.

Prince Albert v. Strange (2 De G. & Sm. 652, affirmed 1 M. & G. 25), is always cited as a leading case in copyright law. The defendant Strange had become possessed of copies (taken in breach of trust) of etchings made by the Queen and Prince Consort for their own amusement, and relating to the most private matters of their life. These Strange proposed to exhibit in a public gallery without the Queen and Prince Albert's consent (much indeed against their wishes), and he began by publishing a descriptive catalogue. It was a monstrous invasion of royal privacy, but it had one good result, it elicited from Vice-Chancellor Knight Bruce a most able and exhaustive judgment which may be summed up by saying that he held the portfolio as much entitled to protection as the writing table.

The Court of Chancery has gone very far in establishing precatory trusts, but it has never gone farther than Vice-Chancellor Knight Bruce and Lord Truro went in *Briggs v. Penny* (3 De G. & Sm. 525; 3 M. & G. 546), when they found a trust in the words of a testatrix, "Well knowing that she (the legatee) will make a good use and dispose of it in a manner in accordance with my (testatrix) views and wishes." It is instructive to compare Jessel, M.R.'s remarks in *Stead v. Mellor* (5 Ch. Div. 225) with *Briggs v. Penny*, and note how the tide has turned on the subject of precatory trusts.

In *Re Cumming* (1 De G. M. & G. 557), the Lord Justice energetically vindicates the right of an alleged lunatic to traverse the inquisition. "It is the right," he says, "of an English person to

require that the free use of his property and personal freedom shall not be taken from him on the ground of alleged lunacy, without his being allowed the opportunity of establishing his sanity or denying his insanity before a jury, as a contesting party, not merely as a subject of inquiry."

In Burgess's anchovy case (3 De G. M. & G. 896), in which the two brothers Burgess, sons of the original inventor of the sauce, were the litigants, the brother to whom the sauce business had been left complained of the other vending the sauce, and the Lord Justice begins his judgment thus: "All the Queen's subjects are entitled to manufacture pickles and sauces, and not the less so that their fathers have done it before them. All the Queen's subjects are entitled to use their own name, and not the less so that their fathers have done it before them." Given these propositions, the plaintiff, fraud apart, had no case. *Barrow v. Barrow* (5 De G. M. & G. 182) is another highly characteristic judgment of his. Lord Selborne in his Autobiography gives it as his opinion that the Lord Justice's judgments "suffered as contributions to the science of law from the strong marks of his personality impressed on them—that they had too great a flavour of rhetoric." But is not the saying of George Herbert true of the law, "A jest may find him who a sermon flies."

The Lord Justice was a fastidious critic of language, as a lawyer ought to be. Hence the accuracy which characterises his statement of the law. Hence, too, the epigrammatic vigour of his phrases. (a) "The decree in this case" (borrowing by an extravagant infant) "is a matter of course unless the court and the laws of this country are to be reconstructed with a view to this particular case." "The light of justice is waning in August." "The ornamental portion of the prospectus." "There are callings in which to be convicted of literature is dangerous" (was the learned judge thinking of the Bar?). "Some breaches of good manners are breaches of law also." "I should like to see the man bold enough to affirm that a young lady of seventeen is

(a) He was indeed a born epigrammist. The following will be familiar to most:—

"The curate's eyes our ladies praise.

I never see their light divine.

He always shuts them when he prays,

And when he preaches closes mine."

not *doli capax*." "Men may be honest without being lawyers, and there are doings from which instinct without learning may make them recoil."

To how many lawsuits might not the following remarks from *Ex parte Banks* (2 De G. M. & G. 937) apply. It was a quarrel over a plumber's bill—a trumpery question of £5—yet upon this, "upon a matter," as the Vice-Chancellor says, "that if they had not good sense enough to settle it for themselves, some respectable neighbour would probably upon application have adjusted for them in an hour, began the career of cost, and heat, and hatred, of reproach, scandal, and misery in which they are now engaged, of which neither this day nor this year will, I fear, see the end, and which seems to exemplify an old English saying, that the mother of mischief is no bigger than a midget's wing."

"Truth, like all other good things, may be loved unwisely, may be pursued too keenly, may cost too much; and surely the meanness and the mischief of prying into a man's confidential consultations with his legal adviser, the general evil of diffusing reserve, dissimulation, uneasiness, and suspicion are too great a price to pay for truth itself": *Pearse v. Pearse* (1 De G. & Sm. 25-6, 28, 30).

Perhaps the most interesting, certainly the most racy of his judgments, is to be found in *Thomas v. Roberts* (3 D. & Sm. 758), commonly known as "The Agapemone Case." It was an application to remove a child of four from the guardianship of his father. This gentleman, Mr. Thomas, had joined a new religious sect, led by a prophet of the name of Prince, and had become engaged to a young lady of property, also a believer at the time, but who afterwards fell away. The following letter, written a few weeks before marriage, speaks volumes for this gentleman's character. "My beloved Agnes," he writes, "you mentioned your desire to have a settlement of your property upon yourself. This, I assured you, would be very agreeable to my feelings, and is so still; but last night, waiting on God, this matter was quite unexpectedly brought before me. I had entirely put it away from my thoughts, leaving it to take its course as you might be led to act, but God will not have it so. He shows me that the principle is entirely contrary to God's word," &c., &c. Mr. Thomas was not only impressed with the impiety of marriage settlements, but thought it right to desert his wife and go and live with the prophet at the Agapemone, "a sort of spiritual boarding-

house," as the Vice-Chancellor calls it, for both sexes, at Bridge-water. In the result the Vice-Chancellor said he would as lief let the child go to the Agapemone as "consign him to a camp of gypsies." The whole judgment is in a fine vein of sustained sarcasm.

BARON PARKE—LORD WENSLEYDALE.

BARON PARKE is a unique figure among our English judges. He was what is known as a "black-letter lawyer," that is, a man impressed with a profound, and may we not add, a just reverence for the wisdom of the ancient sages of our law, a man who stood, too, on the ancient ways. "He loved the law," said Baron Bramwell, in alluding to his death (he told a lady once when he was late at a party that he could not tear himself away from a "beautiful demurrer"), "he loved the law, and like others who do so, he looked with some distrust on proposals to change it." "Think of the state of the record," he said when it was proposed to allow amendment of pleadings. We smile, but it would be wrong to set down the utterance of the grand old judge to a perverse preference for technicality over justice, or call his ideas, as another learned judge did, "awful crotchets." He, like others, firmly believed that the interests of justice were best served by a strict adherence to technical rules. There is a merry tale told that once he was summoned to advise the Lords, and in the midst of the argument was suddenly seized with a fainting fit. Cold water, hartshorn, and other restoratives were applied, but they had no effect. At length an idea occurred to one of his brethren, who well knew his peculiar temperament, and he immediately acted on it. He rushed into the library, seized a large musty volume of the old statutes, came back and applied it to the nostrils of the patient. The effect was marvellous. He at once opened his eyes, gave them a slight rub, and in a few seconds he was as well as ever.

On another occasion a legal friend of his was ill, and Parke went to his bedside, taking with him a special demurrer which had been submitted to him. "It was so exquisitely drawn," he said, "that he felt sure it must cheer the patient to read it."

Parke was an instance of a man who owed his success to sheer

force of intellect and unremitting industry. After a distinguished career at Cambridge as a High Wrangler, Chancellor's Medallist, and Fellow of Trinity—things which counted for more then than they do now—he settled down steadily to the work of a Special Pleader. A thorough mastery of the mysteries of special pleading was in those days the first condition of professional success. No one who reads the reports of the period can fail to be struck with how the cases, nine times out of ten, turn on the form of the pleadings. These are the real battle-ground, and here Parke was pre-eminent. In a clever little *jeu d'esprit*, called "Crogate's Case," by the late Serjeant Hayes, his love of the art is pleasantly satirised under the soubriquet of "Baron Surrebutter." This learned baron, being, as he says, summarily removed from the upper regions by *habeas corpus*, without time to question the regularity of the proceedings, arrives on the bank of the Styx, and there, in Hades, meets all the heroes of leading cases, Crogate, Twyne, the Six Carpenters, &c., and is attacked and mobbed in the most unmerciful way by a host of former plaintiffs and defendants, against whom he had given judgment in his lifetime, as they alleged, contrary to plain justice and upon technical quibbles. The whole is highly amusing.

When, at thirty-one, Parke gave up special pleading and was called to the Bar, he speedily got into large mercantile and maritime practice on the Northern Circuit, helped perhaps by the fact of his father being a Liverpool merchant. It is a great mystery, success at the Bar. No recipe can be given for it. The likely fail, the unlikely succeed. Parke had no showy parts. He was not great as an advocate; he was no speech-maker; he was not persuasive; he never succeeded in acquiring the art of examining a witness; he disdained the smaller arts of advocacy, but he was remarkably clear-headed, and he possessed the faculty of so marshalling his facts that the dullest mind could follow his narrative and his argument. Like his contemporary Sir James Scarlett, the greatest of modern verdict winners, he talked common sense to average minds in simple language, and won them by his intelligibility and his fairness.

At the Queen's trial he was chosen one of the junior counsel for the Crown, "owing," it was said, "to the great legal reputation he had even then acquired." The "even then" here is amusing. This wise young lawyer was only forty-four! Two years afterwards he was, without taking silk, made a judge of the

Court of King's Bench. There was a Park already on the Bench, and to distinguish them they were popularly known as "St. James' Parke" and "Green Park." Almost his first judicial employment was being sent with Mr. Justice Vaughan and Baron Alderson to Hampshire, to try the rioters there for smashing machinery. In these days of the living wage controversy it is instructive to find Baron Alderson writing, "There is really no distress here. The average of wages has been nine shillings a week." One rioter was actually earning eleven and ninepence!

In 1834 Parke was made a Baron of the Court of Exchequer, and here he sat for twenty-two years, enjoying an unrivalled supremacy as a lawyer and judge—a supremacy "acknowledged," as Baron Bramwell said, "by his brethren and the Bar." His countenance was one that exhibited great power and intelligence—he was curiously like George III., and was proud of it. He was grave without being pompous. He paid the most profound attention to the proceedings, never exhibited signs of impatience, was courteous to everyone alike, and would now and then go out of his way to say a kindly word of encouragement to a beginner. On circuit he sometimes sat till nearly midnight. Terse and concise himself, he did not favour diffuseness in others. The members of the Western Circuit had at that time a reputation for making lengthy speeches. "I am going the Western this time, Maule," said Baron Parke, "and I will make those long-winded fellows shorter, or I will know the reason why."

"Quite right," said Maule, "but by the time you get back, Parke, you will have learned the reason why."

One of his peculiarities was a passion for fresh air. In winter as in summer, by night and by day, he kept all the windows open. Having bought a house handsomely furnished, his first order, it is said, was to saw down every bedpost, and the next to burn all the window curtains. When presiding on a winter circuit at Exeter on a bitterly cold day in December, with the court unwarmed and half filled, he ordered the ventilators to be raised to their full height. Down swept an icy blast on the devoted counsel, laying them up for weeks with colds, the sheriff shivered, and the jury sat each with a different coloured handkerchief over his head, while the learned Baron revelled in the whirlwind which was death to others. The fact remains, however, that he lived till eighty-six. There is a story that once on circuit a barrister, not fond of deep potations, had slipped away from the mess-room

to bed. The rest resolved to hunt up the offender. They found what they thought was his room, and twitched the bed clothes off the sleeping man. What was their horror to discover themselves confronted by the venerable countenance of the judge. Serjeant Goulburn attempted to explain the mistake next morning. "No, no, brother Goulburn," said Sir James, shaking his head, "it was no mistake, for I heard my brother Adams say, 'Let us unearth the old fox.'"

It was a little hard that on Lord Abinger's death Pollock, the Attorney-General, should have been put over Parke's head. Some reparation was felt to be due to him, and he was accordingly created a life peer with the title of Baron Wensleydale. The plan of such life peerages was highly obnoxious to the Conservative peers, and a committee of privileges—while not disputing the Crown's right to create such peerages—reported against Lord Wensleydale's right to sit and vote. Eventually the matter was compromised by an hereditary peerage in the usual form being conferred. It made no difference to Lord Wensleydale, for of the six children which he had by his wife, Miss Cecilia Burton, a Yorkshire lady, only one, a daughter, survived him.

A lady once said to him, "I wonder, Baron Parke, you have never written any book."

"Madam," replied the judge, "my works are to be found in the pages of Meeson & Welsby."

It is true. He systematically delivered written judgments—he was the last of the judges who did so—and these judgments on all questions of importance or novelty he got up with great care. Hence they have the value of legal treatises. *Chasemore v. Richards* (7 H. L. Cas. 349) is an instance. His speech in the House of Lords occupies ten pages of closely-packed reasoning. Yet what is the proposition of law affirmed? Only the seemingly simple one that a man may sink a well in his own land, though by doing so he dries up the sources, supplied by natural percolation, of his neighbour's spring. An even more familiar decision of his is that of *Langridge v. Levy* (2 M. & W. 519, affirmed 4 M. & W. 337), so often cited on the distinction of suing in contract or tort. The gunmaker, in that case, warranted the gun (which subsequently burst) to the buyer, knowing it was to be used by the buyer's son. He was not liable, of course, to the son on the warranty, because the son was not privy to it, but he was liable to the son in an action of deceit, because he recklessly misrepresented

the gun as being a safe one for his use. The misrepresentation, however, as the court was careful to point out, did not extend beyond the son to anyone to whom he passed the gun on.

The distinction between admitting extrinsic evidence to explain a latent ambiguity in a will (as where there is a gift to John, and there are two Johns) and admitting it to explain a patent ambiguity (such as a blank) is well put in *Doe d. Rees v. Williams* (2 M. & W. 749): "The characteristic of all these cases" (latent ambiguity) he says, "is that the words of the will do describe the object or subject intended, and the evidence has not the effect of varying the instrument in any way whatever. It only enables the court to reject one of the subjects or objects to which the description in the will applies, and to determine which of the two the testator understood to be signified by the description which he used in the will." To admit parol evidence in the case of a patent ambiguity—a blank—would be, in Lord Bacon's language, "to make that pass without writing which the law appointeth shall not pass but by writing." In connection with wills, *Whicker v. Hume* (7 H. L. Cas. 165) is another case of first-rate importance, deciding that probate is not conclusive as to the testator's domicile, but merely that the instrument is testamentary according to the law of this country. It is curious to note that Lord Wensleydale and Lord Cranworth both anticipated the very point which arose more than a quarter of a century later in the well-known case of *Concha v. Concha* (11 App. Cas. 541).

A farmer kept a stallion, and sent out a card that, "The horse will be at home on Sundays." This invitation was responded to by the plaintiff, who sent his mare on Sunday, but would not, or at least, did not, pay the charge for the stallion's attentions: so the farmer detained the mare, and the Court held he had a right to do so, for whether the contract was void under the Lord's Day Act (29 Car. 2, c. 7, s. 1) or not—and the Court held that the farmer (the At-home card notwithstanding) was not exercising his "ordinary calling"—yet, being executed, it gave the farmer a lien. The distinctions on lien are fine, not to say thin. An agister of milch cows, for instance, has no lien at common law (*Jackson v. Cummins*, 5 M. & W. 342), a decision of Baron Parke, nor has a livery-stable keeper (*Judson v. Etheridge*, 1 C. & M. 473), but a trainer has (*Bevan v. Waters*, Moo & Malk. 236). The theory of

lien of course is, that labour and skill have been expended on the improvement of the chattel. It is well to note, however, that the person with the lien cannot charge for keeping it. This is clear from Lord Wensleydale's speech in *Somes v. British Empire Shipping Company* (8 H. L. Cas. 338).

Lord Wensleydale was one of the law lords who decided *Cox v. Hickman* (8 H. L. Cas. 266), a leading case, or rather the leading case on partnership law, deciding, as it does, what constitutes a partnership. A person is not a partner merely because he takes a share of the profits, if the business is not conducted on his behalf. Bovill's Act does little more than develop and give statutory force to the common law principle affirmed in *Cox v. Hickman*.

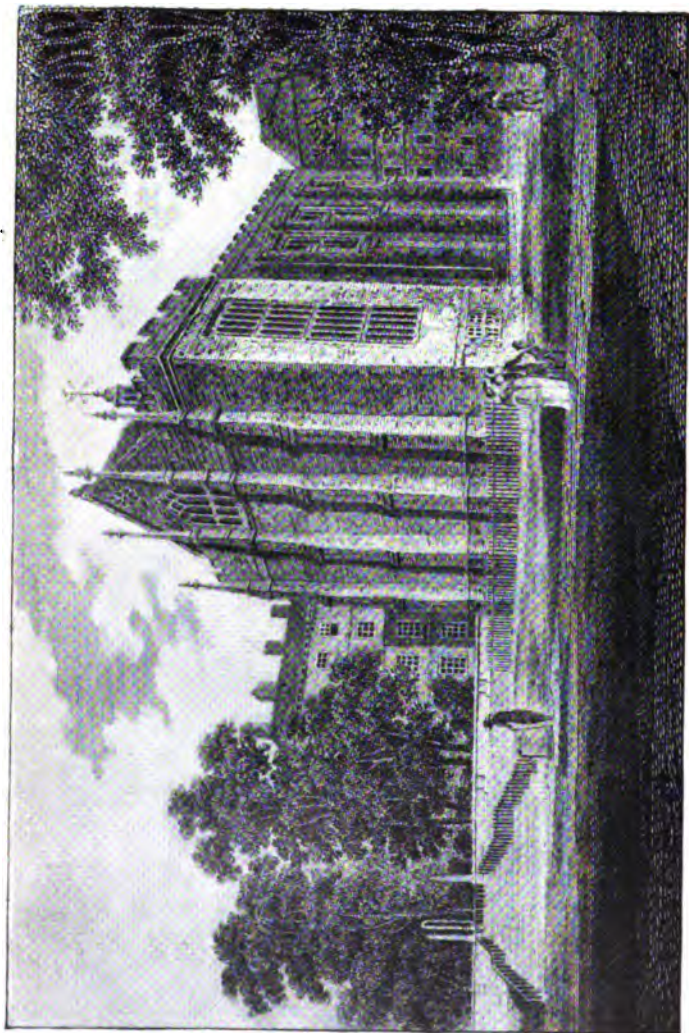
Our common law is notoriously unsentimental. In seduction it is simply sordid. No service, no wrong, sums it up. In *Harris v. Butler* (2 M. & W. 539) the plaintiff's daughter, a milliner's apprentice, had been seduced by her master. As the girl was living away from home there was no service, so the plaintiff sought to rely on an implied contract by the master to look after the morals of his apprentice, but he forgot to allege it in his pleadings. "Demurrer allowed." This is altogether as unfavourable a sample of our law as could be furnished, but Baron Parke was not a judge to let hard cases make bad law.

Here are a few more of the learned Baron's decisions: That a solicitor is not personally liable to a witness he subpoenas for his expenses of attendance (*Robins v. Bridge*, 3 M. & W. 114); that when a party has been absent seven years without having been heard of the presumption of law then arises that he is dead, but there is no legal presumption as to the time of death (*Nepean v. Doe d. Knight*, 2 M. & W. 894); that on a note payable on demand the Statute of Limitations begins to run from the date of the note (*Norton v. Elam*, 2 M. and W. 461); that a wager as to the conviction or acquittal of a prisoner on a criminal charge is illegal, as being against public policy in tending to prejudice the course of public justice (*Evans v. Jones*, 5 M. & W. 77); that a foreign court cannot dissolve an English marriage where the parties are not *bond fide* domiciled in such foreign country (*Dolphin v. Robins*, 7 H. L. Cas. 390); that a separation deed is not a "necessary" for a wife (*Ladd v. Lynn*, 2 M. & G. 267); that a man who buys a bureau and finds a purse of money in a secret drawer in it and appropriates it, will be guilty of larceny

if he had reason to think the purse was not sold with the bureau (*Merry v. Green*, 7 M. & W. 623)—a subject much discussed since in *Reg. v. Ashwell* (16 Q. B. Div. 190) and *Reg. v. Flowers* (16 Q. B. Div. 643).

In his latter years Baron Parke had acquired a habit of thinking aloud, which led on one occasion to a rather amusing incident. While trying an old woman upon a charge of stealing faggots he unconsciously ejaculated, "Why, one faggot is as like another faggot as an egg is like another egg." The counsel defending the case heard the observation and repeated it to the jury. "Stop," said Sir James, "stop; it is an intervention of Providence. This was the very thought that passed through my mind. Gentlemen (addressing the jury) acquit the prisoner."





VIEW OF THE MIDDLE TEMPLE HALL.

THE RIGHT HONOURABLE STEPHEN LUSHINGTON.

THE composite character of our law is strikingly illustrated in the fact that it is made up not only of common law, statute law, and equity, but in a large measure of the civil and the canon law; but it is the civil law and canon law adjusted to English ideas and exigencies. Next to Lord Stowell no judge has done more towards making and moulding this branch of our law—the law once administered in the Admiralty and Ecclesiastical Courts, and now in the Probate, Divorce, and Admiralty Division—than Dr. Lushington, “*clarum et venerabile nomen.*” Of an ardent and enthusiastic temperament, young Lushington threw himself heart and soul (Eton and Christchurch notwithstanding) into the strong tide of reform which set in at the beginning of this century under the impulse of the French Revolution.

Forward, rang the voices then, and of the many his was one.

His was one, and not the least potent. At twenty-four he had already made his mark in the House of Commons as an able and vigorous speaker and a pronounced party man. Slave emancipation, extension of the franchise, abolition of capital punishment, abolition of Jewish and Catholic disabilities, education, the ballot—he championed them all, the complete Liberal programme of the day. His political career may be said to have run parallel to that of Brougham. But Lushington had two sides to his character. With the ardour and impulsiveness which made him a friend of the people when it was almost infamy to be so, he united a singular calmness and sobriety of judgment which foretold the future judge. No one ever made more brilliant speeches in Parliament. No one could be more safely trusted to deal with a grave and difficult appeal.

It was in this latter capacity that he was consulted while at

the Bar by Lady Byron as to her relations with Lord Byron. Lady Byron's first idea was that Byron's eccentricities, to give them a mild name, were due to insanity, and at her request Dr. Lushington and Dr. Baillie actually visited him, without informing him of their purpose of course, to judge of his state. The result was to convince them that he was of perfectly sound mind. On hearing their report, Lady Byron's views of her husband's delinquencies underwent an entire change. She had parted from him on good terms, but she now refused to return. She went to London, and saw Dr. Lushington. He and Sir Samuel Romilly, who had also been consulted by Lady Noel (Lady Byron's mother), had spoken of possible reconciliation. Lady Byron now told Dr. Lushington of facts "utterly unknown," he says, "I have no doubt, to Sir R. and Lady Noel." His opinion was entirely changed. "He thought reconciliation impossible, and should it be proposed, he could take no part, professionally or otherwise, towards effecting it." What the secret was which Lady Byron communicated to Dr. Lushington—the real cause of the rupture—is a mystery which has piqued the curiosity of the gossips ever since. Mrs. Beecher Stowe's version, of Byron's being guilty of an incestuous connection with his half-sister, Mrs. Leigh, is generally voted inadmissible—a figment of Lady Byron's jealous fancy. When it was promulgated, Dr. Lushington made no sign either for or against it. The authentic secret, whatever it was, died with him. (a)

As a leading counsel in matrimonial cases, Dr. Lushington naturally figured in another historical scene—Queen Caroline's trial. He was retained for her, and delivered a masterly speech on her behalf. He seems, indeed, in an especial manner to have commanded her confidence, while she equally distrusted Brougham. When the Bill of Pains and Penalties was brought to her by the Usher of the Black Rod, she walked about the room in extreme agitation, repeatedly exclaiming: "If my head is upon Temple Bar it will be Brougham's doing."

In recognition of their brilliant services on this occasion

(a) A red box supposed to contain the Byron secret was given by Dr. Lushington to his son—not to be opened until ten years after his death. It was duly opened in the presence, among others, of Mr. Guy Lushington, from whom the writer had the story, and was found to contain nothing but a few betting memoranda. The bottom had been cut out with a saw—by whom it was never known—and the contents removed.

Lushington, with Brougham and Denman, had the freedom of the City of London conferred upon them. When the Queen died, as she did not long after, a curious episode occurred, as recorded in the *Gentleman's Magazine*. Dr. Lushington, who was one of the executors, was present on the morning of the funeral at Brandenburgh House, and when Mr. Bailey (the undertaker) went into the State room to give directions to the Lord Chamberlain's officers to deliver up the body to the persons in waiting, "a very warm and unpleasant altercation" ensued betwixt Dr. Lushington and Mr. Bailey. Dr. Lushington, as one of her Majesty's executors, prohibited the removal of the body, and Mr. Bailey, as appointed by Government, insisted on the performance of his orders. Mr. Wilde (afterwards Lord Truro), as the other executor of her Majesty, then presented Mr. Bailey with a written protest against the removal of her Majesty's body. He declared that the body was taken by force against the will of the executors, and called upon Mr. Bailey to give him some information as to where he intended to take the procession, by what route and where its destination. The meaning of this scene was, that the executors, knowing how high party feeling ran, wanted to avoid any *contretemps* which might attend a public funeral. Wisely, as the result showed. The funeral *cortège* processioned round London *via* Hammersmith, Kensington, Bayswater, Tyburn, Edgware-road, New-road, Mile-end, &c., and some disgraceful rioting took place in consequence of certain persons trying to obstruct the progress of the *cortège*. Finally the mortal remains were forwarded to Harwich and so on to Brunswick, where the Queen had desired that she should be buried. She left Dr. Lushington by her will her coach and a picture.

On the Queen's coffin there was put a silver plate, with the following inscription by the Queen herself:

"THE INJURED QUEEN OF ENGLAND."

Before the funeral a messenger from the King brought a fresh plate and removed the first. The pall concealed the change, and the butler kept the original plate. Years afterwards it was brought tied up in a rag to Dr. Lushington's family by an old woman—the butler's widow. He had been afraid to sell it: superstitiously thought it had brought him trouble: took to drinking and died.

In 1828 Dr. Lushington (then forty-six) was appointed judge of the Consistory Court of London. This appointment had the

additional recommendation that it allowed him to retain his seat in Parliament, but after the great triumph of the Reform Bill, he withdrew more and more from the stormy arena of politics, feeling that the work might now be left to others; and with characteristic versatility turned his attention to questions of pews, and faculties, and probates, bringing to bear on them the same energy of mind which had made him eminent in the House of Commons. Ten years later he became judge of the Admiralty Court in succession to Sir John Nicholl, and here it was that his consummate ability and address more especially signalised itself in a long series of admirable judgments.

"All who ever heard one of those luminous expositions of law," says a contemporary, "must remember the effect produced in court when, often without taking time to consider his judgment, Dr. Lushington would deliver one of those masterpieces of judicial wisdom and legal learning which rank him among the first of our English jurists." The Crimean War in particular, bringing up as it did many questions of the rights of neutrals, of blockade and contraband of war, won him a still higher reputation as an authority on international law. Long before his retirement the Queen had expressed a wish to confer a life peerage upon him, but by a curious accident he never received it.

It happened on this wise. The Queen sent for him with the intention of conferring the peerage upon him: but such was the attractiveness of his manner and the engrossing charm of his conversation that her Majesty forgot all about the honour she had meant to confer, and Dr. Lushington left the room. Then the Queen remembered and sent for him back. "Your Majesty had better let me go as I came," said the old judge, and he did.

Speaking of his private life—he married in 1821 a Miss Carr, of Hampstead, (a) and had ten children—one who knew him well said: "The sweet amenities of life were never more beautifully displayed than in him." Under the ermine of the judge beat one of the most genial and kindly hearts ever implanted in a human breast. He declined, for instance, from humanity to prosecute a servant who robbed him. To the young he was always attractive and instructive, and those who can remember the dinners in

(a) When he was starting with his bride on their wedding trip there was rioting going on in London, and a bullet from one of the Life Guards entered the carriage and passed between his wife's head and his own!

Doctors' Commons, which he so often enlivened with his presence, will recall the grace and wit and charm of his conversation, and the reminiscences in which he delighted, of Stowell and Eldon among his opponents, and Mackintosh among his friends. How few there are in this generation who can believe that there was a time when the courts sat at nine, when all the business in them was over at two, when judges and advocates dined always at five, when men drank regularly at least one bottle of port each, and after dinner, instead of returning to slave at chambers, went out into society to see their friends! They went then earlier to bed, but they also got up earlier to consider their cases. Yet this was Dr. Lushington's account of the Doctors' Commons when he joined it. One great gift he certainly had—that of always living up to his time. Some old men are, as it were, dead and buried in the past. Dr. Lushington, to the very last moment of his life, was alive to everything that happened, and took as keen an interest in modern science and discoveries as if he had been but nineteen instead of ninety-two years old. Only a month before his death he took a journey from his country seat near the pretty little village of Ockham, in Surrey, to Oxford, to record his vote for Dean Stanley, then fiercely opposed, as select preacher for the University. The result was an attack of bronchitis, of which he shortly after died—a martyr, in a sense, to the cause of religious toleration.

Dr. Lushington was equally a master of ecclesiastical, probate, matrimonial, Admiralty, and international law. Indeed, reviewing his multifarious judgments, we feel the same wonder growing in us that Goldsmith's rustics felt at their village schoolmaster,

That one small head should carry all he knew.

But it is more especially with maritime law that his name is associated. Our maritime supremacy is the admitted basis of all our greatness, and our maritime law is interwoven with it. That that law has helped and not hindered the expansion of our empire and our commerce is due in no small degree to Dr. Lushington. He, like Lord Mansfield in the case of commercial law, had the wisdom to recognise and give free play to those usages which the maritime world had already found out for themselves to be reasonable and convenient, and on these lines of experience and good sense he formulated and laid down the law judiciously and well on such varied subjects as collisions and towage, derelicts and liens,

salvage and wages, bottomry and lights and foghorns, no less than on the rights of belligerents, and neutrals, of prizes and blockades. The rough-hewn block of maritime custom is chipped and fashioned with careful forethought, and fitted into the great structure of English law. It is a small matter, but it serves to illustrate the bearing of maritime law on maritime supremacy—the care which our law has for seamen, not merely in protecting their simplicity against fraud, but in the positive favour it shows them. Thus, if there be a doubt as to the interpretation of a seaman's contract, the contract is to be interpreted favourably to the seaman (*The Nonpareil*, B. & L. 355); so seamen's wages in rival claims against proceeds of ship are preferred to master's wages and disbursements (*The Salacia*, Lush. Adm. R. 545); and there are many other instances.

One very instructive judgment of Dr. Lushington is that in which he traces the history of bottomry bonds, instructive because it illustrates how our case law may be and is judicially moulded to meet changed conditions of commerce. These bottomry bonds "were invented," as Lord Stowell says, "for the purpose of procuring the necessary supplies for ships which may happen to be in distress in foreign parts where the master and owners are without credit, and where, unless assistance could be secured by means of such an instrument, the vessels and their cargoes must be left to perish." Hence they were held of a very high and privileged nature, both by Lord Stowell, Sir C. Robinson, and Sir J. Nicholl. The result was that shipowners and cargo-owners were, as Lord Esher put it in *The Pontida* (4 P. Div. 177). "practically robbed." Then telegraphic communication came into vogue and judicial policy began to remould the law. The Privy Council ruled (*The Oriental*, 7 Moore P. C. 459) that the owner must be informed of the necessity of bottomry, and it went on to decide in *The Hamburg* (B. & L. 253) that a master has no authority to hypothecate a cargo if he can communicate with the owners before doing so. There must be entire good faith on the part of the lenders before the court will pronounce on the bond, and even then the ship's necessity is the measure of the owner's liability (*The Pontida*, *sup.*). *The Milan* (5 L. T. Rep. 590) is particularly noticeable among Dr. Lushington's Admiralty decisions. It not only established the Admiralty rule (now by the Judicature Act, 1873, s. 25 (9) to prevail over the common law rule), that where both ships are to blame in a collision each can only recover

a moiety of the damage, but it undermined the extraordinary theory propounded in *Thorogood v. Bryan* (8 C. B. 115) that a passenger is so identified with his conveyance (in that case an omnibus) that he cannot recover if the collision was partly due to his own driver's negligence. "Cases apart, can it be reasonably contended," said Dr. Lushington, "that the owner of a cargo is responsible for the acts of the master and crew of the vessel in which his goods are laden; how is he *particeps criminis*?" and he declined to be bound by *Thorogood v. Bryan*. This resolute adherence of Dr. Lushington to principle made it more easy for the House of Lords to overrule *Thorogood v. Bryan* when the occasion arose in *The Bernina* (58 L. T. Rep. N. S. 423; 13 App. Cas. 1).

To be an officer in Her Majesty's service is an undoubted honour, but the post of honour is the post of danger, for, as Dr. Lushington points out, in case of tort or damage committed by vessels of the Crown, the legal responsibility attaches to the actual wrongdoer. "I recollect," he says, "a case where damages were recovered against an officer in command of one of Her Majesty's ships of war who had unjustly seized a ship in time of peace, and the officer was obliged to fly the country": (*The Athol*, 1 Rob. Adm. R. 381).

His decision in *The Batavia* (9 Moo. P. C. 286) holding a steamer liable for going six miles an hour up the Thames and swamping a barge with its swell may be commended to owners of steam launches. Whether indeed it was a question like this of negligence or of the indelibility of a maritime lien (*The Europe*, Br. & Lush. 89), or what is a legal derelict (*The Champion*, Br. & Lush. 71), or the right of material men, now commonly called "necessaries" men (*The Pacific*, B. & L. 245; conf. *The Heinrich Bjorn*, 52 L. T. Rep. N. S. 560; 11 App. Cas. 270), or the ship-owner's lien on cargo for freight (*Hirchner v. Venus*, 12 M. P. C. 361), and for general average (*Cleary v. McAndrew*, 2 Moo. P. C. N. S. 216), or of neutrals carrying on trade with a blockaded port (*The Helen*, 13 L. T. Rep. 305; 1 Adm. & Ecc. 1), or what is an effective blockade (*The Franciska*, 2 Spinks Ecc. & Adm. R. 135), he touched nothing which he did not illuminate.

On marriage Dr. Lushington held what would now be thought old-fashioned notions. During the earlier part of his judicial life, it must be remembered, all agreements, even for separation, were on grounds of public policy held void in law—thought

"shocking" indeed, as Jessel, M.R. says in *Besant v. Wood* (12 Ch. Div. 605).

Thus in the well-known case of *Dysart v. Dysart* (3 Notes of Cases Ecc. & Mar. 324) he held the spouses to their bargain, though the husband had (under provocation it is true) treated his wife shamefully. There was a Viking once, who, being teased by his wife, gave her a smack in the face, which this model wife was so far from resenting that she thanked him for "teaching her not to be importunate, and for giving her what women covet most, a fine complexion." Our law does not require a patience equal to that of this Northern Griselda, in the case of a smack in the face or other gross indignities (*Saunders v. S.*, 1 Rob. Ecc. R. 548; *D'Aguilar v. D'Aguilar*, 1 Hagg. 775); but Dr. Lushington lays it down that if a wife can ensure her own safety by lawful obedience and by proper self-command she has no right to come to the court, for the court affords its aid only when the necessity for its interference is absolutely proved. "Her duty is submission," "The path of duty is often beset with thorns," and so on. Dr. Lushington might require police protection from the fair sex if he uttered these sentiments now.

It is interesting to note by the way that the discipline of the old ecclesiastical courts is still vested in the present Probate Division (*Redfern v. Redfern*, 64 L. T. Rep. N. S. 68, (1891) P. 139), so that a wife guilty of adultery may even now be ordered to walk to St. Paul's in a white sheet with a taper in her hand, or perform any other appropriate penance. As late as the year 1838 a woman did penance in public at Walton Church by order of the Ecclesiastical Court for defaming the character of her neighbour. The white sheet, however, was not enforced.

In ecclesiastical matters the period during which Dr. Lushington sat upon the bench as judge of the Consistory Court of London, as Dean of Arches, and member of the Privy Council, coincided with the period of the keenest religious controversy of this century. It began with the Oxford movement, and it ended with the scandal of "Essays and Reviews." During it the doctrine of the real presence (*Ditcher v. Denison*), of baptismal regeneration (*Gorham v. Bishop of Exeter*), church discipline in the colonies (*Long v. Bishop of Cape Town*), heresy (*Burder v. Heath*, the *Colenso* case, and *Williams v. Bishop of Salisbury*), and many others came under review. Nothing is more remarkable than to note how this controversial spirit has waned of late

years. In *Williams v. Bishop of Salisbury* (2 Moore P. C. N. S. 375) the Privy Council solemnly decided, "That it is not penal for a clergyman to express a hope of the ultimate pardon of the wicked." What satire is here!

Two parishioners once came to "heckle" a vicar at a vestry meeting (*Williams v. Hall*, 1 Curt. Ecc. R. 597). "You are anything but a gentleman; you are a disgrace to your cloth," said one. "You fancy yourself the Sultan of Hendon," said the other, "but I am come to teach you that we are not living in Barbary, and that you have not Turks to deal with." (! He had.) So spake these bold parishioners, but they forgot that the vestry was on consecrated ground (it was held in an old family vault, ten feet by nine feet), and they found themselves charged on a criminal proceeding with "chiding and brawling." The vicar was not blameless, for he seems to have jeered at his parishioners' want of aspirates; but the upshot was that each of the defendants was "suspended from entering the church for the space of one week." There are persons, it is to be feared, in these days, who would submit to the deprivation with equanimity.

CHIEF JUSTICE JERVIS.

LORD JUSTICE BOWEN, not long before his lamented death, paid a high tribute to the old courts at Westminster. "The three great Courts of Banc which used," he said, "to sit at Westminster, each under the presidency of its Chief Justice or its Chief Baron, were usually courts of four. The collective weight and experience of a tribunal of this kind were so considerable that their judgments as a rule were satisfactory, and the public and the Profession acquiesced with equanimity in the state of the law which prohibited appeals in all but a specified class of cases. However special the subject matter of the litigation, there was sure in the old days to be one member of the court within the range of whose knowledge it fell, and the judgments of those splendid Courts of Banc made the English law respected in every English-speaking country." Such was the Court of Common Pleas in the middle of this century. It had Justices Maule, Cresswell, Vaughan Williams, Talfourd, and Crowder as its puisnes; and over these, eminent as they were, Chief Justice Jervis presided and showed himself most worthy to preside. Jervis, as a writer in *Notes and Queries* points out, is often wrongly pronounced Jarvis. The ancestor of the Staffordshire family, from a junior branch of which the Lord Chief Justice and his cousin, Viscount St. Vincent, the well-known admiral, were descended, was Gervasius de Stanton; in Edward III.'s reign it had become Gervays de Chateulme, and in 1496 it was anglicised into Jervys of Chakyll. Jervis had been dedicated to the law from the first. His name was entered at the Middle Temple when he was only fifteen, but after he had passed through Westminster and Trinity Hall, his fancy turned elsewhere, and he entered the Army with a commission in the Carabineers—not the only lawyer who has done so. Good old Sir Mathew Hale trailed a pike in the low countries before he sowed his wild oats and settled to the law, and Erskine

was a young ensign when he went into the Assize Court at York, and heard such dull advocacy that he said to himself, "I could do better than this," and did. Arms yielded to the toga in Jervis' case too, but the little bit of soldiering he got was no doubt useful to him. No knowledge or experience comes amiss to your true lawyer. He was called to the Bar in 1824, and naturally he chose the North Wales Circuit, where his father was Chief Justice of Chester, the last of the line. Like many other eminent lawyers of that age of special pleading, he made his mark first by his proficiency in practice. The Court of Exchequer had then its "postman" and its "tubman." Jervis was "postman," and as such had a certain precedence in moving. He reported, too, first in conjunction with Younge, then with Crompton. He founded the *Jurist*, and wrote frequently for it. He wrote several standard text-books; in particular, one on coroners, and Jervis' Acts are still cited daily in our courts.

Without being what is known as a black letter lawyer, he was thus thoroughly versed in the principles of English law; more than that, he was a most shrewd and ready counsel at Nisi Prius, a quality the want of which has condemned many a profound lawyer to vegetate unseen—a legal cactus in Stone Buildings or Fig Tree-court. It is a striking testimony to his reputation that when the then leaders of the South Wales Circuit applied for silk, Lord Cottenham intimated to Jervis his intention of bestowing the same honour on him unsolicited. Then came, in 1846, the Solicitor-Generalship, and two days after, by Wilde's promotion, the prize of the Attorney-Generalship. How often disappointments are good fortune in an unkind shape! A few years before he had asked and been refused an Indian judgeship, and thought himself very ill-used by the Government. As Attorney-General it fell to him to conduct the prosecution against the Chartist rioters, who had tried to get up a poor travesty of a French Revolution on Kennington Common. The labour which he underwent at this period in this and other Crown business—for he never spared himself—undoubtedly laid the foundations of the disease—atrophy—which shortened his life. When Lord Denman retired from the Chief Justiceship of England, Sir John Jervis conceived that he had a claim by usage—as unquestionably he had by his services—to the vacant place, and a correspondence took place between him and Lord John Russell on the subject. Lord Chancellor Cottenham

was appealed to, and he ruled that the only chiefship which the Attorney-General could claim by usage was that of the Court of Common pleas; "the cushion of the Common Pleas belongs," as Lord Coke once said, "to the Attorney-General to repose upon." The result was that Campbell got it, and it is rather amusing to read that the first thing he did, being rather rusty in his law, was to get up his rival's New Rules. Lord John Russell had, at the time, a scheme for the division of the office of Lord Chancellor, and if it was carried through, it was arranged that Jervis was to have the political moiety, the Speakership of the House of Lords, with a peerage and the title of Lord Keeper. The scheme fell through, but there is a good deal to be said in favour of it, for the work of a Lord Chancellor is certainly, in these days, too much for any single human being, however gifted or industrious, as the late Lord Herschell's pathetic remarks, to a deputation, about his holidays show. We should have no more scandal, either, about political judges. Instead of Lord Keeper, Jervis, in a year or two, on Wilde becoming Chancellor, took his place as Chief Justice of the Common Pleas. In one of the letters of the late Frederick Robertson, the well-known minister of Trinity Church, Brighton, there is a graphic account of the Chief Justice. Robertson had been appointed to preach the assize sermon. "I do not regret," he writes, "having had office this year, for it has given me an insight into criminal court practice which I never should have had but for this occasion; for nothing else would have compelled me to sit twice for four or five days together through every case. The general result of my experience is that, although Burke says 'The whole end and aim of legislation is to get twelve men into a jury-box,' yet the jury system, beautiful as it is in theory, is in itself neither good nor bad, but depends upon two things—first, the national character; secondly, the judge, and on this last almost entirely. The Chief Justice, Sir John Jervis, was the criminal judge this time, and his charges to the jury surpassed in brilliance, clearness, interest, and conciseness, anything I ever could have conceived. The dullest cases became interesting directly he began to speak, the most intricate and bewildered clear. I do not think above one verdict was questionable in the whole thirty-six cases which he tried. One was a very curious one, in which a young man of large property had been fleeced by a gang of blacklegs on the turf and at cards. Nothing could exceed the masterly way in which Sir John Jervis

untwined the web of sophistries with which a very clever counsel had bewildered the jury. A private note-book with initials for names and complicated gambling accounts was found on one of the prisoners. No one seemed to be able to make head or tail of it. The Chief Justice looked it over, and most ingeniously explained it all to the jury. Then there was a pack of cards which had been pronounced by the London detectives to be a perfectly fair pack. They were examined in court, everyone thought them to be so, and no stress was laid upon the circumstance. However, they were handed to the Chief Justice. I saw his keen eye glance very inquiringly over them while the evidence was going on. However, he said nothing, and quietly put them aside. When the trial was over, and the charge began, he went over all the circumstances till he got to the objects found upon the prisoners. 'Gentlemen,' said he, 'I will engage to tell you, without looking at the faces, the name of every card in this pack.' A strong exclamation of surprise went through the court. The prisoners looked aghast. He then pointed out that on the backs, which were figured with wreaths and flowers, in dotted lines all over, there was a small flower in the right-hand corner of each. The number of dots in this flower was the same in all the kings, and so on. A knave would be perhaps marked thus, an ace thus . . . and so on, the difference being so slight and the flowers on the back so many, that even if you had been told the general principle it would have taken a considerable time to find out which was the particular flower which differed. He told me afterwards that he recollected a similar expedient in Lord De Ros' case, and therefore set to work to discover the trick. But he did it while the evidence was going on, which he himself had to take down in writing. Another thing he did very well. A man was robbed. Among the coins he had was a sou, a Portsea token, and another—the name of which I forget—a sort of half-penny. A man was taken up on suspicion, and in his pocket with some other money were three such coins. The prosecutor could only swear that he had three such. He could not identify, nor could he swear to any of the other pieces. The counsel for the defence proved in evidence that all these coins are extremely common in Brighton where the robbery took place, and the case seemed to have broken down by the countenances of the jury. 'Gentlemen,' said the Chief Justice, 'the question has to be tried by the doctrine of chances. The sou is common, the token is

common, and the third coin too. The chances are that perhaps a thousand sous are in the pockets of different people in Brighton; that five hundred tokens are so too, and perhaps fifteen hundred of the other; but the chances are very great against two men in Brighton having each a sou and a token, and almost infinite against two men having each in his pocket at the same time a sou, a token, and the third a coin. You must, therefore, add this to the rest of the evidence, not as a weak link, but as a very strong one."

In criminal cases like these he especially excelled, owing to his almost intuitive insight into character and his quickness. This very quickness of perception, however, which was so marked a characteristic of the Chief Justice, had its disadvantages. It made him—no uncommon judicial infirmity—impatient of argument, and sometimes—partly owing to his health—irritable. But his impatience was not at the expense of justice. His decisions were always in accordance with law and reason.

In private life—he married early a Miss Catherine Mundell, and had five children—he was an agreeable, lively, and convivial companion, full of good-humoured satire and repartee, a generous and constant friend. Ballantyne records an instance of his kindness. In a prosecution for fraud on Prince Louis Napoleon (afterwards Napoleon III.), Ballantyne's leader was arguing while he was actually dying of cancer, and suffering intensely. His only desire was to live to see (which he did not) his daughter married the next day. He told the Chief Justice (Jervis) that he had no hope, and that he was sorry for his clerk. "Do not trouble yourself," said Jervis, "I will provide for him." And he did, by giving him an office in the Common Pleas.

On November 2nd, 1856, there is the following entry in Lord Campbell's diary: "While writing this, I was interrupted by the news of the sudden death of Chief Justice Jervis. From his years, he ought long to have survived me—and before long I must follow him. While living, when dying, and at the day of judgment, Lord have mercy upon me!" A few years afterwards Campbell himself was found dead one morning, in his armchair, stricken as suddenly.

Bird's case (2 Den. C. C. 94), in which the Chief Justice took a leading part, is an instructive one in the history of our criminal law. The prisoners had emulated the performances of Mrs. Brownrigg, and whipped a female apprentice to death. The

indictment charged a series of very brutal beatings, culminating in death; but, at the trial, medical evidence was sprung on the Crown, which proved that death was caused by a blow given a short time previously, and there was nothing to show that the prisoners had struck it. So they were acquitted. Could they afterwards be indicted for the assaults? Eight judges of the Court for Crown Cases Reserved said "Yes"—for on the indictment for murder they could not be convicted of the assaults; six, and Chief Justice Jervis among them, said "No"—*autrefois acquit*; but the principle which Chief Justice Jervis lays down is the principle which has been embodied in 14 & 15 Vict. c. 100: "A prisoner," he says, "may be acquitted of the felony and be convicted of assault upon an indictment for felony wherever the crime charged legally includes an assault and the evidence properly admissible and produced to prove the crime charged warrants the finding of assault."

Reg. v. Powell (2 Den. C. C. 403) illustrates another anomaly of our common law. The prisoner there was charged with burglariously entering a dwelling-house with intent to steal certain "goods and chattels." What the prisoner really went after was a mortgage deed, and Chief Justice Jervis held—quite rightly, no doubt—the indictment bad, the mortgage deed as a security being a *chose in action*. Observe, had it been paid off, the parchment and wax would then have been a mere chattel. This nice distinction recalls Hale's ruling as to homicide in the commission of a felony—which Lord Bramwell not long ago held to be still law—that if a man feloniously shoots at a tame duck, misses it and kills a man, this is murder, but it is not murder if the duck is a wild one.

The days of duelling are over for us, but we have only to go back half a century to find the law of honour and the law of the land diametrically opposed to one another. The law of honour required you to call out a man and shoot him. The law of the land hanged you if you did. But observe the effect on the law of libel. You may call a duellist who has killed his man a murderer, but you must not say he practised all the night before with a pistol, or impute any other circumstance of aggravation or unfairness: (*Helsham v. Blackwood*, 11 C. B. 111). For even a murderer may have his honour, otherwise he would be outside the pale of the law.

The Roman law allowed creditors to carve up their debtor.

Our law never went quite so far, but it fully recognised a man's person as part of his assets, and not the least valuable either. In *Arden v. Goodacre* (11 C. B. 883), the court had to determine the measure of damages against a sheriff for letting the debtor escape, and it held that they were the value of the custody of the debtor at the moment of escape, without any deduction for what the creditor might have obtained by diligence after the escape. The liability of a sheriff for the acts of his officers is well explained in *Greg v. Cotterell* (5 E. & B. 585). "He is supposed," says Chief Justice Jervis, "to be executing his duty in person, as he is bound in the first instance to do. The impossibility of so doing authorises him to delegate that authority to another, and he puts that party in his place, and for whatever that party does, not only when done *virtute mandati*, but *colore mandati*, the sheriff is responsible; if, for instance, under a *fi. fa.*, the officer arrests the body of the debtor. But so, too, is the officer. He is only protected while acting strictly in accordance with his warrant (*Munsday v. Stubbs*, 10 C. B. 432), and a *bonâ fide* mistake makes no difference." Among the Chief Justice's other decisions may be noted: That an alien resident abroad has no copyright in England (*Jeffreys v. Boosey*, 4 H. L. C. 815); that a secretary of legation, acting as *chargé d'affaires*, is entitled to all the privileges of an ambassador (*Taylor v. Best*, 14 C. B. 487); that a man tucking up his sleeves and announcing his intention of breaking your neck unless you leave the premises is an assault in law (*Read v. Coker*, 13 C. B. 850); that the measure of damages on breach of a contract to deliver goods at a specified time is the difference between the contract and the market price at the date of the breach, and does not include loss of anticipated profit on a re-sale (*Peters v. Ayre*, 13 C. B. 353); that a buyer with a warranty cannot return the goods, if the property has passed, though not equal to sample, but must sue on the warranty, unless the contract is conditional (*Dawson v. Collis*, 11 C. B. 452); that a man is not entitled to a lien unless he receives the property or does the act in the particular character to which the lien attaches (*Dixon v. Hairsfield*, 10 C. B. 398); that to entitle anyone but the author of a literary work to register it at Stationers' Hall there must be an absolute assignment (*Ex parte Bastow*, 14 C. B. 631). *Shelton v. Springett* (11 C. B. 452) is what newspaper advertisements would call Important to Parents. It lays down that the mere moral obligation of a parent to maintain his child affords

no legal inference of a promise to pay a debt contracted by him even for necessaries. If, for instance, a father sends a son to London with £5 in his pocket to look for employment, he cannot be made to pay a bill which the son has run up at an hotel. "People are apt to imagine," as Mr. Justice Maule remarked in this case, "that a son stands in this respect on the same footing as a wife. But he does not." When, therefore, the prodigal finds himself cut adrift, what will he do? Chief Justice Jervis explains: He will go on the parish, and the parish will sue his parent for his maintenance. For a parent by the law of England, if of ability, remains liable to maintain his offspring, whatever their age may be. This may be recommended for reflection to persons about to marry.

LORD CRANWORTH.

"I THINK him a very nice little peer." So writes Lord Denman in 1850 to a friend. The nice little peer was Lord Cranworth, just then appointed one of the new Lords Justices with a peerage. There seems to have been but one opinion about him. "There never lived a better man than Rolfe," says the caustic Campbell. Greville, as keen a critic and observer of human nature as could be found, says in his diary, 1845: "At Ampthill I met Dundas, Baron Rolfe, and Empson. Nobody is so agreeable as Rolfe; a clear head, vivacity, information, an extraordinary pleasantness of manner, without being either soft or affected, extreme good humour, cheerfulness and talk make his society on the whole as attractive as that of anybody I ever met. The conversation and the anecdotes of these lawyers would be well worth recording, but it is now too late; one hears in this way things which go to prove how many false notions take root in public opinion, and one for example which struck me was the concurrent opinion of Parke and Rolfe of Eldon's value as a great lawyer and chancellor. They rate it astonishingly low, and think that he did nothing for the law and for the establishment of great legal principles (what treason was this?) which surprised me."

Lord Cranworth's career is the sort of career that Englishmen are proud of. The son of a country parson, rector of Cranworth, Norfolk, he made his way in the world by his own great abilities and sterling character. Lord Nelson was his cousin, and he had something of the great admiral's pluck and determination in him.

"It was just one year after Waterloo," says a contemporary critic, "that he was called to the Bar and took chambers in Lincoln's Inn, having made up his mind, in the usual sanguine spirit of young barristers, to win his way to the Woolsack."

For many years it did not seem as if his ambitious dreams



LORD CRANWORTH.

(From a photograph by the London Stereoscopic Company.)

were at all likely to be realised, and he had shown himself for many seasons in Westminster Hall—appearing chiefly in the Equity Courts—before briefs came in to him in any remunerative number. Crabb Robinson, the diarist, relates how he was once sitting with Rolfe (still a junior) in court while a counsel of the name of Henry Cooper was addressing it. Cooper's memory and cleverness were very striking, but so was his want of judgment, and his clever and amusing hits told as much against as for his client. As he was entertaining the whole Court, Rolfe whispered to Crabb Robinson, "How clever that is! I thank God I am not so clever." But, though not brilliant, he was patient and laborious, steady and sound, and, in due course of time, as his merits became known among the solicitors, things began to change for the better. So the little brook of fees became a stream, and the stream had grown to a river when he was honoured with a silk gown in 1832. Like many another ambitious brother of the wig and gown, he made in the meanwhile one or two unsuccessful efforts to get into Parliament, and at last found a safe seat for Penryn.

Still, when he was made Solicitor-General, the choice came as a surprise to the public, who knew little of him. Campbell, then Attorney-General, tells us how it came about. The first suggested for the place was Charles Austin, a man of consummate ability. At least no man of that generation made such an impression on his contemporaries as this brilliant and gifted Charles Austin, even on such men as Macaulay, Campbell, and John Stuart Mill. But Austin had the year before—it was the time of the great railway mania—netted £40,000 in fees before railway committees, and was not inclined to give up this gold-mine. Failing him, the choice lay between Wilde (afterwards Lord Truro) and Rolfe, and Campbell, who liked Rolfe, "carried" his appointment, as he did most things he set his mind on. Not long after, a puisne judgeship in the Exchequer fell vacant. Campbell had half a mind to take it, for his Government was going out, but Brougham's sneer about Sir Vicary Gibbs, Attorney-General, when the Prime Minister was tottering, "in a fit of terror sinking into a puisne judge," kept him back; so Rolfe took it, and proved an excellent judge. It might seem rather hazardous at that time for a Chancery practitioner to be transplanted to the Bench of the Exchequer—though the anomaly was not greater than Erskine sitting in Chancery. Rolfe himself frankly says, when Campbell,

many years after, on his appointment as Lord Chief Justice, was asking his advice about what he should read for the practice, "When I came upon the Bench I was entirely ignorant of the practice, but somehow one picks it up, and no real difficulty occurs." He had fortunately had what few Chancery practitioners have, *Nisi Prius* and criminal experience as Recorder of Bury St. Edmunds, the town where he had first been to school.

Indeed, it was in the character of a criminal judge that his excellence on the Bench became first generally known to the public, on the occasion of his presiding at the Norfolk Assizes in 1849, at the trial of Rush for the murder of Mr. Jermy. This murder created a great sensation at the time, as well it might, being of a peculiarly atrocious character. Mr. Jermy, the victim, or, rather, one of the victims, was Recorder of Norwich. There had been some quarrels between him and Rush, the prisoner, who lived close by, about some land, and Rush, resolving to be revenged, went to Mr. Jermy's house one evening with a gun and shot him dead; then he shot the son, who came to his father's assistance, dead too, and seriously wounded a manservant and a daughter. The only difficulty in the case lay in identifying Rush as the man, and this was done beyond all doubt by the evidence of a young woman, Sandford, whom Rush had seduced, and whom he tried to silence by threats. It is a striking observation—it was made, indeed, by the learned judge—that had Sandford been the prisoner's wife, had he had the conscience to repair by marriage the wrong he had done her, the law of England would have sealed her lips, and he might have escaped the retribution which overtook him. Throughout the trial the prisoner behaved with singular effrontery, and endeavoured to browbeat the learned judge, but Rolfe was equal to the occasion, and exhibited a firmness and presence of mind which won him golden opinions. When he was subsequently raised to the peerage, the wits of the Bar observed that his title ought to have been, not Lord Cranworth, but Lord Kilrush.

It might have been expected that when Rolfe was made a Baron, and had remained at the Exchequer for eleven years, he was shelved. So far from this being the case, it was only the beginning of a brilliant career. From the Court of Exchequer he went back to Chancery as Vice-Chancellor. Then he became a Lord Justice with a peerage, and a year after he reached the goal of his youthful ambition, the Woolsack. When Lord Chancellor

he used to sit continually with the Lords Justices, for the purpose, it was said, of making himself better acquainted with the new procedure in Equity, of which he was comparatively ignorant. One day someone remarked to Bethell, "I wonder why old Cranny always sits with the Lords Justices?" The caustic but humorous reply was: "I take it to arise from a childish indisposition to be left alone in the dark."

Smart, but shallow, like many of Lord Westbury's witticisms, for no one may impugn Lord Cranworth's knowledge of the mysteries of equity. Eloquence or wit he had little, though his face as he sat upon the bench was ever wreathed in smiles. But after all, judicial joking is a thing we can very well dispense with. It is mostly of indifferent quality. The Bar laugh—respectfully—much as the village school children in Goldsmith laughed at their master's jokes, with "counterfeited glee."

Lord Cranworth was not contented to be only a judge, however excellent. He aspired to the *rôle* of a law reformer.

In stating, in 1855, the intentions of the new Government in the House of Lords, he unfolded a programme which must have satisfied the veriest glutton for legal reform. Testamentary jurisdiction, divorce, transfer of land, charitable trusts, and the consolidation of the statute law were indicated as subjects on which the Government were prepared to legislate. The Lord Chancellor was even bold enough to hold out some hope that the consolidation and classification of the public Acts might form the foundation of a Code Victoria—a consummation which seems no nearer now at the commencement of King Edward the Seventh's reign than when the devout wish for it was first expressed.

In accordance with his promise, Lord Cranworth brought in a Land Registration Bill; but the foes were those of his own household.

Campbell, referring to the career of "our little Chancellor," adds, "I may tell you that the Attorney-General and Solicitor-General (Bethell) both conspire his downfall, each having the hope of replacing him. Their consistent habit is to vilipend him. Bethell hardly attempts to disguise his eagerness to clutch the Great Seal; but I have little doubt that Rolfe, though not very gloriously, will keep his ground." Bethell no doubt was ambitious, but Campbell complaining of ambition reminds us too much of the Gracchi complaining of sedition. The truth of

the matter was, that throughout their joint career in office, and even after they had both quitted office, the two were constantly coming into collision on questions of law reform. Lord Westbury told a friend that in his opinion Lord Cranworth had an unhappy knack, though always with the best intentions, of making exactly such proposals for their amendment as would entirely defeat the operation of some of Lord Westbury's most masterly measures. It was the farce of the rival reformers. Land Registration was an example. Lord Cranworth was all for registration of deeds, Bethell of title.

Penal servitude and the ticket-of-leave system is another thing which we owe to Lord Cranworth and Lord Palmerston. The evils of the old system of transportation and the hulks had become intolerable. The hulks were simply floating hells, the prisoners huddled together without discipline or supervision. The Colonies flatly refused to have any more of our social refuse shot there. The present system is not without defects—Baron Bramwell once stated from the Bench that he had instances of criminals coming before him who had three sentences overlapping one another—but on the whole it works well. Solon said he did not give always the best laws, but the best laws the people would bear.

But "Lord Cranworth's Act" is the one by which Lord Cranworth is best remembered now. Its object, and a very laudable one it was, was to make certain powers and provisions which it is usual to insert in settlements, mortgages, wills, and other instruments incident to the estates of the persons interested, so as to dispense with the necessity of inserting them in terms—to minimise, in fact, the scandalous verbiage of conveyancing. Lord Cranworth's Act has been superseded by Lord Cairns' Conveyancing Act, but the Conveyancing Acts have only expanded and developed Lord Cranworth's principle.

The Chancellorship, with its multitudinous responsibilities, if not too much altogether for one mortal man, demands at least a man in the plenitude of all his powers. To essay it at the age of seventy-five is reserved for phenomenal beings like Lyndhurst or Brougham. Lord Cranworth was not phenomenal. Campbell speaks of "Lord Chancellor Cranworth evidently failing in quickness of apprehension, for which I have generally found him most remarkable." A year later he resigned in favour of Lord Cairns. Then came his wife's death, the companion of his life for fifty years. Few men survive long the severance of such a tie. Six

months later Lord Cranworth, at the age of seventy-eight, followed her to the grave.

"Lord Cranworth," says Lord Selborne, "take him for all in all, was one of the best Chancellors I have known. Others had more splendid gifts; but in him there was nothing erratic, nothing unequal. In steady good sense, judicial patience, and impartiality and freedom from prejudice, he was surpassed by none."

A leading trait in Lord Cranworth's character was his humility and amiability: he was always deferential, and seemed to think that others knew better than himself. He was also strong in facts. Parke, it was said of the Exchequer Court, settles the law, Alderson settles the Bar, Rolfe settles the facts.

If it cannot be claimed for Lord Cranworth that he possessed as a judge any high constructive or architectural genius, it is certain that his law was always sound, his knowledge of law extensive, his language clear and accurate. Certainly no English judge has ever had so varied a judicial experience as he.

To sample a few of his decisions. Our law is, perhaps rightly, suspicious of gifts; at least it requires good evidence—unequivocal evidence. The *animus donandi* will not do. The gift must be completed by deed or delivery. The result is, that the good intentions of would-be donors are often defeated, as was the case in *Jones v. Lock* (1 Ch. App. 25).

There a father in an expansive moment put a cheque for £900 into his child's hand, saying, "I give this to baby for himself." "Take care, he will tear it," said the careful mother. "He may do what he likes with it," said the father; "it is his own." Then he took the cheque away, and locked it up in a safe. It was rather hard that after this the baby did not get the benefit of the cheque. But Lord Cranworth held the gift incomplete, and could not see his way to spell out a declaration of trust. *Donationes causâ mortis* give even more trouble than gifts *inter vivos*. They, too, are to be "viewed with suspicion," says Baron Rolfe (*Hills v. H.*, 8 M. & W. 401); but he is clear on one point, a *donatio mortis causâ* is none the less valid because there is a condition attached by the donor, e.g., that the donee "shall bury her comfortably."

Deodands are a curious survival of fetishism. The incongruity of the old and new ideas could hardly be presented in more amusing contrast than in the Crown claiming and being allowed as forfeit and deodand a locomotive which had run off the rails and killed somebody: (*Reg. v. Eastern Counties Railway*, 10 M.

& W. 58). If the Crown had spent the proceeds in providing masses for the soul of the departed, according to the original design, it might have had our sympathy, but, as the proceeds only went the way of Queen's taxes we can hardly regret the abolition of this venerable superstition by 9 & 10 Vict. c. 62. A corporation of itself cannot be guilty of fraud, but when it can only accomplish the object for which it was formed through the agency of individuals who act fraudulently, the corporation stands in the same situation with respect to the conduct of its agents as a private person would have stood had his agent so misconducted himself. This is *Ranger v. Great Western Railway* (5 H. L. Cas. 72), another of Lord Cranworth's leading cases. When it was sought to apply this principle to an action against a company for malicious prosecution, Lord Bramwell stoutly protested against motive or malice being imputed to a corporation (*Abrath v. North-Eastern Railway Company*, 11 App. Cas. 247; 55 L. T. Rep. N. S. 63). But why not? A corporation is a pure legal fiction. If such artificial person has mind enough to appoint and authorise agents, why may we not attribute to it the inspiration of all the acts of its agents which are not *ultra vires*? But judicial views will differ, and *à propos* of this may be cited some very sensible remarks of Lord Cranworth himself. It was in a case of a charge of heresy, with reference to the doctrine of eternal punishment, preferred against a clergyman. "I hope," he says, "the differences among lawyers on legal points will cease to be a subject of merriment, when amongst the three highest theological authorities one (the then Bishop of Oxford) thinks the judgment below right on both points as to both defendants, another thinks it wrong on both points as to both defendants, and the third thinks it as to each defendant wrong on one point and right on the other."

Money v. Jordan (2 De G. M. & G. 318) is an instructive case. A person of the name of Marnell once upon a time financed a very young man of the name of Money for the purpose of some foreign stock speculation, on the strictly business understanding that he, Marnell, was to share in the profit, but not in the risk. Needless to say the speculation resulted in a loss of some £1200, for which the astute Marnell got judgment, but died before enforcing it. Now Miss Marnell, his sister, not only did not look upon her brother's conduct in this matter with approval, but repeatedly condemned it, and being executrix and universal

legatee, nobly declared often to Mr. Money and other persons that she would never claim the debt. Hopefully relying on these representations, Mr. Money shortly after became engaged to, and, as Miss Marnell knew, married a Miss Poore—an ominous conjunction—but still the bond remained uncanceled and undefaced in Miss Marnell's desk, or with her solicitor. So Mr. Money's mother paid her a visit, and the following truly feminine dialogue ensued :

Mrs. Money: " You have long given up the debt, so it's only a nominal thing, and it's no use your keeping a paper you have long since promised you will never enforce."

Miss Marnell: " I will be trusted."

Mrs. Money: " Who talks of not trusting you ! But you may marry, and then you would be at the command of your husband."

Miss Marnell: " I give you my word of honour that I will never use it against William ; but I will be trusted, and I will keep it."

Alas! for the constancy of woman. The event which Mrs. Money, with a matron's prophetic eye, foresaw, happened. Miss Marnell did marry a year or two afterwards, and she and her husband did shortly after require payment, and proceeded to enforce it. Thereupon the ill-used Mr. Money applied for an injunction to restrain the action, and Romilly, M.R., and Knight Bruce granted it, thinking the circumstances amounted to a binding contract not to sue. Lord Cranworth dissented on the ground that the misrepresentation was one of intention, not fact. But intention is a fact, a psychological fact ; so we know now. As Lord Justice Bowen says in *Edgington v. Fitzmaurice* (29 Ch. Div. 483), " The statement of a man's mind at a given time is as much a question of fact as the state of his digestion." The moral is that the immemorial prescriptive right of a lady to change her mind must be received with qualification.

MR. JUSTICE MAULE.

IN a letter to his father, giving an account of a journey of some length, which he had made on horseback, young Maule relates how his pony had shied at a waggon of hay. "I thought it strange," he goes on to say, "for a horse to be frightened at a load of hay, till I remembered having seen people frightened at a drove of oxen who had no objection to a dinner of beef." Slight as it is, this boyish remark is worth recording, because in it we strike that vein of irony which was, through life, Maule's most characteristic trait. Of him it might be said, as Byron said of Gibbon, that he was

The lord of irony, that master spell.

Charles Greville enters in his diary, January 2nd, 1831, "A dinner of clever men; among them Maule," &c. "Maule," he adds, "was Senior Wrangler and Senior Medallist at Cambridge, and is a lawyer. He was nephew to a man with whom I was at school thirty years ago, and I had never seen him since. He was then a very clever boy, and assisted to teach the boys, being admirably well taught himself by his uncle, who was an excellent scholar and a great brute. I have young Maule now in my mind's eye suspended by the hair of his head, while being well caned, and recollect, as if it were yesterday, his doggedly drumming a lesson of Terence into my dull and reluctant brain as we walked up and down the garden walk before the house. When I was introduced to him I had no recollection of him, but when I found out who he was I went up to him with the blandest manner as he sat reading a newspaper, and said that 'I believed we had once been well acquainted, though we had not met for twenty-seven years.' He looked up and said, 'Oh! it is too long ago to talk about,' and then turned to his paper. So I set him down for a brute like his uncle, and troubled him no further." This

little incident just shows how easily people may form wrong impressions. So far from Maule being a "brute," those who knew him best speak of him as nicely sensitive to right and wrong, as in all relations of life kind, just, generous; as a good son, a good brother, a good friend, and a good master; a good husband he had no chance to show himself, for he never married. Unlike the centurion of Tacitus, "eo immitior quia toleraverat," he abhorred cruelty, and punished it with severity. But there is no doubt he had a cynical manner, an unfortunate brusqueness which offended people like Greville, just as Dr. Johnson's manners did Lord Chesterfield. But Maule, like Johnson, had, in Goldsmith's happy phrase, nothing of the bear but his skin. This brusqueness, which was partly waywardness and partly the fear of sycophancy, recoiled on his own head. It drove away clients, and delayed for many years that success at the bar which his legal reputation and his splendid talents would otherwise have won him. When Knight Bruce was about to drop the Brecon Circuit, he observed, in recommending some junior friend to join it, that Maule was the only man on it fit for much, and he might always be heard "blowing up his attorney." Where Maule was in his element (besides blowing up attorneys) was in throwing cold water on the pathos and sentiment of his friend and rival, Serjeant Talfourd. Ridicule in all its forms, from the lightest persiflage to the bitterest sarcasm, was the weapon he wielded most successfully. But irony, that master spell, is a dangerous figure of rhetoric to use with a common jury. Not unfrequently such a jury took Maule at his word, and brought in a verdict the opposite of what he meant. His most brilliant effort as an advocate was on the Carlow County election petition in 1835. So great a local reputation did his conduct of this case gain him, that he was invited to stand as Parliamentary candidate for the county, and sat as its representative for several years. His conversational powers were extraordinary, so much so that Lord Brougham, it is said, designated him as the only man in London he was afraid of. The story is well known how, when he and Sir William Follett were lunching together, just before the hearing of an important House of Lords appeal, Sir William, who was limiting himself to an abstemious glass of sherry and a biscuit, asked Maule how he could indulge in steak and a tankard of stout. "To bring my intellect down to the level of the judges," replied Maule.

Among his lesser talents was the curious one of picking locks. He had acquired this art, it is said, owing to the habit he had of mislaying his keys. On one occasion he very much astonished a country blacksmith by opening, with a bit of wire, a portmanteau which that worthy had pronounced impregnable. In solving puzzles he was equally an adept.

One of his most intimate friends was Babbage, the inventor of the famous calculating machine. Maule had assisted him greatly in his mathematical speculations—had, indeed, made some important discoveries as to the Differential Calculus, and it is amusing to find him lamenting to a common friend that Maule had not made science his pursuit, in which he was so certain to have distinguished himself.

“He is doing very well at the Bar,” said the friend; “who knows, he may come to be Lord Chancellor.”

“And if he is Lord Chancellor, what is that to what he might have been?” Worthy Babbage! He had the true philosopher’s sense of the dignity of science!

Lord Chancellor, Maule was not destined to become, but in 1839 he was made a Baron of the Exchequer, and a few months later transferred to the Common Pleas, and here he sat for the remaining sixteen years of his judicial life. On the Bench, no judge had ever a finer sense of the anomalies and incongruities of our English law than Maule, and his power of sarcasm brought them into strong relief; witness his sentence in a certain bigamy case—a masterpiece of irony.

A hawker, who had been convicted of bigamy, urged in extenuation that his lawful wife had left her home and children to live with another man, that he had never seen her since, and that he married the second wife in consequence of the desertion of the first. The judge, in passing sentence, addressed the prisoner as follows:

“I will tell you what you ought to have done under the circumstances, and if you say you did not know, I must tell you that the law conclusively presumes that you did. You should have instructed your attorney to bring an action against the seducer of your wife for damages. That would have cost you about £100. Having proceeded thus far, you should have employed a proctor, and instituted a suit in the ecclesiastical courts for a divorce *a mensa et thoro*; that would have cost you £200 or £300 more. When you had

obtained a divorce *a mensa et thoro*, you had only to obtain a private Act of Parliament for a divorce *a vinculo matrimonii*. The Bill might possibly have been opposed in all its stages in both Houses of Parliament, and altogether these proceedings would cost you £1000. You will probably tell me you never had a tenth of that sum, but that makes no difference. Sitting here as an English judge, it is my duty to tell you that this is not a country in which there is one law for the rich and another for the poor. You will be imprisoned for one day."

This irony must always be reckoned with in reading Maule's judgments. "How does the mother of an illegitimate child differ from a stranger?" he says in *Re Lloyd* (3 M. & G. 547)—an unnatural sentiment which perplexed good-natured Sir George Jessel. There is a lurking satire where he says of the rule as to promises on executed considerations, "As it is a rule well established by decisions, it is not necessary to give any reasons in its support, or to say anything to show it to be a good and useful one": (*Emmens v. Elderton*, 4 H. L. Cas. 624, 658). But Maule was not for wresting the law because it did not square with his sense of the fitness of things. He knew there must be hardships in any system of law, were it made, as Lord Herschell once said, by a "committee of archangels." Thus, speaking of the sufficiency of a signed bill of costs, he says, "The point is certainly not one which tends very much to the justice of the case, but I think it much more important that a statute should receive its proper construction than that justice should be doled out to suit the circumstances of each particular case." Speaking one day of what Sir Frederick Pollock calls "the facts behind the law of the land," he observed: "Scarcely any verdict would stand if it could be set aside because the jury had reasoned inconclusively. The trial by jury is not founded upon an absurd supposition that all twelve will reason infallibly from the premisses to the conclusion." Chief Justice Wilde had once refused a new trial for breach of promise on the plaintiff's application, his reason consisting of a tirade against the state of the law which allowed of such an action at all. Maule followed, and began by remarking that "the question of what the law ought to be had now, he thought, been amply discussed; he should therefore, for his part, consider what it really was." Maule was, in fact, no law reformer, though in more than one instance his sarcasms led to its being changed. For instance, it is the fashion now to regard

codification as a panacea for the defects of our legal system. Maule was averse to codification, and his argument has great weight. He objected to making all decisions depend, not upon a deduction of principles, but upon an interpretation of the precise words of positive enactments—an objection with which no one who compares the common run of cases which turn on the construction of Acts of Parliament with those decided on general principles of law can fail to sympathise.

Many pungent sayings of his are recorded.

"My Lord," said a witness, "you may believe me or not, but I have stated not a word that is false, for I have been wedded to truth from infancy."

"Yes, sir," said Maule; "but the question is, how long you have been a widower."

"I am sorry to interfere, Mr. ———, but do you not think that by introducing a little order into your narrative you might possibly render yourself a trifle more intelligible? It may be my fault that I cannot follow you. I know that my brain is getting old and dilapidated, but I should like to stipulate for some sort of order. There are plenty of them. There is the chronological, the botanical, the metaphysical, the geographical—even the alphabetical order would be better than no order at all."

He once addressed a phenomenon of innocence in a smock frock as follows:

"Prisoner at the bar, your counsel thinks you innocent: the counsel for the prosecution thinks you innocent: I think you innocent: but a jury of your own countrymen, in the exercise of such common sense as they possess—which does not seem to be much—have found you guilty, and it remains that I should pass upon you the sentence of the law. That sentence is that you be kept in imprisonment for one day, and as that day was yesterday, you may now go about your business."

Ladies had been requested to leave the court.

"My Lord, I see your order has not been attended to, for I see that females are still present.

Maule: "I do not agree with your interpretation of the order. I have always understood its meaning to be that all *modest* females must quit the court, and so far as my judgment goes the order has been strictly complied with."

"May God strike me dead, my Lord, if I did it," exclaimed a convicted prisoner on the verdict being given. For a few

moments Maule waited, and then said, "As Providence has not seen fit to interpose, the sentence of the Court is"

The law of arrest for the debt he calls a mere device for enabling a man to "pledge the compassion of his friends."

A friend about to build a house asked him what sort of instructions he should give to his architect. "Don't let him know what you really want," said Maule, "or you will be sure not to get it."

Though a very sound lawyer, Maule was not like Parke, a deeply learned one. He did not, in Lord Eldon's phrase, "dine with Coke" in an evening, but refreshed himself with novels, which he considered excellent to "air the mind." It was while so engaged that he set fire to his chambers by putting the candle in an unsafe place, and burnt down a large part of the Temple, thus opening the way, as the late Mr. Serjeant Robinson points out, for handsome improvements.

One of the most interesting cases which came before him was a case on the construction of a life insurance policy with a clause avoiding the contract if the assured should "die by his own hand": (*Borrodaile v. Hunter*, 5 M. & G. 639). What the assured did was to jump into the Thames from Vauxhall Bridge and drown himself while *non compos mentis*. He meant to drown himself, but he was not responsible for his actions. Maule, J. held the policy to be avoided, finding nothing to confine the construction to a felonious taking of his life. In *Reg. v. Burton* (1 Dear. C.C. 282), on a charge of stealing pepper, it was argued for the prisoner that the *corpus delicti* must be produced. But what says Maule? "If a man go into the London Docks sober without means of getting drunk and comes out of one of the cellars very drunk, wherein are a million gallons of wine, I think that would be reasonable evidence that he had stolen some of the wine in that cellar, though you could not prove that any wine was stolen or any wine missed." But are there not stories of weak-headed people having been intoxicated by the mere fumes of these London Docks' cellars? *White's case* (1 Dear. C. C. 203) is another curious larceny case.

A surgeon attended an old lady for eleven years before her death, and forebore for all that time to send in any bill for medicine and attendance, under the expectation of a legacy from her. When she died, and he found she had left him nothing, he promptly sent in a bill for £500 to the executors, and the Court

held that the executors must pay. It was very wrong of the surgeon not to send in his bill, but the Court could not find any understanding that he was to be paid by a legacy; so he was remitted to his legal right.

In the same volume of Manning & Grainger we have a sporting point adjudicated, viz., what is "across country" in a steeplechase? and for the credit of English sport we are glad to find it means that the riders are to go over all obstructions, and are not to avail themselves of an open gate: (*Evans v. Pratt*, 3 M. & G. 759).

A little girl was in the witness-box, and as usual, before she was allowed to be sworn, she was examined by the judge as to her understanding the nature of an oath, and her belief in a future state.

"Do you know what an oath is, my child?" said Maule.

"Yes, sir, I am obliged to tell the truth."

"And if you always tell the truth where will you go when you die?"

"Up to heaven, sir."

"And what will become of you if you tell lies?"

"I shall go to the naughty place, sir."

"Are you quite sure of that?"

"Yes, sir, quite sure."

"Let her be sworn," said Maule. "It is quite clear she knows a great deal more than I do."

LORD ABINGER.

Oh! who can tell how hard it is to climb
The steep where Fame's proud temple shines afar?

exclaims Beattie in "The Minstrel," but some there are to whom the toilsome ascent is a "primrose path," and one of these was Lord Abinger. Briefs flowed in from the first, and they continued to flow in an increasing volume till he left the Bar for the Bench. "I have had," he says, "a longer series of success than has ever fallen to the lot of any other man in the law." He has left behind him the reputation of being the greatest verdict-winner of his own or of any other age. At the height of his fame as an advocate and *facile princeps* at the Bar he visited every part of England and Wales on special retainers, and while the assizes were on in the different counties he spent his time in galloping from one end of England to another, over thousands of miles as fast as four horses and a postchaise could carry him. Yet he possessed no transcendent gifts. He was a "reading" man at Cambridge, and a scholar like most of the men of his generation, but he won no high academic honours. It was to his knowledge of men rather than of books that he owed his singular success. His *première coup* was the elucidation of some subtlety in pleading. "Upon this occasion," he says, "I made my *début* at Carlisle, and here it may be said was laid the foundation of my reputation. Some questions having arisen in the course of the trial upon the construction of the pleadings, it fell to my lot to explain them, which I had the good fortune to do to the satisfaction of the judge, and to receive from Mr. Law, afterwards Lord Ellenborough, who was on the other side, a very flattering compliment." These dramatic incidents, somehow, do not happen now. Solicitors take the *début* of junior barristers much more calmly.

On the strength of this good beginning Scarlett allowed himself the expensive luxury of marriage. The lady was Miss Louise H. Campbell, daughter of Peter Campbell, of Kilmorey, Argyllshire. "She had been the object," he says, "of my early and constant attachment, and had from my first acquaintance with her exercised a strong influence over my conduct." Very happy this union turned out, nor was it so rash a step as might be thought, for he was sure, from family connections, of a competency in Jamaica if the English Bar failed him; but it did not. Good fortune still attended him; indeed, he found himself delightfully in request. At the Lancashire sessions, which he attended, there was quite an embarrassment of briefs. "The counsel," he says, "were accustomed to arrive late in the evening before the sessions, the attorneys on the next day. The magistrates commenced their business at half-past eleven. It was only during the few hours that elapsed, from eight to that time, that I had to prepare the day's work. It sometimes occurred that I had fifteen or twenty briefs in settlement cases, which were always taken the first day. To make myself master of the points in each by reading them was impossible. As to the law and the decided authorities, I came well prepared, and required no study. The mode, then, which I adopted to obtain the facts was to interrogate the attorney when he came with his brief, what was the fact in his own case on which he mainly relied. Next, what he supposed his adversary's case to depend upon. Having made a short note of his statement on the back of the brief, I proceeded to discuss the appeal without further instruction or meditation, and I believe I may safely say that I did not read one brief in ten in the most important cases in which I was concerned at quarter sessions." This was a somewhat haphazard method of getting up his briefs, but it was unavoidable, and it served him in good stead afterwards in the press of business at Nisi Prius and in the Superior Courts. In that heroic age, Lord Kenyon and Mr. Justice Buller would dispose with ease of twenty-six causes a day, and Campbell describes Lord Ellenborough as "rushing through his cause list at Guildhall like a rhinoceros through a sugar plantation." No leading counsel could keep pace with this lightning despatch. Still, there was an alleviation. In those happy days the courts rose at two, and Scarlett and his friend Samuel Romilly could refresh themselves with long walks—"their custom always of an afternoon."

"Scarlett," says Alderson, writing from the Northern Circuit, "is the great man here—he has by far the most business, and when, as is expected, he gets a silk gown, he will annoy either Parke or Topping a good deal."

Scarlett's forensic success was referred to in a well-known humorous speech on the Northern Circuit by Tindal (afterwards Chief Justice). "His friend Mr. Scarlett," he said, "had for many years been employing his genius in the invention of a machine, which he had brought to perfection. The operation the whole circuit were in the habit of witnessing, with astonishment at his success. He (Tindal) had at length discovered the secret, which was no other than a machine which he dexterously contrived to keep out of sight, but by virtue of which he produced a surprising effect upon the head of the judge. You have all noticed, gentlemen, that when my learned friend addresses the court, he produces on the judge's head a motion angular to the horizon, like this" (making a movement of his head which signified a nod of approbation). Then he turned to another, of much higher reputation than Scarlett as a speaker (Brougham, to wit). "This gentleman," he said, "you all know has for years been devoting his illustrious talents to surpass Mr. Scarlett. This he endeavours to accomplish by various means, and amongst others by imitating his example in the invention of a machine to operate on the head of the judge. In this he has at last succeeded. But you have observed that the motion he produces is of a different character. It is parallel to the horizon, in this fashion" (moving his head in a manner denoting dissent). The contrast and the joke occasioned much laughter.

Scarlett even chose his seat—while he ruled the Northern Circuit—second to that of which he had a rightful possession by rank—the seat on the judge's left, because it gave him the advantage of having the judge always in his eye, and could shape his course with the jury by the effect he found he had produced on "my Lord."

Chief Justice Tenterden is said, indeed, to have been somewhat too much under the influence of Scarlett. Upon one occasion Scarlett, provoked at something, said, "Mr. Adolphus, we are not at the Old Bailey." "No," replied Adolphus, "for there the judge presides, and not the counsel."

One of Scarlett's special qualifications for advocacy was an extremely sweet and pleasing voice—so pleasing that a lady once

said that as some people are asked to sing, Mr. Scarlett should be asked to speak.

Lord Houghton relates that, sitting by Scarlett at table at Lady Holland's, in Great Stanhope-street he asked him whether he had any especial secret by which he got his verdicts. Scarlett replied that he thought his success was mainly owing to his habit of seldom addressing the jury collectively, but of selecting one or two of them—generally one, and by no means always the foreman, with whom he reasoned on the subject as best he could, placing himself in mental communication with him, and going on till he appeared to have convinced him. "Brougham," he added, "at one time detected my process, and imitated me as well as he could, but somehow or other he always hit on the wrong man." The same plan of convincing the master-mind among the jury was practised as the writer knows by the late Serjeant Parry, another great verdict-winner. It is based on a profound knowledge of human nature; in other words, on the ovine propensity of men, including jurymen, to follow one another. Get the leader into the gap and the rest will take the leap. How adroit must have been his management of the jury is evident from the following anecdote: After the breaking up of the court on the last day of a long Yorkshire Assize, Wightman, then at the Bar, found himself walking in the crowd, cheek by jowl with a countryman whom he had seen serving day after day on the jury. Liking the look of the man, he got into conversation with him, and finding that this was his first attendance at assizes, asked him what he thought of the leading counsel. "Well," was the reply, "that Lawyer Brougham be a wonderful man: he can talk, he can; but I don't think nowt of Lawyer Scarlett." "Indeed!" exclaimed Wightman, "you surprise me. Why, you have been giving him all the verdicts." "Oh! there's nothing in that," said the juror; "he be so lucky, you see, he be always on the right side." What made Scarlett always on the right side was the very simple discovery that the most important part of speaking is to make yourself understood. "It was my habit," he says, "to state in the simplest form that the truth and the case would admit the proposition of which I maintained the affirmative and the defendant's counsel the negative, and then without reasoning upon them, the leading facts in support of my assertion." It was quite consistent with his somewhat bold mode of proceeding that Scarlett never prepared his

speeches. He thought out his ideas, and trusted to the inspiration of the moment for the language. "Rem previsam verba sequentur." He put all his strength into his reply. Lord Lyndhurst, on the other hand, like Lord Erskine and Lord Brougham, attached the utmost importance to the opening speech, expending upon it all the resources of their reasoning and eloquence, and carefully preparing and committing to memory the most telling passages, the *purpurei panni*. Their opening was a *tour de force*, to which they trusted to produce an indelible impression on the jury. Lord Brougham, it is well known, wrote out the peroration of his speech at the trial of Queen Caroline fifteen times before he could satisfy himself with it. One who had seen Lord Erskine's briefs tells us that they had few notes and interlineations, but particular parts were doubled down and dashed with peculiar emphasis, his plan being to throw all his strength upon the grand features of the cases, instead of frittering it away on details.

Another shrewd rule of Scarlett's was to understate rather than overstate the facts he expected to prove. "For whatever strikes," he says, "the mind of the juror as the result of his own observation and discovery makes always the strongest impression upon him. No error is more fatal to an advocate than exaggeration; yet none is more common. I learned by much experience that the most useful duty of an advocate is the examination of witnesses, and that much more mischief than benefit generally results from cross-examination. But he could use cross-examination effectively sometimes. On one occasion an action was brought for abatement of a nuisance, and Mr. Scarlett was employed for the defence. He began his cross-examination of a lady, the plaintiff's witness, by inquiring tenderly about her domestic relations, her children, their illnesses. The lady became confidential and appeared flattered by the kind interest taken in her. The judge interfered with a remark about the irrelevancy of this. Mr. Scarlett begged to be allowed to proceed, and, on the conclusion of the cross-examination, he said, "My Lord, that is my case." He had shown on the witness's testimony that she had brought up a numerous and healthy progeny in the vicinity of the alleged nuisance. The jury, amused as well as convinced, gave a verdict for the defendant. He was once cross-examining a very clever woman, mother of the plaintiff in a breach of promise action, and had been completely worsted in the encounter of wits.

By an adroit stroke of advocacy he turned his failure into a success. "You saw, gentlemen of the jury," he said, "that I was but a child in her hands. What must my client have been?"

When he saw the impression of the jury to be against him, he did not, as some do, get angry with their perversity and so only make the jury obstinate. He made it the rule, on the contrary, to treat the impression as very natural and reasonable, to acknowledge that there were circumstances which presented great difficulties and doubts, &c. It was this putting himself *en rapport* with the jury which made the great Duke of Wellington say, "When Scarlett is addressing the jury there are thirteen jurymen."

In spite of the simplicity of his style, he was, like Erskine, a consummate actor. He could squeeze out, when necessary, real tears for the benefit of a jury. A remarkable instance is remembered in Westminster Hall of his acting in the face of the jury at the critical moment of their beginning to consider their verdict. He had defended a gentleman of rank and fortune against a charge of an atrocious description. He had performed his part with even more than his accustomed zeal and skill. As soon as the judge had summed up, he tied up his papers deliberately, and with a face smiling and easy, but carefully turned towards the jury, he rose and said, loud enough to be generally heard, that he was engaged to dinner, and in so clear a case there was no occasion for him to wait what must be the certain event. He then retired deliberately bowing to the Court. The prosecuting counsel was astonished at the excess of confidence or effrontery—nor was it lost upon the jury, who began their deliberations. But one of the juniors having occasion to leave the Court, found that all this confidence and fearlessness had never crossed its threshold—for behind the door stood Sir James Scarlett, trembling with anxiety, his face the colour of his brief, and awaiting the result of "the clearest case in the world" in breathless suspense.

His disgust at defeat in a case of public interest was intense. "I would have Sir James Astley to know," he was heard to say after the case of *Astley v. Garth*, in which he had obtained only a shilling damages (thanks to the exposure of his client's reputation), "that if he has no moral character to lose, I have a professional one."

We get some interesting glimpses of Scarlett's private life from

Campbell, who was courting Miss Scarlett. Campbell would not have been Campbell if he had not been fully alive to the advantages of an alliance with the Scarlett family; but, to do him justice, he really was in love with Mary. At first she was unpropitious, but Campbell persevered. "A pleasant party at Scarlett's," he writes; "sat at dinner next Miss Scarlett, and Scarlett has invited me to spend some days with him at his country house at Easter. What say you to that?" Then comes a party at Mrs. Scarlett's, "very crowded and brilliant." Then Campbell is at the Eton Montem, "with Miss Scarlett under my arm," and a page or two later he is the accepted lover, and his cup of happiness is full when he is put up by Scarlett and elected a member of Brooks. "Scarlett," he says, "has mixed more in society, and has better talk than any other man at the Bar except Brougham. The country house to which Campbell refers was Abinger Hall, near Guildford, Surrey. Here, at his Sabine farm, Scarlett spent all his leisure time

In studious ease, and generous mirth,
And every chaste affection.

He rode, and sometimes fished, but he was too short-sighted for most field sports. Adolphus, the reporter, gives a charming picture of him "at home," surrounded by his children, who were all most tenderly attached to him. Among his visitors was Canning, and, had he lived, Scarlett would have been his Chancellor, as he was his Attorney-General. "He had fully expected," says Campbell, "before this to have been Lord Abinger; but he affects to say"—Campbell could not believe it was anything but affectation—"that a man's happiness depends on the state of his digestion, and not the station he fills." It was from the Duke of Wellington, and not from the Whigs (from whom he had parted on the question of Reform) that he got his preferment as Chief Baron in 1834. He sat ten years on the bench, and then was suddenly struck down by a paralytic seizure while on circuit at Bury St. Edmunds. Only six months before his death—in his 74th year—he had married again, the widow of the Rev. H. J. Ridley, an accomplished lady, young enough to be his daughter. On hearing of the match, the witty Lord Alvanley exclaimed, "Ridley! Mrs. Ridley! why, if she's old enough for Abinger, she must be the widow of the good bishop who was burnt."

He came late—too late—upon the Bench; took the judicial office too easily. "It is a curious fact," his son-in-law

Campbell remarks, "that, having got so many verdicts at the bar, he has lost all the verdicts since he mounted the bench; that is, that the juries have found against his direction. Nevertheless, he has got," he adds, "great κῆδος as a judge. Even the equity men praise him very much for his performances in equity."

Lord Abinger's decisions will be found reported in Meeson and Welsby, and Compton, Meeson, and Roscoe. *Arden v. Pullen* (10 M. & W. 321) is one of those cases which, as Bacon says, "come home to men's business and bosoms," deciding as it does that a lessee is not entitled to quit a house, though it has become utterly uninhabitable for want of structural repairs, for which he is not liable; e.g., large gaps opening in the walls, and the basement being flooded with water. The ordinary layman finds it hard to believe, till convinced by painful personal experience, that by English law a landlord need do nothing in the way of repairs unless he has covenanted to do so.

The Six Carpenters are familiar figures in our law. The plaintiff and his friends in *Sunbolz v. Alford* (3 M. & W. 248) had emulated the performance, or rather the nonfeasance, of these heroes of our legal history; that is to say, they had gone to an inn and partaken of "divers quantities of tea and other victuals," and refused or neglected to pay for them. So the landlord asserted a lien on the plaintiff's great coat, which he, the landlord, described as "laying his hands on the plaintiff in a gentle and necessary degree, and stripping and pulling the said coat," but which the plaintiff described as "assaulting and beating the plaintiff, shaking him and pulling him about, stripping and pulling off his coat, &c., &c." The Court naturally asked where this principle was to end, because, if pushed to its logical conclusion, the innkeeper would have a right to take off all his guest's clothes, and send him—or her—away naked, a proceeding manifestly tending not only to a breach of the peace but a common nuisance. The legal result is, that the innkeeper has no lien on his guest's person or his apparel in actual wear. If he wants to possess himself of these he must wait till the guest has gone to bed (*Bissett v. Caldwell*, 1 Esp. 206, n.), or his clothes to the wash (*Baynes v. Smith*, 1 Esp. 206).

Jones v. Waters (1 C. M. & R. 713) gives us the definition of a privileged communication. It is "a communication made on such an occasion as rebuts the *prima facie* inference of malice arising from the publication of the matter prejudicial to the

character of the plaintiff, and throws upon him the onus of proving malice in fact."

Simpson v. Nicholls (3 M. & W. 240) is a warning against Sunday trading. There certain "wines and goods, to wit two bottles of port," were sold and delivered to the defendant on Sunday. This contract was void under the Lord's Day Act, as the seller found when he came to enforce payment; so he tried to get an implied promise to pay out of the fact that the defendant had detained (and probably drunk) the port in question; but this again would not do, for the property had passed, so that no promise could be implied from keeping the wine, and the plaintiff went away, like the wedding guest in "The Ancient Mariner," "a sadder and a wiser man."

Partridge v. Scott (3 M. & W. 220) is a very important case. It decided that, if a man builds his house at the extremity of his land, he does not thereby acquire any right of easement for support or otherwise over the land of his neighbour. He has no right to load his own soil so as to make it require the support of that of his neighbour, unless he has some grant to that effect. *Angus v. Dalton* (44 L. T. Rep. N. S. 844; 6 App. Cas. 740) introduced the further element of one house leaning up against another.

In *Earl of Ferrers v. Robins* (2 C. M. & R. 152) an auctioneer was held liable for selling furniture for bills instead of ready money; but on a sale of real estate an auctioneer may, it has been decided, accept a cheque for the deposit (*Farrer v. Lacey, Hartland, and Co.*, 54 L. T. Rep. N. S. 396; 31 Ch. Div. 42), this being the usual course of business and a reasonable one.

If your dog bites somebody, you feel disposed to offer him something by way of compensation. Beware. The offer is not proof, but it is some evidence that you knew the dog to be mischievous—technically of the "scienter": (*Thomas v. Morgan*, 2 C. M. & R. 496).

Thick heads were in Scarlett's time more common among the common juries of the Midland Circuit, Warwick in particular, than elsewhere. A ruffian in the dock was charged with theft. The counsel for the prosecution made a very short story of it. The man, in broad daylight, entered a shop in Warwick, and was seen by a shop-boy to unfasten a coat from a peg and run down the street with it. The shop-boy followed him in a moment, found him in possession of the coat, and gave him in charge to

the police. This was the case. The Chief Baron turned to the jury and said, "Gentlemen, the story is so clear I need not trouble you with summing up. You may retire and consider your verdict." After ten minutes' absence, the foreman appeared with his colleagues and said, "My Lord, we say he is not guilty." The Chief Baron then turned to the prisoner and said, "Prisoner, take care not to place yourself in the dock again for a similar offence; you may not always be so fortunate as to find a Warwickshire jury to try you. You may go, but remember." Strange that Shakespeare's native county should be the Bœotia of England. But Bœotia had its Hesiod.





THE HALL OF THE MIDDLE TEMPLE.

LORD TRURO.

IN his "Village School Mistress," Shenstone, moralising, like Gray, on childhood and its destinies, sees with prophetic eye among the dame's scholars

A little bench of heedless bishops here,
And there a chancellor in embryo.

Anyone who visited St. Paul's School (a) about the year of the great French Revolution would have seen a chancellor in embryo in the person of little Thomas Wilde. But there was not much then to foreshadow his future greatness. He had no academic career, brilliant or otherwise. His father was a respectable attorney in the city of London, and Wilde followed in his footsteps, but he felt, as many solicitors justly do, that he had as much capacity as many successful members of the Bar, and, animated by the comparison, he got himself called to the Bar in 1817, though he was then thirty-five. Wiseacres would have called it a highly imprudent step; but "it will not do," as Sydney Smith says, "to be perpetually calculating risks and adjusting nice chances. That did very well before the Flood, when a man could consult his friends for 150 years and then see success afterwards; but at present a man waits and doubts and hesitates and consults his brother and his uncle and particular friends till one day he finds that he is sixty years of age, and has lost so much time in consulting his first cousins that he has no more to follow their advice." Ambition must be made of sterner stuff. In the words of Queen Elizabeth's spirited rebuke to Raleigh,

He either fears his fate too much,
Or his desert is small,
Who dares not put it to the touch,
To win or lose it all.

Wilde put it to the touch and won, and it was all the more to his

(a) Long afterwards, when Lord Chancellor, Wilde gave £1000 to found the Truro Prize at St. Paul's for an English essay.

honour because he laboured under a special disqualification for the Bar—an impediment in his speech, which rendered it almost impossible for him to utter certain words. What he did by way of remedy was to form a list—and a very comprehensive one it was—of those perverse words and annex to each its synonym. Upon finding any difficulty in the pronunciation of any particular word, he at once dismissed it, and substituted one of his synonyms with a promptitude and address so remarkable that scarcely any break could be detected in the flow of his discourse; so Lord Lyndhurst stated in the House of Lords. Mrs. Inchbald, the celebrated beauty, actress, and dramatist, suffered from a similar impediment when, with equal courage, she essayed the stage. Her plan was to keep the unpronounceable words written on slips of paper in her pocket and practise them in her leisure moments. Wilde's appearance, too, did not tell in his favour. He was short and coarsely built, his voice was harsh, and his appearance indicated strength rather than grace. Furthermore, he had to encounter not a little jealousy from the Bar; but he lived this, like all his other disadvantages, down.

The Queen's trial is an instance. The retainer of Wilde as counsel for Her Majesty was at first very distasteful to Denman, and made Brougham outrageous, but his talent and energy soon made themselves appreciated. "We were no sooner acquainted with him," says Denman, "than our prejudices vanished. He thought of nothing but success, and contributed most largely to it. Extremely able and acute, generally very judicious, always active and persevering in the highest degree, his habits as an attorney qualified him for many things to which counsel are incompetent." The Queen appreciated his services on her behalf so highly, that she appointed him one of the executors of her will. As Lord Tenderden said, "Wilde has industry enough to succeed without talent, and talent enough to succeed without industry." The combination was irresistible.

"He was the most laborious man," says Campbell, "who ever entered our profession, his daily habit being to go to chambers at six o'clock in the morning, summer and winter, to remain there till he went into court and only going home to dinner for a few minutes, to return to chambers and to remain there till between two and three in the morning. If hard pushed, he did not mind sitting up all night."

When Wilde joined the Western Circuit he was an invalid,

and travelled with his wife. He rarely dined at the Circuit mess, and devoted the entire evenings to his briefs. This compelled a corresponding alteration of habits in others, and a popular leader—afterwards a distinguished judge—is reported to have said to him, "I'll tell you what it is, Wilde, you have spoiled the Circuit. Before you joined us we lived like gentlemen, sat late at our wine, left our briefs to take care of themselves, and came into court on a footing of perfect equality. Now all this is at an end, and the assizes are becoming a drudgery and a bore." Less than seven years after his call (in 1824) he attained the dignity of a serjeant. He had applied for this honour to Lord Eldon some time before, but had not received it. Happening, however, to be engaged in a Chancery suit, he displayed so much learning and discrimination in the conduct of it, that at the close of the argument Lord Eldon invited him into his private room and intimated to him that if the application were renewed it would be granted. So in old days heroes were knighted on the battlefield.

This laboriousness of his, and the great pains he took for his client, impaired his health, and brought on, as it did with Sir John Karslake, severe neuralgia, amounting in fact to tic douloureux, which resulted eventually in the softening of the brain. Yet he bravely conducted causes of great importance with infinite skill whilst suffering the acutest agonies.

One of these cases was the celebrated appeal in *Small v. Attwood* (6 C. & F. 279) in the House of Lords, in which he succeeded in obtaining a reversal of the judgment pronounced by Lord Lyndhurst in the Court of Exchequer. He obtained permission to argue the case without his wig in consequence of the acuteness of his sufferings.

"An amusing circumstance," as Ballantyne relates, "occurred in the middle of his argument. His client had made him a present of a pair of carriage horses, and one day shortly after this event his servant came into the breakfast-room with a very long face and told his master that Mr. Attwood was dead, at which naturally he was much shocked. Upon inquiry, however, it turned out that his coachman had christened the two horses Small and Attwood, and that it was one of these that had departed this life."

When Wilde and Pollock were both at the Bar (they were fast friends), Pollock was retained to defend a clergyman in Norfolk on a capital charge. In consultation the clergyman

admitted his guilt to his counsel, and Sir Frederick, feeling that this knowledge would embarrass his conduct of the defence, especially as it was a question of the credit of certain witnesses, asked and obtained permission to return his brief. The brief came afterwards into the hands of Wilde; he had no notice of the confession, and he secured a triumphant verdict of acquittal. Pollock had no doubt that it would have been his duty after accepting the retainer to go on with the case if his client had insisted. Baron Parke thought so too in Courvoisier's case, but, obviously, such a confession hangs like a millstone round the neck of counsel. The incident illustrates the wisdom of the rule of professional etiquette which prohibits counsel from interviewing prisoners.

When Wilde entered Parliament for Newark, his energy, industry, and ability soon won him a conspicuous position among the Whig leaders. This is not the place to enter on the vicissitudes of party warfare. It was the usual career of the politician. His pennon, like Marmion's at Flodden, flew with varying fortune:

Advanced, forced back,
Now high, now low,
The pennon sank and rose;

but it never "wavered 'mid the foes." His most noticeable effort was his speech on the Bill which followed the great privilege case of *Stockdale v. Hansard*, a speech in which he argued with great force and conclusiveness against the Bill. He just missed the Solicitor-Generalship in 1839 owing to his rival Rolfe being a *protégé* of Campbell's, but everything comes to him who waits (unless, as Madame de Stael said, he dies first), and in 1841 he became Attorney-General, and in 1846, on Tindal's death, Chief Justice of the Common Pleas. Four years later he was raised to the woolsack as Lord Truro. "His appointment," remarks Lord Selborne in his memorials, "was received with surprise, and could only be accounted for by his marriage with Miss D'Este, the Duke of Sussex's daughter. But Lord Truro as Chancellor took pains to do well, and was not unsuccessful. He was a very upright and honourable man, and he made himself popular by a degree of hospitality and affability to which the Chancery Bar was not accustomed. In this he was seconded by his wife, whose manners were frank and agreeable, though she sometimes chose to remind her guests of that claim to Royal rank

by the advocacy of which, as her brother's counsel, her husband—not well favoured by nature—had gained her affections.”

To Lord Truro we owe, too, some of the very best appointments to the Bench, those of Knight Bruce and Lord Cranworth as Lords Justices, and of Vice-Chancellors Turner, Parker, and Kindersley. One of the most gratifying things attending his elevation was an affectionate address from 500 members of the branch of the Profession to which he originally belonged, expressing high appreciation of his honourable conduct through life, his indefatigable exertions as an advocate, and his unvarying courtesy. His portrait still ornaments the hall of the Law Society.

Some years before his death ill-health obliged him to retire from public life. “I met him,” says Ballantyne, “after his retirement at Wiesbaden. He was staying at the Hotel de Quatre Saisons, amusingly nicknamed the Quarter Sessions from the number of lawyers that patronised it. He was manifestly in bad health, although I did not discover any mental weakness; he was pleased with the attention I was glad to pay him, and rewarded me with much pleasant gossip. He had a very great admiration for the talent of Mr. Adolphus (the reporter), and confirmed my view of that gentleman that, but for his temper, he would have become a very distinguished member of the Bar. I never met Lord Truro afterwards, but with him and Pollock terminated a generation of great lawyers.”

After his death Lady Truro, his second wife, daughter of the Duke of Sussex by a morganatic marriage, presented his very valuable library to the House of Lords.

In *Parsons v. Gingall* (3 C. B. 545) the Court of Common Pleas had before it the question whether horses and carriages standing at livery are not exempted from distress for rent, and Chief Justice Wilde lays down the law very clearly. “The general principle of law,” he says, “undoubtedly is that all goods found upon the premises are liable to be distrained for rent. Upon that general rule two exceptions only are engrafted. The first is where the article is sent for the sole purpose of having the labour or skill of the artisan performed upon it, and is to be returned to the owner so soon as that purpose has been accomplished. Such is the case of a horse sent to a farrier to be shod; such, too, the case of a tailor to whom cloth is sent to be made

up. The second exception is when goods are sent to the party's premises in the way of his trade for the purpose of sale. Was the mare sent to Plunkett's stables for the mere purpose of being fed and groomed, or was she sent there for the purpose of being kept in and occupying the premises? If the latter the mare was distrainable." For the same reason a livery-stable keeper has no lien; he is like an agister of cattle, he has done nothing on the animals. It seems somewhat anomalous that an innkeeper should have a lien on his guest's horses and carriages (*Allen v. Smith*, 12 C. B. N. S. 638) and not a livery-stable keeper, but the reason is that an innkeeper has by law to keep open house and entertain all comers. He cannot choose his customers. The lien is a compensation for this obligation. It is curious to note this *quasi*-public character of certain trades in the theory of our old law. Thus, if a smith refuses to shoe my horse, action on the case will lie against him: (per Holt, C.J., *Keilweg*, 50). These things are a necessity of a primitive civilisation.

The validity of a waiver clause in a prospectus was long a *vezata questio* among lawyers. It has now been solemnly banned by s. 10 of the Companies Act 1900, but the difficulty would have been solved long since if *Ritchie v. Smith* (6 C. B. 462) had been cited, deciding as it does that an agreement entered into for the purpose of enabling one of the parties to it to contravene a statute passed for the protection of public morals cannot be enforced in a court of law. Sect. 38 of the Companies Acts 1867 is something very like a statute passed for the protection of public morals.

Self-help is a well-recognised remedy in English law. But before you can take the law into your own hands you must be quite sure that it is the law: (*Lane v. Dixon*, 3 C. B. 776). There A. had sublet some of the rooms in his house to B., with leave to put a brass plate on the door. B. did not pay his rent as punctually as he ought to have done, so A. took away the brass plate and locked B. out of his rooms. B. described this in his pleadings as "breaking and entering with force and arms, &c." It was the rhetoric of the special pleader, but the Court could not shut its eyes to the substance of the thing that A., in locking out, meant to enter and sublet, and upheld the declaration. Among other decisions of Wilde's may be noted that, to con-

stitute infringement of dramatic copyright, it is not necessary to show that the defendant knowingly invaded the plaintiff's right, otherwise the statute would fail altogether (*Lee v. Simpson*, 3 C. B. 871); that an arbitrator has a general discretion as to the mode of conducting the inquiry before him (*Tillam v. Copp*, 5 C. B. 211); that a statute is not to be construed so as to have a retrospective effect, unless the words are very clear (*Thompson v. Lock*, 3 C. B. 551); that an arbitrator dining with one of the parties and his witnesses after hearing and before award is not misconduct (*Crossley v. Clay*, 5 C. B. 581); that the *scienter* is the gist of an action by a person who has been bitten by a dog (*Card v. Case*, 5 C. B. 622); that if the holder of a bill of exchange can prove its destruction, secondary evidence of its contents is admissible (*Blackie v. Pidding*, 6 C. B. 196); that a foot race is a lawful game within 8 & 9 Vict. c. 109 (*Batty v. Marriott*, 5 C. B. 818); that an indorsee of a bill signed "per proc." must ascertain the authority (*Alexander v. Mackenzie*, 6 C. B. 766). The unfortunate case of *Thorogood v. Bryan* (8 C. B. 115), which identified a passenger on an omnibus with the owner of the omnibus, occurred while Wilde was Chief Justice, but he was not a party to the decision. Had he been a member of the court, his sagacity, we may fairly think, would have turned the scale, but we should have lost the benefit of the Court of Appeal's exhaustive examination of the doctrine of contributory negligence in *The Bernina* (56 L. T. Rep. N. S. 258; 58 L. T. Rep. N. S. 423).

Consideration is a ticklish doctrine of English law. Even in such a matter as marriage the law will have a *quid pro quo*. Commonly this is to be found in the reciprocal promises of the parties; but in *Harvey v. Johnson* (6 C. B. 295) the gentleman—was it designedly?—departed from the conventional formula, "If you will marry me, I will marry you," and wrote, "If you will come to this country, I will marry you." It was rather too bad, when the lady *had* come from Toronto to the Emerald Isle, for the gentleman to set up the flimsy technicality of want of consideration. He deserved to be—as he was—bowled out with heavy damages.

Sir Thomas More long ago pointed out in his Utopia that the severity of our criminal code defeated itself. It aggravated crime by making men desperate. Not the least valuable property of our system of trial by jury is that it keeps our

criminal law in touch with public sentiment. Soon after Wilde had become Chief Justice, he was presiding in the Crown Court at the Kingston Assizes, and deferred sentencing the prisoners convicted on the first day until the following morning, and then sentenced several of them to be flogged. There was not another conviction during the whole assizes.

BARON ALDERSON.

"I COULD not stay out the debate" (on the Diplomatic Bill with Rome), writes Greville in his diary, February 18th, 1848, "being engaged to dine with Chief Justice Wilde, where we had a great party, almost all lawyers, Parke, Alderson, Lushington, Talfourd. I sat next to Alderson, and found him a very agreeable man, Senior Wrangler, Senior Medallist, a judge (and really a lawyer), a wit, a life all of law and letters such as I might have led if I had chosen the good path. I always think of this when I meet such men who have 'scorned delights and lived laborious days,' and now enjoy the benefit thereof. He told me he had been writing an exercise in the morning for one of his sons at Oxford, a dialogue between Erasmus and More on the preference of the Latin to the Greek as a universal language. There is a good saying going about of the Court of Exchequer and its Barons. It runs thus: 'Parke settles the law, Rolfe settles the fact, Alderson settles the Bar, Platt settles nothing, Pollock unsettles everything.' The lawyer, as we know from Horace when his client assaults his door at cockcrow, praises the quiet of a farmer's life. 'Happy merchants!' exclaims the war-broken veteran." Perhaps, if Greville had read Baron Alderson's lines, entitled "My Holidays," he would have seen that the ideal life of law and letters had its worries too; but, as mortals' lots go, Alderson's life was a fortunate and a happy one. His worst misfortune was losing his mother when a child. His father, too—who was Recorder of Norwich, Yarmouth, and Harwich—was much away in London, and thus the boy's early life—spent at Yarmouth—was one of solitude and isolation. Here, like the hero of Locksley Hall,

Here about the beach he wandered nourishing a youth sublime,
with dreams doubtless of literary and legal ambition. An old gentleman found Sydney Smith when he was a boy lying under

a tree in the playground reading Virgil while all his schoolfellows were at their games. "Clever boy," he said, patting him on the head, "clever boy! That is the way to conquer the world." Young Alderson was not only a clever boy, but he knew it. "If anyone had offered me," he says when going up to college, "the place of Second Wrangler, I would have at once refused." The event, as it proved, justified the boast, for he achieved at Cambridge a list of honours unrivalled in the annals of the University; but what we are concerned to note in the speech is the confidence it argues. If there is one gift with which a fairy godmother should dower an infant destined for the Bar, it is this one of self-confidence. No wonder he made his way early.

In one of his letters written to his sister shortly after joining the Northern Circuit, he speaks of "small but increasing gains"; then he is "driving a flourishing trade." Anon we have the glorious uncertainty of practice illustrated. The "flourishing" junior is addressing an "Ode to Adversity." Here are the concluding stanzas:

Though others say "Adversity,
Sweet are thy uses," yet to me
Thy manners are too rude.
No longer dwell with me I pray,
I wish thee, Goddess, not to stay
Nor on my haunts intrude.

(Why was there not a chorus here?)

But 'stead of Thee let Business come
Attended by the ceaseless hum
Of Motions, Briefs, Appeals.
How sweet her voice, how fair her mien,
While in perspective dim are seen
King's Counsel and the Seals.

Alderson, like Mr. Silas Wegg, had a habit of dropping into poetry, and his literary tastes in this direction were stimulated by his correspondence with his lively cousin, Mrs. Opie, then in the full swing of London gaiety. They wrote, and rallied, and versified, these two clever young people, and tossed the shuttlecock of wit and badinage and compliment backwards and forwards between them. Alderson, though serious in his views, was one who knew how "desipere in loco," and was not averse to a rout or a theatre, or even a masqued ball at Almack's.

But, though it ebbed and flowed, the tide of success had

fairly set in. In 1823 he could marry the lady of his choice, Miss Georgina Drewe, a Devonshire beauty, and give up law reporting—"Barnewell and Alderson," to wit—at which he had toiled for five years. It is a remarkable thing, by the way, how many of our eminent judges have qualified in this school, and an admirable one it is, of law reporting.

"I get briefs," he writes, "I know not how or from whom or why—a decisive proof of being in business. As long as you can tell why a brief comes, as from favour, affection, or interest, it is nothing. My clients now come from the streets." He was able soon to describe himself as the "Heir apparent to the Crown," that is, to the then leaders of the circuit. Yet the men against whom he was matched were legal giants—Brougham and Scarlett, Pollock and Wilde, Campbell, Parke, Patteson, and Cresswell. One of his briefs was on the prosecution of Jonathan Martin for setting fire to York Minster. Alderson gives an interesting account of how this crank incendiary managed his nefarious exploit; how he cut a bell-rope, and therefrom made a rope-ladder to climb into the choir, and hence escape through a window when he had lighted his bonfire. Alderson remarks that he hardly hoped for a conviction—the man was insane, but his so-called insanity was really a diseased desire for notoriety at any price, a kind of thing with which we are familiar enough in these days. It was a high tribute that Mr. Justice Bayley should have offered, after hearing Alderson lead two causes, to call him within the Bar—in other words, to make him a King's Counsel, at Lancaster—a privilege which the judges possessed at that place. "I have declined the honour," he says, "for the present circuit, but I mean to accept it next time, if offered, and so I told him." He laughed and said, "Well, you are on the road to promotion." This was in reference to Alderson mentioning to him his appointment as Commissioner for amending the law. Mr. Justice Bayley was right, for before a few months had elapsed, and while he still wore a stuff gown, he was appointed—on the common law judges being increased from twelve to fifteen—a judge of the King's Bench. Four years afterwards he was transferred to the Exchequer. He had scarcely been appointed when he was sent with Baron Parke to try the "machinery smashers" of Hampshire. Alderson was hardly the man for the work; he was no Jeffreys to conduct a Bloody Assize—indeed, he always showed extreme hesitation in permitting a conviction in

capital cases. Ballantine says that, though his manner was brusque, his humanity made him "almost nervous" when trying capital cases. It is not surprising, therefore, to find him writing from the Hampshire Riot Commission, "I am thoroughly sick of the whole business, and hate it." There were 600 rioters to be tried for felony, and on one day alone out of twenty-three prisoners tried fifteen or sixteen were capitally convicted. "These people," he says, "have no idea of the risk they run, and they really will lose their living without knowing why. They have been gulled and goaded on by a set of artful and unprincipled scoundrels."

This is how he reviled against the harshness of the then criminal code:

"I have been trying a case under the Riot Act, and acquitted the prisoner on the ground of the proclamation not having been correctly made by leaving out 'God save the King.' The Act is so very severe a law that one requires a very minute observance of all its provisions."

"I wish," he adds, "the punishment of death could be dispensed with. It is a bad thing to have verdicts continually given in the teeth of the law and the evidence." Later on he says:

"I find I try cases very quickly, and yet I hope satisfactorily also. At least I am sure the juries think so, for with them I am a very popular judge, as I always endeavour to bring the case at once to the real point, and always leave that point to them to determine. . . . This is the secret of getting on fast, viz., discarding all the fudge and nonsense of the case, and coming to the real point."

The following scene is rather an amusing commentary on the above remarks, as to his popularity with juries. A verdict had been returned to the Criminal Court which ran counter to the judge's opinion.

"Good God, Mr. ——" (the officer at the assize), "can't I have *another* jury, and let these twelve persons go into the other court, where they can't do so much mischief?" Then, addressing "the twelve persons," the judge continued: "Gentlemen, you will find in the other court perhaps in the course of the day something you *can* try." Next, turning to the Bar, but appearing to soliloquise, "No doubt there are some men who never can comprehend what 'evidence' is; but that twelve such should come *together* to-day, and let that man off!" Aloud, to prisoner in

the dock, "Prisoner, the jury have acquitted you! Heaven knows why! No one else in the whole court could have the slightest doubt of your guilt, which is of the grossest kind; but you are acquitted, and I can't help it."

It has been well said that "a very clever court is a hard one to get a hearing in." This was Alderson's failing as a judge. His quickness and almost intuitive power of reasoning made him impatient of arguments urged against his preconceived opinions. But, if he was not the perfect judge, the ideal combination of learning, temper, firmness, wisdom, gravity, courtesy, who is? Where shall we find such a combination unless it be in that admirable judge, the late Lord Hannen? Alderson did not think himself perfect. "I know myself too well not to be aware how much I fall short of what I ought to be as a judge, and am in constant fear that I shall be found out by others also. Perhaps I am found out already; but no matter, I must do as well as I can." Among the famous trials at which he presided was that of the Chartist prisoners, who at the close thanked him from the dock for the fairness he had displayed towards them.

Alderson was much addicted to joking on the bench.

It was he who said to a counsel who was cross-examining with more temper than skill: "Mr. —, you seem to think that the art of cross-examining is to examine crossly."

Even in banco he could not always refrain. Once a counsel on applying for a *nolle prosequi* pronounced the penultimate syllable long. "Stop, sir," said the Baron; "consider that this is the last day of term, and don't make things unnecessarily long."

At an assize town a juryman said to the clerk who was administering the oath to him: "Speak up, I cannot hear what you say." The Baron asked him if he was deaf, and on the juryman answering "Yes, with one ear," replied, "Well, then, you may leave the box, for it is necessary that jurymen should hear both sides." At the Hertford Assizes, however, the same judge showed that the plea of deafness might be offered once too often. A tradesman who had been summoned on the jury claimed exemption from serving on the ground that he was deaf. "What does he say?" interposed the judge. "He says that he is deaf, my lord," replied the clerk of arraigns. "Are you very deaf?" asked Baron Alderson in a whisper, looking intently at

the juror. "Very," was the unguarded reply. "So I perceive," rejoined the judge. "Very deaf, but not whisper deaf. You had better go into the box. The witnesses shall speak low."

His chief pleasure was in sailing, and in later life in watching from his garden, that overlooked the sea, the ships entering and leaving Lowestoft Harbour. Twenty-six years of judicial work is enough to wear out the strongest intellect, and Alderson's gave way at last. "I shall never go another circuit," he said one day in 1855. Then came an attack of giddiness and fainting—symptoms of brain disease. He was told he was worse. "Worse is better for me," he said. They were his last words. Few, indeed, knew that under the brusque, jocose, and somewhat self-sufficient manner of the Baron as he appeared on the Bench there ran a current of deep religious feeling. But it is revealed in his *Memoirs*.

There is something strangely pathetic in his lines entitled "My Holidays."

My holidays, my holidays!
 'Tis over and now I am free
 From the sharp attorney's tricky ways
 And the clerk's chicanery,
 And the subtle draughtsman's tangled maze
 As he weaves the vacation plea.

My holidays, my holidays!
 Now cometh the tranquil night,
 And the twilight walk and the upward gaze
 At those distant orbs so bright,
 While the swelling wave 'midst the pebbles plays
 And breaks with a gleam of light.

My holidays, my holidays!
 O! will the time ever come
 When, freed from the world and its weary ways,
 And its trifles light as the foam,
 'Midst welcomes of joy and songs of praise
 I may reach my real home.

His daughter, Miss Alderson, married Lord Robert Cecil, the present Marquis of Salisbury, under circumstances which show that a romantic attachment can secure the most enduring domestic happiness.

Alderson's decisions as ordinary Baron of the Exchequer will be found in the renowned Meeson and Welsby, and Exchequer reports, his decisions as Equity Baron in Younge and Collier.

One of the most interesting cases tried before him was that known as the Running Rein Fraud. The hero of this fraud was a Mr. Goodman, or "Goody Levi," and what he did was this: He substituted a four-year-old horse called Maccabæus for Running Rein and won the Derby with it. The fraud was discovered, and upon a trial in the Court of Exchequer, before Baron Alderson, fully exposed—that learned judge, who was not wont to conceal his opinions, observing that if gentlemen would condescend to race with blackguards they must expect to be cheated. In another "Turf" case raised by Lord Eglington he decided an important point, to wit, that stewards have a right to exclude persons from a racecourse though they have paid for their admission. It is rather a pity this legal right is not more frequently exercised.

There are some legal vulgar errors which no time or experience will eradicate. One of these is, that when you take a house on lease it is to be reasonably fit for habitation. There is no such implied warranty in law, as every lawyer knows since *Hart v. Windsor* (12 M. & W. 68). The decision is really only one aspect of that fundamental principle of our law *Caveat emptor*—a maxim which, if it makes hard cases, has the merit of making men of business. Fortunately a furnished house or lodgings at the seaside, taken temporarily, is not within the rule. *King v. Hoare* (13 M. & W. 494) is a case often cited. It decides that a judgment without satisfaction recovered against one of two joint debtors is a bar to an action against the other.

Equity not only treats that as done which ought to be done, but, with a fine disregard of facts, treats as not done that which ought not to have been done. Thus, if an administrator transfers part of the estate to a wrong person, he is by this admirable fiction of equity treated as having the property still in his possession. In *Skeffington v. Whitehurst* (1 Y. & C. 1) Baron Alderson works out this doctrine very elaborately.

In *Gathercole v. Miall* (13 M. & W. 319) Parke, B. gave expression to the alarming dictum that sermons preached in a church but not published are not the lawful subject of public comment. This is adding a new terror to life; but we breathe more freely when we find Baron Alderson a little later on doubting "whether you may not criticise a gentleman's sermons by saying 'He is a remarkably bad preacher.'" This will do for ordinary purposes.

Our unsentimental common law recognises only loss of service as the wrong involved in seduction. Modern judges have done their best to relieve against this sordid view by enlarging the meaning of service to cover anything; but what if the loss of service is occasioned by distress of mind—if a woman is seduced and abandoned by her seducer, and in consequence of being so abandoned becomes ill, and her services are thereby lost to her parents? The Court of Exchequer in *Boyle v. Brandon* (13 M. & W. 738) was evidently of opinion that such a loss of service will not sustain an action by the parent for seduction. The seduction is not the *causa causans* of the loss of service, but the desertion—a conclusion which will perhaps perplex the honest layman.

Baron Alderson was one of the judges summoned to assist the House of Lords in the well known case of *Cadell v. Palmer* (1 Cl. & Fin. 373; 36 R. R. 328), on the Rule of Perpetuities as affecting executory devises. A literary interest attaches to this case, because it is identified, in the tradition of the Chancery Bar, with the suit of *Jarndyce v. Jarndyce*, in Dickens' well-known description of the old Court of Chancery. "The only odd thing about the description," says Mr. Campbell, "is that the absurdity of the procedure is in no way exaggerated. Exaggeration would be impossible. In the old procedure, when an estate was thrown into Chancery, or, to employ the technical expression, administered by or under the direction of the court, every act of administration was carried out in detail by a professional army under the direction of the Chancellor or Vice-Chancellor with all the paraphernalia of the court. There was a petition setting forth at enormous length the will and all subsequent proceedings. The statements in the petition were echoed with equal prolixity by affidavits of trustees and solicitors and experts. Similar proceedings in the same suit have gone on from time to time from the memory of the oldest judge, in the memory of the existing Bar, and perhaps, in some sequestered chambers sadly shorn of their former dignity, are going on still." It is a curious verification of Mr. Campbell's surmise, that only a few months since, a firm of traders received from the aforesaid court a belated dividend on the estate of a testator who died a few days after the battle of Waterloo.

In *Worth v. Terrington* (13 M. & W. 781) there was a scandalous scene between two rival claimants to the office of parish

clerk of Walsokin, Norfolk. The plaintiff was one of the claimants. He had been dismissed by the rector, but insisted on asserting his right. Accordingly, upon a Sunday before the actual commencement of Divine service, but whilst the congregation was assembling, he placed himself in the clerk's desk, prevented the other clerk from getting and being therein, and made divers loud noises by reading and singing in a very loud, noisy, and unbecoming manner; so one of the churchwardens had to call in the aid of two police-constables to pull this riotous clerk out of the desk, which they accordingly did. He brought an action, and the Court committed itself to the inconvenient conclusion that a churchwarden has no power to turn a person out of church who is misconducting himself on a week day or while Divine service is not going on. It is amusing to find Serjeant Byles arguing against the jurisdiction of the churchwardens, on the ground that churches were frequently used for other than sacred purposes—for courts of justice and musters of soldiers; that in the Temple Church counsel held consultations with their clients, and in Serjeants' Inn each serjeant had his special pillar for that purpose. This secularisation was practised, too, in a certain temple in Jerusalem long ago, and received on one occasion a very memorable rebuke.

LORD DENMAN.

"To have seen him" (Lord Chief Justice Denman) "on the bench," wrote his friend Charles Sumner, "in the administration of justice was to have a new idea of the elevation of the judicial character." It was not merely his attractive personality or his high moral character; he dignified the bench because he was himself deeply impressed with the majesty of law and justice. In his speech in the House of Lords in the O'Connell case he had spoken of certain proceedings as rendering the system of trial by jury "a mockery, a delusion, and a snare." "Ah!" he said afterwards, "I am sorry I used those words; they were not judicial."

Denman's youth was the age of educational theories, the age of Sandford and Merton, when it was imagined that human nature was perfectible by a patent process of training, when Miss Edgworth was swung by the neck at school to make her grow, and when ghosts were dressed up to strengthen children's nerves. Denman's parents—they were excellent people—shared these ideas. "Little Thomas" was to be "the best and wisest man that ever lived."

ἀνδρῶν ἀριστέειν καὶ ὑπεύροχον ἔμμεναι ἔλλων;

and as you cannot begin too early, he was sent to school at three and a half years of age to Mrs. Barbauld, of poetic fame, who kept a school at Diss, in Norfolk. Denman as he grew up certainly went far to realise his parents' ideal. Tall, strong, and active, with a fine face, a resonant voice, and a remarkable air of distinction, his external graces were but the outward and visible sign of a noble nature. As we look on the admirable portrait of him by Eddis, the words of the Lady Olivia in "Twelfth Night" rise instinctively to our lips:

A gentleman! I'll be sworn thou art.
Thy form, thy face, thy tongue, action, and spirit,
Do give thee five-fold blazon.

Yet withal so modest was he, that an old Chancery barrister



LOBD DENMAN.



predicted he would never get on at the Bar—"he had not brass enough."

Herman Merivale, who was with Denman at Cambridge, enters in his diary, 1797: "At supper I sat by Denman, who gave me a very interesting account of a walking tour he had just made with Shadwell through Wales. They traced the Wye from its source to the sea, and then, after going through the southern counties, got into Merioneth and Carnarvonshire, climbed Snowden and Cader Idris, and returned into Shropshire. On their arrival at Shrewsbury they had just 16s. left, having stayed out much longer than they intended. Driven to this extremity they lived on bread and cheese till they got to Oxford, where a fresh supply from a friend enabled them to pay their fare, the mail to London. To add to their misfortunes they had worn out their shoes in climbing the mountains, and had not money enough to buy others." An amusing plight this for the future Lord Chief Justice and Vice-Chancellor of England! More than once while at Cambridge the two friends—who metaphorically went through life arm in arm, as the Hon. G. Denman said—walked thence to London in little more than twelve hours, a distance of over fifty miles. Such a physique as this feat argues is invaluable for the Bar. It is often remarked to what a great age judges live. The reason is simple. They are men of exceptional vitality. Were they not they would have succumbed to the strain.

Lord Mansfield advises the student of English law with the intention of practising at the Bar to begin with Tully's Offices—the title then given to Cicero in three books, "De Officiis." The advice may sound strange to some, but in truth it is sound advice, because all law has a moral foundation. A clear understanding of the duties of men in society is the true basis of legal science. Denman was a pupil of Tidd, the author of the famous Practice, and this was the lesson he learnt from him. "I well remember," says Denman, "the advice he gave to a pupil who was about to commence practice: 'When you are called upon for your opinion, make yourself perfect master of the facts, and then consider what is right. You may be pretty sure that is the law, without looking much into the cases.'" This advice—especially as to cases—must be received with discretion, but it is substantially sound.

It has been said that a man never settles down to work till he marries. Denman acted on this principle, and he chose wisely. "Good lack! what a handsome couple; good lack-a-day! what a

beautiful bride," were the exclamations of the assembled rustics as he led his wife—lately Miss Vevers—from the porch of Saxby Church. Forty years afterwards revisiting it he said: "To that church I owe the greatest blessing of my life." He had married for love and not money, but fortunately his father was in good practice as a physician, and could make him an allowance, but he kept him "short," as Sir Thomas More's father did him, thinking, to use Lord Eldon's words, that nothing does a young lawyer so much good as a little starvation. Hence "plain living and high thinking." Being asked one day at breakfast if he would not take some bacon, his reply was, "Thank you, I have already had an egg, and one luxury is enough." The high thinking found plenty of scope in the chambers of Butler and Dampier, the eminent conveyancers of that day, with whom he read. Dampier states that Denman was the only pupil he ever had who studied Coke upon Littleton of his own account and with liking. He had his reward, for he scored his first professional success over the rule in *Shelley's* case, actually discomfiting the great Copley. But the event to which he attributed his ultimate success was his employment on the trials of the Luddites in 1817.

"The name Luddites," says Spencer Walpole (*Hist. of Eng.*, i., 423), "had a very curious origin. More than thirty years before there lived in a village in Leicestershire one Ned Ludd, a man of weak intellect, the village butt. Irritated by his tormentors, the unhappy fellow one day pursued one of them into an adjoining house. He could not find the lad who had been mocking him, but in his fury he broke a couple of stocking frames which were on the premises. When frames were afterwards broken it was the common saying that Ludd had broken them, and thus Ned Ludd, the village idiot, gave a name to one of the most formidable series of riots of the present century." Throughout Nottinghamshire, Derbyshire, and Leicestershire a widespread conspiracy was formed to destroy the improved looms of Heathcoat wherever they could be found. Nottingham was the centre of the movement. Denman was retained to defend the prisoners, and he became the hero of the hour. What luck criminals in those days sometimes had is illustrated in one of these trials. The indictment was for sending a letter to Nunn and Co. threatening to smash all their frames. The charge was a capital one, and there was no defence, but in the indictment Messrs. Nunn and Co. were described as "proprietors of a silk

and cotton lace manufactory." The evidence showed that they made silk lace and cotton lace. Counsel for the prisoners thereupon objected that they ought to have been described as "proprietors of a silk and of a cotton lace manufactory." The judge actually sustained the objection and directed an acquittal.

But it was the Queen's trial that did most for Denman's fame. Crabb Robinson gives an amusing account of an interview he had with one of the Queen's ladies and most devoted partisans, a certain Marchioness Sacрати. Brougham—"Monsieur Broggam"—she described as "grand coquin."

C. R.: "Take care, Madam, what you say; he is now Chancellor."

M. S.: "N'importe: c'est un grand coquin—ce Monsieur Broggam." When Denman was mentioned to her she clasped her hands and exclaimed in a tone of admiration: "O c'etoit un ange, ce Monsieur Denman. Il n'a jamais douté l'innocence de la Reine."

His chivalrous devotion to the Queen's cause, indeed, cost Denman dear. In his impassioned speech in which he described her as "pure as unshined snow," he introduced a Greek quotation from Dion, found for him by the learned Dr. Parr—an expression hurled at Tigellinus, the infamous creature of Nero, by Pythias, one of the Empress Octavia's women, when she was being tortured to extort a confession of adultery against her mistress. It is apposite, though unquotable, but it gave deep umbrage to the King, as well it might, and for a long time he utterly refused Denman a silk gown. The Duke of Wellington at last appeased the Royal wrath. "I've got it for you, Denman," said the Duke, "but by G—— it was the toughest job I ever had." The most singular *faux pas* in Denman's speech on the occasion was in his peroration. After defending the Queen for ten hours against the imputations made against her, he ended by adjuring the House to treat her in the Spirit of Him who said, "Go and sin no more." The consequence was the following epigram:

Most Gracious Queen, we thee implore,
To go away, and sin no more;
But if that effort be too great,
To go away, at any rate.

Denman himself was no bad hand at a *jeu d'esprit*. The Lord Chief Justice of the Common Pleas (Tindal), on his way from

Shrewsbury to Hereford (on the Oxford Circuit) ran over and killed a pig. An ancient crone to whom the pig belonged came out, and abused him vehemently. Sir Nathaniel, who was the very personification of good humour, asked the enraged matron what the pig was worth. On her naming £2, he at once handed her the amount (not depriving her of the pork and bacon), and said: "There, my good lady, is 40s. for you, and that, you know, carries costs." Denman wrote some capital Maccaronic lines on the incident. They begin:

Judex Capitalis
Habens odio porcum,
Vi et armis malis
Tradidit in orcum.

The "moral" is:

Interest clientibus
Ut sit finis litium,
Bene jus scientibus
Melius est initium.

On Lord Tenterden's death, in 1832, Denman was appointed Chief Justice of England. Coming as he did after four of the greatest Chief Justices who have ever sat on the bench—Mansfield, Kenyon, Ellenborough, and Tenterden—he had a difficult task; but, if he could not vie with his predecessors in learning, he amply sustained the dignity of his great office, and during the twenty years that he administered justice won universal esteem and affection by his high character and his gracious and kindly manners.

Ballantine mentions an instance of his thoughtful kindness. He had applied to the Chief Justice for a revising barristership. There was only one vacancy, and that the Chief Justice gave to a Mr. Kennedy. "I happened," says Ballantine, "in a somewhat disconsolate mood to go into the court as it was rising and caught his eye. As I heard afterwards, after seeing me, he sent for Montague Chambers, who held a revising appointment, and asked him if his position upon the circuit was not such that he might dispense with it. That gentleman at once placed it at Lord Denman's disposal, and he sent it to me. The remuneration was not large, but at that time it was vitally serviceable."

Kindly as he was, he could be master in his own court, as a judge ought to be. "There has been a great sensation in the courts of law," writes Greville in 1841, "in consequence of Lord Denman suddenly closing the term on the last day of it in conse-

quence of the absence of counsel. He did it in a passion, and though there is much difference of opinion, on the whole he is blamed for it. The evil required a remedy, and the judges would have done right to lay down some rules for the future, but they have punished the innocent suitors by what they did, and most people think it was wrong in the Chief Justice to vindicate the dignity of his court at their expense." Had the Lord Chief Justice read this criticism of the caustic Greville, he would probably have replied as Burke once did to Grey. Grey was resuming his seat in the House of Commons, after having spoken with some vehemence, and he whispered to Burke, "I hope I have not shown much temper." "Temper," replied Burke, "temper, sir, is the state of mind suited to the occasion."

There is a pleasant story related by Serjeant Robinson. One Serjeant Adams was the first paid assistant judge of the Middlesex Sessions. On taking his seat he gave out that he had Lord Denman's authority for saying that he ought to be addressed as "My Lord." Lord Denman was afterwards asked whether he had ever given such directions. "Well," he said, "the truth is Jack Adams came to me and said that the Bar at the Middlesex Sessions wished to know whether there would be any impropriety in their calling him 'My Lord,' and I told them I could see no objection to their styling him what they pleased, so as they did not call him Jack when he was on the bench, as that might appear disrespectful to a learned judge."

The disqualification of witnesses with a supposed bias has been one of the anomalies of English law: we are hardly clear of it yet. Instead of discounting the evidence the law disqualified the witness. Soon after Her late Majesty's accession Lord Denman carried an Act removing the archaic fetter by which persons interested in the result of an action or suit were disabled from becoming witnesses. Eight years later another statute rendered the parties to almost all civil proceedings competent and compellable to give evidence.

Politically, the most sensational trial in which Lord Denman took part was that of O'Connell. By indicting the great agitator in Dublin, and by unsparing use of the right to challenge jurors, the Government succeeded in convicting him of conspiracy, and when he carried a writ of error to the House of Lords, Chief Justice Tindal and six other English judges called in to advise held that the verdict was good, Parke and Coltman alone dissenting. But

the ultimate decision of the appellate tribunal lay with five Law Lords. Of these Lyndhurst, a Tory, and Brougham now acting with the Tories, gave their voice for sustaining the Irish and English judges, but Cottenham, Campbell, and Denman by a majority of one were able to reverse the judgment and set O'Connell free. It was on this occasion that Denman made use of the words above-mentioned, that if such practices as challenging jurors were allowed, trial by jury would become "a mockery, a delusion, and a snare." Legally, the most important trial by far, over which Lord Denman presided was that of *Stockdale v. Hansard* (11 Ad. & El. 297). The question raised in this case was, whether an action for libel could be maintained against the printers of the House of Commons for publishing the House's proceedings by its authority. To give a history of this war of privilege would take a volume. Suffice it to say that the Chief Justice held that action would lie. The House of Commons was furious, and would have been ready, as Campbell says, to send the Chief Justice to the Tower; but the Gordian knot was cut by a short declaratory Act. Constitutional lawyers are now generally agreed that Lord Denman was wrong. Another *cause célèbre* was the trial of Lord Cardigan by his peers for shooting Captain Tuckett in a duel on Wimbledon Common. The case, like that of the Luddites above alluded to, illustrates strikingly the then technicality of our criminal law. The indictment charged shooting at Harvey Garnett Phipps Tuckett with intent, &c. The evidence of the Crown was that the person shot at bore the name of Harvey Tuckett. This variance was held by Lord Denman, presiding as high steward, to entitle the accused to an acquittal. The prosecution of Moxon for publishing Shelley's "Queen Mab" brought out Lord Denman's good sense. It is better to refute such sentiments than to prosecute the authors—such sums up his view. In *Reg. v. Hetherington*, in the same volume, he points out very justly that the question in prosecutions for blasphemy is not altogether a matter of opinion, but of tone, and style, and spirit.

Among other decisions of his may be noticed his ruling that it is not necessary that a servant should be dismissed by his master for a valid reason. It is sufficient if a valid reason in fact exists, even if the master is not aware of it at the time of dismissal (*Ridgway v. Hungerford Market Company*, 3 Ad. & El. 171), a decision which has not escaped criticism; that, if an

attorney conducting a suit commits an act of negligence, *e.g.*, not being prepared with a certain document at the trial, by which all the previous steps become useless, he cannot recover for any part of the business done (*Bracey v. Carter*, 12 Ad. & El. 373); that the ancient usage of perambulating the boundaries of a parish upon Thursday in Rogation week, and if necessary breaking and entering dwelling-houses, is a notorious and valid custom. (*Taylor v. Devey*, 7 Ad. & El. 409); that in England it is the parishioners and not the parson who must repair the church. (*Burder v. Veley*, 12 Ad. & El. 233); that a sale within the city of London in an open shop of goods usually dealt in there is a sale in market overt, though the premises are not sufficiently open to the street for a person on the outside to see what passes therein (*Lyons v. De Pass*, 11 Ad. & El. 326). This case, in which the shopkeeper was the purchaser, is hardly reconcilable with the late so-called *Pearl* case (*Hargreave v. Spink*, 65 L. T. Rep. N. S. 650; (1892) 1 Q. B. 25).

In *Reg. v. Seward* (1 A. & El. 706) some parishioners hit upon the ingenious idea of getting rid of a female pauper by marrying her to a male pauper in another parish. For this public-spirited contrivance they were actually indicted on a charge of conspiracy. Surely they deserved rather a civic crown.

LORD ST. LEONARDS.

It is sometimes asked whether writing law books pays. Assuredly it did in Sugden's case. His "Vendors and Purchasers," his "Powers," his "Letters to a Man of Property," his learned edition of "Gilbert's Uses and Trusts," not only brought him in money—for one edition of his "Vendors and Purchasers" he received, it is said, the unprecedented sum of £4000—but they created for him a unique reputation. Not the least extraordinary thing is that "Vendors and Purchasers" should have been written before Sugden was twenty-two. Akenside's "Pleasures of the Imagination," and Thomson's "Seasons," not to mention *Pickwick*, were written at as early an age; but these were works of wit and poetic fancy. "Vendors and Purchasers" was a laboured monument of legal learning. The story runs that, while still a youth, and employed as a clerk in the offices of a large firm of solicitors in London, Sugden was in the habit of taking matters of business for them to the chambers of an eminent conveyancer, Mr. Duval. Mr. Duval, having occasion one day to speak to young Sugden with reference to some business that he had brought to him, was so struck with the lad's acquaintance with the law of the case that he took him as a pupil without the customary fee, and it was in this eminent conveyancer's chambers that he got that insight into the law of real property which afterwards led him to the woolsack.

Campbell and Sugden were fellow students at Lincoln's Inn, and Campbell records how Sugden introduced himself to him when they were dining in hall one day by asking him "What he thought of the 'scintilla juris' "!

"Determined at my outset in life," Sugden says, "to write a book, I was delighted when I hit upon the subject now before the reader—the Law of Vendors and Purchasers. The title promised well, and many portions of the law had not previously been

embodied in any treatise. Modern law treatises were, indeed, few at that period. When the work was announced for publication nearly the universal opinion was that it would be a failure, as the subjects to be considered were too multifarious for one treatise. Nothing dismayed, I laboured diligently, and, with the aid of Lincoln's Inn Library, in which a considerable portion of the book was written—for my own shelves were but scantily furnished—I at length finished the work in its original shape. My courage then failed me. The expense of publication was certain, and success, I thought, more than doubtful, and it was not without some difficulty that I could be persuaded to refrain from committing the manuscript to the flames. The amount I received as the price of the first edition was small, but I have never since received any sum with anything approaching to the same satisfaction. The book was certainly the foundation of my early success in life."

Immediately on being called to the Bar he stepped into a large practice, and so high was his reputation that few felt their titles secure unless they had been submitted to his revision. Abstracts and opinions poured in upon him in such numbers that he was compelled at last to refuse all conveyancing and confine himself to court work. Here, again, he won an easy pre-eminence, and was soon the recognised leader of the Chancery Bar. Then he sought senatorial honours. It was on the hustings at one of his election contests that an incident occurred which does honour to Sugden's good sense and feeling. He was publicly twitted by one of the mob in his opponent's interest with being the son of a barber. (His father kept a small barber's shop at Lincoln.) "Yes," he replied, "I was, and I still am, the son of a barber; but there is one difference between myself and my assailant, and that is this—I was a barber's son and have risen to be a barrister; if he had been a barber's son, he would probably have remained a barber's boy to the end of his life."

Between Sugden and Brougham during their political as well as professional life a bitter feud subsisted. The cause of it—so Lemarchant told Greville—was this: "In a debate in the House of Commons, Sugden, in his speech, took occasion to speak of Mr. Fox, and said that he had no great respect for his authority, on which Brougham merely said, loud enough to be heard all over the House, and in that peculiar tone which strikes like a dagger, 'Poor Fox.' The words—the tone—were electrical, everybody

burst into roars of laughter. Sugden was so overwhelmed that he said afterwards it was with difficulty he could go on, and he vowed that he never could forgive this sarcasm."

Shortly after Brougham's elevation to the woolsack, the latent animosity broke out into open hostilities. It was on this wise: Brougham had nominated his brother William to the lucrative sinecure of Registrar of Patents while a Bill to abolish the office was pending. Sugden demanded to know how the Government explained the appointment. The next day Brougham made an attack, memorable for its indecency, on Sugden; heaped upon him all the sarcasm and contumely of which he was a master, and wound up by comparing him not to "the insect that flies and stings," but to a "crawling reptile"—a bug. Sugden was furious, and brought the Chancellor's language before the House of Commons in an indignant speech, but nothing came of it. All the aggrieved lawyer could do by way of retort was to compliment Brougham on his encyclopædic knowledge, and add that, if he had known a little about law, he would have known a little about everything. *Tantæne animis celestibus iræ?* *Apropos* of "the insect which flies and stings," Sydney Smith once saw Brougham driving past. "There," he said, "goes a carriage with a B. outside and a wasp in." Sugden's mind had from the time when he was a student been exercised, as we have seen, with the doctrine of the "*scintilla juris*." That doctrine originated in this way: "Prior to the Statute of Uses," says Mr. Campbell (Ruling Cases X. 313-4), "the feoffee to uses would have been in an analogous position to a trustee, and his estate would have supported the contingent limitations. After that statute the legal mind became much exercised in following the legal estate where there was a limitation of uses to one for life remainder to his first and other sons in tail, remainder over in fee. Here the use to the tenant for life and the contingent remainder-man in fee exhausted the fee, yet it was necessary to support the contingent limitations in tail. One answer was by ascribing to the feoffees or releasees to uses a *scintilla juris*, as it was called, which fed the contingent uses as they arose. The other was by holding that the seisin to serve them was in *nubibus*, in *mare*, in *terrà*, or in *custodiâ legis*." This nice metaphysico-legal question was finally settled by Lord St. Leonards in what is known as Lord St. Leonards' Act, which declared that the uses, in such a case, immediate or future, contingent or executory, should derive their

support from the original seisin. The terms of art employed in this great controversy are wittily reproduced by Sir George Rose in his epitaph on the well known Preston :

Stern death hath cast into abeyance here
 A most renowned conveyancer,
 Then lightly on his head be laid
 The sod, that he so oft conveyed.
 In certain faith and hope he sure is,
 His soul, like a scintilla juris,
 In nubibus expectant lies,
 To raise a freehold in the skies.

Sugden's ambition had always been the judicial bench, and in 1834 he realised it. He became Lord Chancellor of Ireland, and soon proved his eminent fitness for the post, though as a Minister his success was by no means as great. His decisions will be found reported in the 4 vols. of Drury and Warren.

On November 12th, 1847, Campbell enters in his journal: "I went to Lincoln's Inn Library to consult some rare books; while there Sir Edward Sugden, ex-Lord Chancellor of Ireland, came up to me. We shook hands very cordially, agreeing to stay and dine together in the hall. He had been examining MSS. for his new work, 'A Review of the Decisions of the House of Lords on Questions of Real Property for the Last Twenty-Five Years,' in which he is cruelly to cut up chancellors and law lords. We had a very jolly dinner, and all rivalry being at an end or suspended we talked to each other without reserve. I thanked him for not reversing any of my numerous decrees" (Campbell had been Lord Chancellor of Ireland seven years before), "and I anticipated my reputation with posterity when it shall be recorded that no decree of mine ever was reversed either on a re-hearing by my successor or on appeal by the House of Lords. I told him (what he had not heard of before) Baron Alderson's joke—that the collection of his decisions during his first chancellorship, which was not longer than mine, instead of 'Reports tempore Sugden' should be 'Reports momento Sugden.' I at last asked him if there was any truth in the story which O'Connell had told of him to this effect: Sir Edward Sugden, holding the Great Seal of Ireland as guardian of lunatics, was in the habit, very laudably, of visiting the lunatic asylums in the neighbourhood of Dublin, accompanied by Sir Philip Crampton, the surgeon who was the official inspector of these places of confinement. It

happened that on one occasion Sir Philip forgot his engagement, and the Lord Chancellor went alone. At the first asylum to which he drove the keeper knew him, and he was very respectfully treated; but when he came to the second they took him for a lunatic who had made his escape, and were going to lay hold of him, when he exclaimed, 'Do you know who I am? I am the Lord High Chancellor.'

" 'We are highly honoured,' said the keeper, 'by the presence of your Lordship; we have got a court here for your Lordship to preside in, and I shall have the honour of conducting your Lordship to the Bench.' Two underkeepers then seized him, whereupon, he becoming furious, they put a strait waistcoat upon him, and carried him to a cell in which they locked him up. There he lay till Sir Philip Crampton arrived, and asked whether Lord Chancellor Sugden was there, expressing regret that he had been prevented from joining his Lordship in Dublin at the appointed hour to accompany him on his round. Sugden admitted the visiting of the lunatic asylums, though not the strait waistcoat, and ascribed the *bon histoire* to the well-known waggery of Sir Philip Crampton. There is no one, however, it may be added, to whom the country owes a greater debt for the amendment of the law of lunacy and lunatics, and also of the law as to imprisonment for debt, than to Lord St. Leonards. In the midst of his most pressing occupations he would find time to pay secret visits to the old Fleet prison, converse with its wretched inmates, and give them, without fee, the benefit of his advice and counsel, which he often followed up by paying out of his own pocket the costs for which they were incarcerated, and so procuring their discharge."

Sugden, of course, had his faults. The "flippant and conceited Sugden," Campbell calls him. Lord Selborne in his "Memorials" says: "A very clever man: profound in conveyancing and case law, but waspish, overbearing, and impatient of contradiction." "Crabbed," "snappish," are other epithets bestowed upon him; but, as a great lawyer, a lawyer who, as Chief Justice Cockburn said, "literally lived in the law," he was and is justly held by lawyers in the highest esteem and veneration. His accession to the woolsack raised a positive excitement, it is said, in the Legal Profession. On the first day on which he took his seat as Chancellor in 1852, in the old hall of Lincoln's Inn, an immense crowd assembled so as to fill the court and over-

flow the approaches, and this continued for a fortnight. "Dignities," he said, in *Egerton v. Earl Brownlow* (4 H. L. Cas. 49), "ought to come from merit, and from merit alone." So his had come. As Chancellor, Lord St. Leonards usually sat erect, with his countenance immovably composed, and he rarely broke silence, though now and again he would let drop, in a sarcastic tone, some such inquiry to an adventurous counsel as, "Do you mean to say that is law?" He seldom, if ever, took notes, and as a rule he delivered unwritten judgments.

Away from the House of Lords at his country seat near Kingston-on-Thames, he would gather his private and political friends round his hospitable table on an evening, and discuss old times in the Law Courts and in St. Stephens over the best of Madeira, having devoted his mornings to the practical superintendence of his estate and farm, and amusing his leisure hours by "posting" up all the recent decisions of the various courts of law in his commonplace book, and in well-thumbed and interleaved copies of his own legal works, the copyright of which he kept in his own hands as a source of permanent income. It is no secret that to these books he devoted so much care and diligence that it was with him a principle literally to have "nulla dies sine linea," so that it would be quite easy for his executors to bring out new editions of them all corrected to the very latest date.

"I have," he says, "in my youth and in my manhood written much for the learned in the law; why should I not at the close of my career write somewhat for the unlearned?" And he sat down, on the verge of eighty, accordingly to write an excellent little handybook on "Property Law" for the million, in the form of easy conversational letters.

His last appearance in public was in 1873, when, at ninety years of age, he walked as a private individual into the assize court at Kingston-on-Thames, and on his entry all the Bar rose in token of respect for his person and years—a tribute of respect which much delighted the venerable peer.

He had made the law in his lifetime, and he bequeathed a leading case on his death. By some singular accident his will was found to be missing. Six codicils were there, but not the will; yet it was incredible that he should have neglected to make one or have destroyed it when made. "To put off making your will until the hand of death is upon you," he had himself written a few years before, "evinces either cowardice or a shameful neglect

of your temporal concerns." It is "sinning in your grave." And, basing itself upon this strong presumption against intestacy, the Court allowed secondary evidence to be given by his daughter, Miss Sugden, of the contents of the missing instrument: (*Sugden v. Lord St. Leonards*, 34 L. T. Rep. N. S. 372; 1 P. D. 154). Seldom, if ever, has a grander court met than that which sat to hear this important appeal—Cockburn, C.J., Jessel, M.R., James, Mellish, Baggallay, L.J.J., were its members. "*Tantum vidi*," the writer may say. All have gone since. The later case of *Woodward v. Goulstone* (55 L. T. Rep. N. S. 790; 11 App. Cas. 469) may be instructively contrasted with *Sugden v. Lord St. Leonards*. Of Lord St. Leonards' decisions, *Lumley v. Wagner* (1 De G. M. & G. 605) on the law of injunctions is one of the best known. It was a case in which an opera singer had covenanted to sing for the season at Covent Garden, and not to sing anywhere else, and had broken her covenant. The Court could not, of course, make her sing, but it laid hold of the negative stipulation to enforce specific performance, and said to the lady, "If you will not sing at Covent Garden, you shall not sing anywhere else." For a long time *Lumley v. Wagner* was a flourishing authority; but the tendency now is to rest the question upon the nature and substance of the contract, whether it is a proper subject of equitable jurisdiction, or whether it is a case for damages only.

But Lord St. Leonards' greatest judicial feat is his masterly speech in *Egerton v. Earl Brownlow* (4 H. L. Cas. 49). In it, speaking of executed and executory trusts, he used the expression, which has now become classical, "Has the testator been what is called, and very properly called, his own conveyancer? Has he left it to the court to make out from general expressions what his intention is, or has he so defined that intention that you have nothing to do but take the limitations he has given you, and to convert them into legal estates?" The same case contains a most luminous exposition on the subject of conditions against public policy. It raises, too, the curious question whether a subject can refuse a peerage. Many other cases—that there is no copyright at common law (*Jeffreys v. Boosey*, 4 H. L. Cas. 815); that an ambiguous policy prepared by the company must be construed against the company (*Anderson v. Fitzgerald*, 4 H. L. Cas. 484); that a court of equity does not restrict the protection it affords to a purchaser for value without notice to a case where he has got the

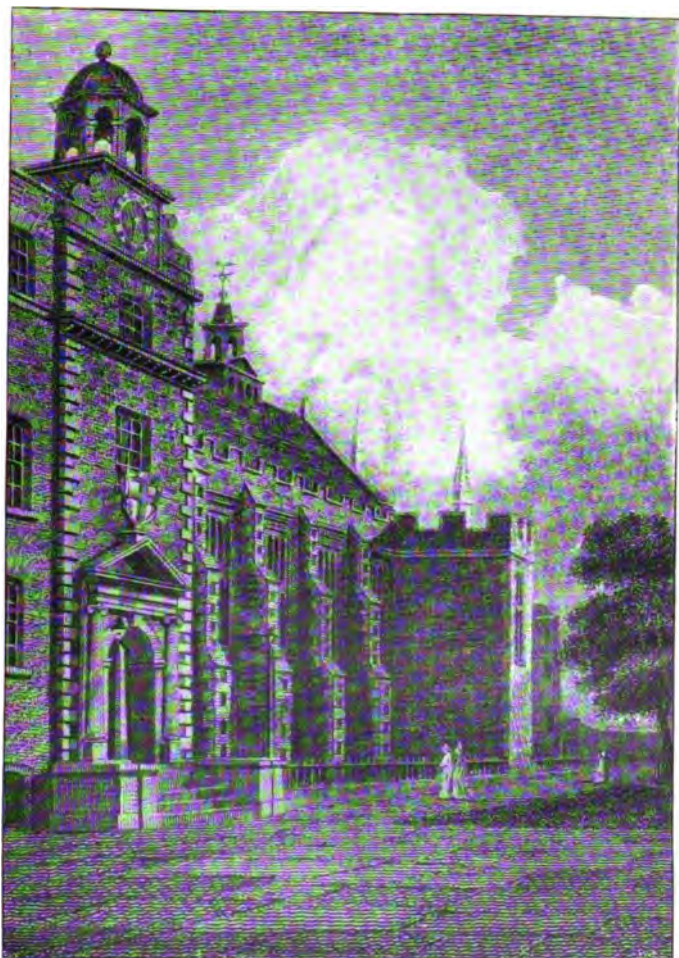
legal estate (*Colyer v. Finch*, 5 H. L. Cas. 905); that when a son, soon after majority, makes over property to his father for an inadequate consideration, the father must show the son was really a free agent, and had independent advice (*Savery v. King*, 5 H. L. Cas. 627); that directors cannot take advantage of their own negligence (*Bargate v. Shortridge*, 5 H. L. Cas. 297)—attest his wonderful learning and lucidity of reasoning. On one very important case (*Jordan v. Money*, 5 H. L. Cas. 185) he was in a minority. He thought that a statement of intention is a statement of an existing fact. It is so sometimes. "The state of a man's mind," as Lord Justice Bowen said, in *Edgington v. Fitzmaurice* (53 L. T. Rep. N. S. 369), "is as much a fact as the state of his digestion," but an intention *in futuro* is different.

A motion had been made to inquire into abuses connected with the constitution and practice of the Court of Chancery, than which no institution has been more "traded by ignorant tongues" from Sydney Smith to Dickens. The advocates of improvement did not scruple to characterise the Court as a "public curse." It is to Sugden's honour that he protested against this view in vehement terms, saying that a court which had conferred so many important benefits on the country ought not to be exposed to public odium. He even went so far as to assert that it was "chiefly fraudulent trustees" who complained of the Court. The fox naturally complains of the construction of the henroost.

CHIEF BARON POLLOCK.

THE Pollocks are the "Mucian gens" of England, a race of hereditary lawyers. Law is in their blood, like literature in that of the Coleridges, politics of the Pitts, music of the Mendelssohns. "Genius," says George Eliot, "comes often from the mothers—it runs underground like the rivers in Greece." It was so with the Pollocks. It was to their mother more especially that the sons of the worthy saddler of Charing Cross owed the remarkable ability and force of character, which made one son Chief Justice of Bombay, another a Field Marshal, and a third, Frederick Pollock, Lord Chief Baron of the Court of Exchequer. This independence of character is illustrated in a story often told of young Frederick Pollock. He had been sent to school at St. Paul's, then under Dr. Roberts, but fancying that he was wasting his time there, as he intended to go to the Bar, he intimated to the head master that he should not stay; the doctor, who was desirous of keeping so promising a lad, thereupon became so cross and disagreeable that one day the youth wrote him a note saying he should not return. The doctor, ignorant of the cordial terms on which the father and son lived together, sent the note to the father, and the father called on him to express his regret at his son's determination, adding that he had advised him not to send the note, upon which the doctor broke out, "Ah! sir, you'll live to see that boy *hanged!*" Some time after, when young Pollock had attained the highest honours which the University of Cambridge can bestow, his mother met the doctor and spoke to him of her son. "Ah, madam," he replied, "I always said he would fill an elevated situation."

There is an interesting anecdote told by himself respecting his "elevated situation" at the Mathematical Tripos. Those are heart-shaking moments when the ambitious student goes to look at the lists. "I was very anxious," he says, "as to my place on the



ENTRANCE TO MIDDLE TEMPLE HALL.



list, and at the same time rather confident. Perhaps my confidence bordered on presumption; if so, it was deservedly punished. As soon as I caught sight of the lists hanging in the Senate House I raised my eye to its topmost name. That name was not mine. I confess that I felt the chill of disappointment; the second name was not my name, nor yet the third, nor yet the fourth; my disappointment was great. When I read the fifth name I said, 'I am sure I beat that man.' I again looked at the top of the list; the nail had been driven through my name, and I was 'Senior Wrangler.'"

Coming from Cambridge to the Bar with a brilliant reputation, he quickly got into practice. He was one of the fortunate few who never know what it is to sit waiting for a brief. He distinguished himself first at the Blake Court Martial in 1810, he won a verdict against the great Scarlett, and found at Lancaster sixty briefs waiting for him, where before he had only four; but, speaking generally, there were no sensational episodes in his professional career; it was by a series of successes, not so brilliant as sterling, that he consolidated his reputation. Attorneys felt themselves *safe* when they had secured his services. This is the best kind of reputation, and it was based on industry as well as ability. He belonged to a race of lawyers to whom the latest hours of night and the earliest hours of the morning presented no impediment to study, and almost to the last he was fond of putting upon his letters the very early hour at which they were written.

In his day—terrible to relate—consultations were held as a matter of course in the evening—were there not, indeed, evening sittings at the Rolls?—and his son, in his pleasant "Reminiscences," describes how after dinner, at fifteen or twenty minutes to seven, the inexorable hackney coach would come to carry off his father and pupils who might have been dining with him, together to the Temple, where consultations and answering of cases occupied the rest of the evening until ten o'clock.

The start for the Northern circuit, too, in those days, as his son describes it, in a carefully provisioned "landaulet" with a "rumble behind for the clerks," the sword case (for highwaymen), the pockets for books and small articles, the Morella cherrypie, and the bottles of choice wine to beguile the road, is worthy of an epic poem.

Macaulay, who was then a young barrister on the Northern

Circuit, describes the rivalry of Brougham and Pollock—at one place Brougham taking the lead, at another Pollock. “Brougham,” he says, “squabbles with Pollock more than in generosity or policy he ought to do. I have heard several of our younger men wondering that he does not show more magnanimity. He yawns while Pollock is speaking—a sign of weariness which, in their present relation to each other, he would do well to suppress. He has said some very good, but very bitter things. There was a case of a lead mine. Pollock was for the proprietors, and complained bitterly of the encroachments which Brougham’s clients had made upon this property, which he represented as of immense value. Brougham said that the estimate which his learned friend formed of the property was vastly exaggerated, but that it was no wonder that a person who found it so easy to get gold for his lead should appreciate that heavy metal so highly. The other day Pollock laid down a point of law rather dogmatically. ‘Mr. Pollock,’ said Brougham, ‘perhaps before you rule that point you will suffer his Lordship to submit a few observations on it to your consideration.’” Such petty taunts and poisoned arrows were too like the rancorous spite of the Dunciad. They glanced harmlessly off Pollock, secure in his commanding ability and conscious rectitude. Campbell once said to him as they sat together in the front row talking of their common profession: “Depend upon it, Pollock, we receive the high wages of an infamous profession”; and he acted up, adds Pollock, to his own views of it. Not so Pollock. No stain ever found its way upon his escutcheon, and no charge of jobbery ever followed his well-deserved success. One innocent artifice is recorded of him. A gentleman named Alexander had a large leading practice, and it was noticed that Mr. Pollock—as he then was—always made complimentary allusions to him. He was asked how he could do so. “Why,” said he, “do you not perceive that if I did not keep Alexander in business I should have that fellow Cresswell against me in every case?”

His well-deserved success came in 1844. He was then Attorney-General (for the second time). Lord Abinger died suddenly on circuit, and the place of Chief Baron was offered to Pollock, an offer which he accepted with undisguised pleasure. To try and find truth is, as Baron Alderson said, a much pleasanter task than trying to find arguments—at all events, to a scientific mind like Pollock’s. On the bench Pollock

possessed firmness and decision. He was never harsh or discourteous—no young counsel had ever to complain of injustice—and he highly appreciated merit. Though deeply versed in all the antiquated refinements of old-fashioned special pleading, and sensible of its scientific value, he saw with satisfaction a new and improved system take its place in 1852. He ever leaned towards doing substantial justice and against technicality. His manner both upon the bench and in society was solemn; but “I have heard him,” says Ballantine, “make the best after-dinner speech that I ever listened to, except from the lips of Dickens.” Mrs. Beecher Stowe, in her “Sunny Memories of Foreign Lands,” mentions that she was particularly pleased with Pollock’s speech at the Mansion House—its dignity, simplicity and courtesy. “I am not quite sure that I must not attribute to him,” adds Ballantine, “some small share of personal vanity, as he was accustomed to sit upon the bench nursing a very handsome leg and foot, and looking at it with great complacency.” Over and above his kindness and his ability he was full of humour. “Espinasse! oh, yes, he was that deaf old reporter, was he not, who heard one half of a case and reported the other half.”

Among the more celebrated criminal trials over which he presided was that of Muller, a case involving a great deal of nice circumstantial evidence; and of the Mannings, husband and wife, for a very brutal murder in Bermondsey. In regard of the latter, the late Serjeant Robinson remarks: “I have heard a good number of persons sentenced to death in London and on circuit, but I scarcely ever saw them betray any but the most stolid demeanour, except Mrs. Manning, who exhibited great fury and uttered a torrent of abuse against the judges and every one connected with the trial of herself and her husband till she was forced by the turnkeys from the dock and taken below. Mrs. Manning insisted on being hanged in black satin, and ruined the trade in that material in consequence for several years for ladies’ dresses.”

One of the Chief Baron’s numerous progeny—he used to say he had had twice twenty-one children, the twenty-first having died—married Mr., afterwards Baron, Martin, a barrister, of whom his father-in-law entertained a very high opinion. It led to a very awkward “scene in court” in 1849. Sir F. Thesiger was objecting to the relevancy of some of Mr. Martin’s questions.

“I can only repeat, Sir Frederick,” said the Chief Baron,

"what I have said before. Counsel must be intrusted with a certain extent of discretion in the conduct of their cases, whether it be a gentleman only called yesterday or a Queen's Counsel of long standing and eminence. I, as a judge, must allow them to exercise their discretion."

Sir F. Theziger (warmly): "My Lord, I cannot but feel that my learned friend is allowed a discretion in this case and in this court generally, which would not be extended to myself or other counsel in this or in any other court."

Pollock, C.B.: "I think that is a very improper observation, Sir Frederick Theziger."

Sir Frederick: "I am sorry your Lordship should think so, but I feel what I spoke."

Pollock, C.B. (rising): "I shall adjourn this court and the cause, with the trial of which I cannot possibly now proceed. Gentlemen of the jury, when a judge is publicly insulted he can have no other alternative than to adjourn the case. I do not feel that I have now, or at any other period of my life, so misconducted myself as to justify the public insult which I have just now received; I shall not proceed with this case any further to-day."

Both were in truth right and both wrong. A feeling did exist in the Profession that Martin was a favoured counsel, but it is quite certain that the Chief Baron had not the remotest intention of showing any partiality. But he was not a Brutus on the bench, and liking cannot always conceal itself.

Speaking of his domestic habits, he once told a friend that the two following rules were the chief causes of his uninterrupted good health through life. In the first place, he never began work when tired in the least. He always went to Westminster Hall in a cab, while others thought it necessary to take exercise in going down there, and often arrived at their work hot and fatigued. His other maxim was never to put anything cold into his stomach. "Our stomachs," he said, "are cooking machines, and if you put cold food into them you tax the machine to make it hot in the first place. Whereas, when the food is hot, half the work is done before the food goes into the stomach." In order to convince his friends of the effects of good digestion, he jumped up in the railway carriage in which he was travelling and began to cut a caper, though he was then upwards of eighty years of age. Where was the kodak? He was full, as FitzJames

Stephen says, "of indomitable vivacity." Unlike his colleague Baron Parke, he cared little for fresh air, and kept every window in crowded courts closed in the hottest weather on assize, while Baron Parke gloried in icy blasts. How these two managed to reconcile their conflicting tastes in the Exchequer Court in London history sayeth not.

Pollock differed, too, from Parke in not being only a lawyer. He delighted in abstruse problems of mathematics. In chemistry, astronomy, medicine, and physiology he was equally at home. He realised, indeed, Brougham's ideal of education, to know something of everything and everything of something. Mr. Justice Buller said his idea of happiness was to sit at Nisi Prius all day and play whist all night. Pollock, speaking to the students of St. George's Hospital, said that, had he been able to choose his lot in life, he would have studied medicine and practised law. After his retirement, Crabb Robinson visited him at Hatton. On September 28th, 1866, he enters in his diary: "I did not quit the beautiful grounds. Sir Frederick Pollock is a capital talker and a kind and generous man. What particularly interested me in the place was a long walk of the precise length of the Great Eastern steamship. We played a rubber; but the great pleasure after all was the free talk of the late Chief Baron." It was an old age full of years and honours.

It is difficult to make a selection from the decisions of a judicial life like Pollock's of more than twenty-two years. *Molton v. Camraux* (4 Ex. 17) is a leading case on the subject of lunatics' contracts, and it lays down a rule, which has always been since accepted, to wit, that unsoundness of mind will not vacate a contract if it be unknown to the other contracting party, and no advantage be taken of the lunatic; *à fortiori* where the contract is executed; that is, that such contracts are *primâ facie* good. This is a sensible and convenient rule, for the inviolability of all contracts is so important to the community that the law ought to presume in favour of their validity, in the absence of fraud. *Reg. v. Abbott* (1 Den. C. C. 273) is instructive on the law of false pretences. There a vendor of cheeses at a fair had given a buyer a cheese taster, which he pretended to have scooped out of the cheese, but had not, and so induced him to buy the cheeses. This was clearly a false pretence, but it was argued that it was different if the money was obtained by means of a contract. The Court, however, declined to take this view, and it

would have been disastrous if it had done. The respectable old gentleman who cozened Moses Primrose into buying the gross of green spectacles would, on this view, have got clear of the law. *Feist's case* (1 Dear & Bell C. C. 590) was a curious one. It was a case in which the master of a workhouse was indicted for selling the bodies of paupers for dissection. The Anatomy Act allows dissection of such persons if the relatives consent, but they often dissent, and the master of the workhouse, regarding their antipathy as unscientific as well as injurious to his interests, arranged a mock funeral, and then, having satisfied the relatives, sold the bodies. This was morally reprehensible, but did not bring him, so the Court held, within the criminal law. Among other decisions of the Chief Baron's may be noted, that a right of way of necessity can only arise by grant express or implied (*Proctor v. Hodgson*, 10 Ex. 824); that a servant absenting herself against orders, even though it is to see a sick mother, is a good ground of discharge (*Turner v. Mason*, 15 M. & W. 112); that a condition in a will of real estate that, if the devisee shall dispute the will or the testator's competency to make it, the disposition in favour of such devisee shall be revoked, is not void as against public policy (*Cooke v. Turner*, 15 M. & W. 727); that the employment by the vendor of a puffer at an auction, where the sale is "without reserve," vitiates the sale (*Thornett v. Haines*, 15 M. & W. 367); that crossing a cheque does not make it less negotiable (*Bellamy v. Major*, 7 Ex. 389); that a gentleman who has promised marriage to one woman and married another cannot say that the first ought to have given him a reasonable time to perform his contract, for in the meanwhile his wife might have died (*Caines v. Smith*, 15 M. & W. 189); that the accumulation of an inflammable material like wood naphtha in the neighbourhood of human habitations is an indictable nuisance (*Lister's case*, 1 Dear. & Bell 209).

Our law ranks bulls among animals *mansuetæ naturæ*. It seems somewhat misplaced confidence, but so it is, and anyone who complains of being tossed and gored must prove the *scienter*. In *Hudson v. Roberts* (6 Ex. 697) the plaintiff was walking innocently along wearing a red tie. To him appeared a bull being lawfully driven along the highway by the defendant. The bull resented the red tie, and in the encounter the plaintiff came off second best. "I knew," the defendant had said, "that the bull, or a bull, would run at anything red." This was held evidence

to go to the jury of the *scienter*. It is slight evidence, but then our law recognises that proving a psychological fact like the *scienter* is a difficult task.

Not long ago Sir Peter Edlin, on a charge of malicious wounding, told the acquitting jury to reconsider the meaning of "maliciously," and some gloomily foreboded in consequence a return to the days when judges, as creatures of the king, fined juries for bringing in a verdict against the direction of the court. "A judge," said Chief Baron Pollock in *Reg. v. Meany* (1 L. & C. C. C. 216) "has a right, and sometimes it is his bounden duty, whether in a civil or in a criminal cause, to tell the jury to reconsider the verdict"; but he goes on to use words which clearly imply that, if the jury insist on his receiving their verdict, he is bound to do so. Mr. Tulliver, in the "Mill on the Floss," regarded law as a cockfight, in which it was the business of injured honesty to get a game bird with the best pluck and the strongest spurs. This is the popular view of jury cases, and not wholly devoid of truth. Juries require the experience of judges, not only to explain the law, but to protect them against the arts of advocacy. There is much more danger of a jury being beguiled by the professional verdict winner than intimidated by the judge.

SIR CRESSWELL CRESSWELL.

MR. JUSTICE MAULE was once at dinner lamenting that none of his pupils had distinguished themselves in after life. One man, he said, he particularly regretted as not having taken orders, "for," he added with characteristic sarcasm, "he had hypocrisy enough for an archbishop." Somebody then suggested that Mr. Justice Cresswell was not altogether undistinguished either at the Bar or the Bench; on which Mr. Justice Maule said, "Oh ay, I had quite forgotten *him*." A strange forget, truly; but Maule was thinking of the pupil, not the judge, and as a pupil Cresswell did not reflect much credit on his coach. He achieved at Cambridge only the doubtful dignity of the "wooden spoon," but it was from no lack of ability. Gibbon, and Swift, and Wordsworth, and Byron, and Tennyson, and Cockburn, and scores of other men of genius have, like Cresswell, had no notable University record. Once called to the Bar, however, he buckled to in right good earnest, appearing first in small maritime cases. The late Serjeant Parry once said that for a man to succeed in maritime practice he ought to be able to navigate a ship round the British Isles. Cresswell's father was a sea captain, and his early days were spent much among sailors and fishermen on the rocky and stormy coast of Northumberland. He always knew where the binnacle was, and he knew the cathead as well as his own. Halyards and maintopsails, weatherbow and iron knees were as familiar to him as to Commodore Truncheon and Pipes the boatswain. Hence in running down cases at Newcastle, when the court was filled with sailors and sea captains, pilots and underwriters, Cresswell was first favourite, from the ease with which he handled maritime topics. One who knew him well describes him at this period—he was tall, pale, and slim—sitting between Henry Brougham and that ripe scholar John Williams. Brougham and Williams were playing at Greek on

the back of a brief—the Greek of John Williams was faultless. Cresswell made a remark to the mighty Brougham, and the mighty Brougham playfully passed the end of a brief over the chin of young Mr. Cresswell as if he were a favourite boy.

He joined the Northern Circuit at a time when Brougham and Scarlett governed the revels of the Grand Court and divided the business of serious litigation. He fought his way along through the dust, in which the two gladiators were always enveloped, and at last, when these heroes were taken up into the *sedes discretæ piorum*, and no longer vexed the Northern Circuit unless as judges, Cresswell and Alexander succeeded to their places. Pollock, as we know, had to bolster up Alexander's reputation for fear of having "that fellow Cresswell" against him in every case. The leadership of the Northern Circuit was in those days something to struggle for and something to retain. It took a strong man to hold his own there. Cresswell was not a Brougham, perhaps he was not in tact and power of persuasion a Scarlett, but he was strong enough to seize upon the leadership of the Northern Circuit, and to hold it easily against all comers. He got his silk gown in 1834, and from that year till 1842 he worked very hard, and found his profession most lucrative.

When he was elected Conservative member for Liverpool in 1837 there were present, so Mr. Forsyth tells us, in the evening at the dinner-table of his host two young barristers who intended to join the Northern Circuit, and on their healths being proposed, before they returned thanks, Mr. Cresswell begged to be allowed to say just a few words. He then, in the kindest manner, expressed his good wishes for the success of his two young friends, and spoke of his own career and the length of time he had to wait before he got into practice. He said that he attended the assizes at Lancaster for seven years before he held there a single brief. He meant this by way of encouragement, and to show that no one need despair. But one of the newly-fledged barristers could not help observing, in acknowledging the toast, that it was but equivocal comfort, for, if "such things were done in the green tree, what would be done in the dry!"

He had laid the foundation of his great and exact knowledge of the law, as so many other eminent lawyers have done, by law reporting. Barnwell and Cresswell cover the decisions of the Court of Queen's Bench for a period of eight years, and are among the most highly esteemed of our Reports.

On Mr. Justice Bosanquet's resignation, Sir Robert Peel at once offered the vacant judgeship in the Common Pleas to Cresswell.

Upon the Bench he fully answered all expectations formed of him. He had many rare judicial qualities—a remarkable memory, great quickness of perception, and a ready command of apt and popular language. He was what is called a "strong" judge: that is to say, he was not only a learned judge, but a man who would have his own way. He had sufficient confidence in himself, a sufficient contempt for his audience, and a sufficient power of saying very disagreeable truths at proper times, to keep everyone in awe of him. It is a great temptation to have this power in that position, and perhaps Sir Cresswell Cresswell abused it as little as it is in human nature to do.

He was not a faultless judge, and, as Sir James Wilde said, he would have despised the flatterer who told him that he was, but his chief, if not only, fault was a fault of manner. This, at times, was, no doubt, trying to the Bar. He was too impatient of a slip or an oversight. His nose seemed to curl visibly with contempt when either a speech or an argument displeased him. Often it meant nothing; he had just contracted a habit of looking disgusted. He was too apt also to ride his court with a curb, and the discipline he enforced was perhaps too much that of a martinet. The story is said to be perfectly true that, after he had several times, as was usual with him while writing down the evidence in a case before him, called out to the counsel who was examining a witness in a peremptory tone, "Stop!"—at last, finding that no attention was paid to his imperious monosyllable, he addressed the counsel and said, "Mr. So and So, I shall feel obliged to you if you will attend to my request, not to go so fast." Upon which the counsel replied, "Oh! my Lord, I thought your Lordship was addressing the usher of the court."

During the trial Serjeant Wilkins, in addressing the jury, made some passing allusion to the anger displayed by Mr. Watson, Q.C., who was on the other side. Mr. Justice Cresswell, interrupting the learned serjeant, said, "Won't you allow an advocate to get angry, brother Wilkins?" Thus pointedly addressed, Mr. Serjeant Wilkins, turning slowly to the bench, replied in those double-diapasoned tones which he occasionally brought into play with such crushing effect, "I have no objection, my Lord, to an advocate or even a judge getting angry;

but I think what either one or the other may say in such a case is not worth much attention." His Lordship threw himself back into his easy chair and instituted a scrutinising examination into the construction of the circular gas jet suspended from the ceiling.

The only person of whom Sir Cresswell was afraid was Mr. Justice Maule and his sarcasms. Cresswell himself had no wit, but the following has a certain piquancy: A witness had been called to prove the solemnisation of a marriage. He was fond of fine language, and he said, "My Lord, I can testify to having seen the marriage duly consummated." "Sir," said the Judge Ordinary, "it is not usual to require a witness for that purpose."

One day when he was sitting in Admiralty a ship case was being tried, and Serjeant Channell, who was rather uncertain in the matter of his aspirates, was on one side and Sir Frederic Theziger on the other. Every time the former mentioned the vessel he called it the *Ellen*; every time the other counsel mentioned her he called her the *Helen*. At last the judge with quaint gravity said: "Stop! What was the name of the ship? I have it on my notes the *Ellen* and the *Helen*; which is it?" The Bar smiled. "Oh, my lud," said Theziger, in his blandest and most fastidious manner, "the ship was christened the *Helen*, but she lost her 'h' in the chops of the Channell."

A murmur of applause once came from the jury box while Mr. Justice Cresswell was addressing its occupants. "Gentlemen," said the judge, "you will forgive me. I dare say you meant it very kindly; but, believe me, the administration of justice is in great danger when applause in court becomes grateful to a judge's ears."

He had been fourteen years on the bench of the Common Pleas, when, in 1857, the Government resolved on establishing a Court of Divorce—that is to say, abolishing the ancient jurisdiction of the ecclesiastical courts respecting divorce, and setting up a regular court of law, the Divorce and Matrimonial Causes Court, to deal with questions between husband and wife. The passing of the Divorce Act was strongly contested in both Houses of Parliament, and was secured at last only by Lord Palmerston's intimating very significantly that he would keep the Houses sitting until the measure had been disposed of. Mr. Gladstone, in particular, offered to the Bill a most strenuous opposition. He condemned it on strictly conscientious grounds. Yet it has to be said, even as a question of conscience, that there was

divorce in England before the passing of the Act, the only difference being that the Act made divorce somewhat cheaper, and easier. Before it was a luxury of the rich; the Act brought it within the reach of almost the poorest of Her Majesty's subjects. The question really was, whether the remedy should be high-priced or comparatively inexpensive. One advantage it certainly gained us. "It put an end," says McCarthy, in his "History of Our Own Times," "to the divorce debates that used to take place in both Houses of Parliament. When any important Bill of divorce was under discussion, the members crowded the House, the case was discussed in all its details as any clause in a Bill is now debated; long speeches were made by those who thought the divorce ought to be granted and by those who thought the contrary, and the time of Parliament was occupied in the edifying discussion as to whether some unhappy woman's shame was or was not clearly established. In one famous case, where a distinguished peer, orator, and statesman sought a divorce from his wife, every point of the evidence was debated in Parliament for night after night. Members spoke in the debate who had known nothing of the case till the Bill came before them. One member, perhaps, was taken with a vague sympathy with the wife. He set about to show that the evidence against her proved nothing. Another sympathised with husbands in general, and made it his business to emphasize every point that told of guilt in the woman. More than one earnest speaker during those debates expressed an ardent hope that the time might come when Parliament should be relieved from the duty of undertaking such unsuitable and scandalous investigations. It must be owned that public decency suffers less by the regulated action of the Divorce Court than it did under this preposterous and abominable system."

The success of the scheme greatly depended on the judge who was to exercise the new jurisdiction.

The choice fell fortunately on Cresswell. He was at once an able lawyer, a man of the world, and a thorough gentleman, and in his hands the experiment answered admirably. Perhaps the only anomaly was that a bachelor, as Cresswell was, should preside in a court for the settlement of matrimonial differences. Lord Campbell began to be afraid that the Court would be only too successful. "I have been sitting two days in the Divorce Court," he says, "and, like Frankenstein, I am afraid of the mon-

ster I have created (the new jurisdiction arises from the report of a Commission over which I had the honour to preside). Upon an average I believe there were not in England above three divorces a year *à vinculo matrimonii*, and I had no idea that the number would be materially increased if the dissolution were judiciously decreed by a court of justice instead of being enacted by the Legislature. But I understand that there are now 300 cases of divorce pending before the new court. This is rather appalling. In the first place, the business of the court cannot be transacted without the appointment of fresh judges, and there seems some reason to dread that the prophecies of those who opposed the change may be fulfilled by a lamentable multiplication of divorces, and by the corruption of the public morals."

A mole-hill—"the little gentleman in black velvet"—ended our greatest king, a horse's stumble the greatest prime minister, and the ablest bishop of this century. A pair of runaway horses brought Cresswell's career of usefulness to a premature close. On July 11th, 1863, he was riding down Constitution-hill when he was knocked down by Lord Aveland's horses, which had bolted, frightened by the breakdown of the carriage they were drawing. His knee-cap was broken, and he was removed to St. George's Hospital, and thence to his house in Prince's-gate. The fracture was not serious, but the shock proved too much for his constitution, and he died a little more than a fortnight after the accident.—*Valde defendus*.

Talk, said a lively contemporary of Cresswell's, of the House of Commons as a powerful body, but what does the House of Commons represent except a parcel of miserable county voters and £10 freeholders, whilst Sir Cresswell Cresswell represents five millions of English wives and mothers. It was a difficult and delicate jurisdiction. He had not only to administer the law, but to make it—to fill in in detail the outline of the Divorce Act—to do for matrimonial law what Lord Mansfield did for mercantile law, and Dr. Lushington for maritime law. How well he did his work will be seen in the four volumes of Swabey and Tristram's Reports. He upheld the sanctity of marriage while he vindicated the rights of outraged spouses.

At an early stage of his administration he had to determine the applicability of the canon law, and he adopted without hesitation the opinion of Chief Justice Tindal, in *Reg. v. Millis* (10 Cl. & Fin. 534), that the canon law of Europe does not and

never did form part of the law of England. *Hope v. Hope* (1 Sw. & Tr. 94) is an instance. It was a suit for the restitution of conjugal rights by a wife. Both spouses had been guilty of adultery; but by the canon law *Paria crimine mutua compensatione delentur*: in other words, the guilt of each being the same, their mutual delinquencies cancel one another. Sir Cresswell refused to follow this curious doctrine "to subtract crime from crime and there remains nothing but innocence," and disallowed restitution. His explanation of "condonation" is instructive. Condonation, he says, "means a blotting out of the offence imputed so as to restore the offending party to the same position he or she occupied before the offence was committed." The term forgiveness does not fully express the meaning of condonation. A person may forgive in the sense of not meaning to bear ill-will or not seeking to punish, without at all meaning to restore to the original position. If you have a clerk or a servant who has robbed you, you might forgive him and say "I forgive you," without having the slightest intention of replacing him in your service or of restoring him to the position he had forfeited. I take it condonation would mean more than this. To use the language of Lord Stowell, it is like releasing a debt; it makes the debt as if it had never existed;" (*Keats v. Keats*, 1 Sw. & Tr. 346). In the recent case of *Bernstein v. Bernstein* (69 L. T. Rep. N. S. 513; (1893) P. 292) the Court of Appeal had to consider whether knowledge was necessary to condonation. Cresswell was clear that it was not. A man may condone whether he knows of the offence or not, in this way: he may say, "I have heard stories about my wife. A. and B. have told me she has committed adultery. I can hardly believe it, and whether guilty or not I will take her back."

Among his other decisions may be noticed that the admissions or confessions of the respondent are not admissible evidence against the co-respondent (*Fredale v. Ford*, 1 Sw. & Tr. 305); that the disability of a native-born English subject to contract marriage with a deceased wife's sister applies equally to a naturalised subject (*Mette v. Mette*, 1 Sw. & Tr. 416); that the marriage of a domiciled Englishman cannot be dissolved by the sentence of a Scotch court (*Tollemache v. Tollemache*, 1 Sw. & Tr. 561); that desertion to be such in law must be without the consent of the spouse who relies upon it (*Ward v. Ward*, 1 Sw. & Tr. 185); a husband's being away in search of employment does

not constitute it (*Cudlipp v. Cudlipp*, 1 Sw. & Tr. 229); that bodily injury, reasonable apprehension thereof, or injury to health, are the general tests of legal cruelty (*Tomkins v. Tomkins*, 1 Sw. & Tr. 168).

In *Du Terreaux v. Du Terreaux* (1 Sw. & Tr. 555) a young lady of sixteen had eloped with her French music master; that is to say, she had gone out, in the way familiar to novel readers, ostensibly for her morning walk, but really, of course, to church, and returned married and in tears. The parents finding a music master of thirty-six an undesirable *parti*, sent the imprudent young lady to the Continent for a few years, and the music master consoled himself by marrying someone else. This was lucky, but had the petitioner disentitled herself to relief by separating herself "without reasonable excuse" within 20 & 21 Vict. c. 85, s. 31? The court said no, for she had been entrapped. The warning, perhaps, is hardly wanted. Aurora Floyds are gone out of fashion; young ladies, even of sixteen, whether we regret it or not, are much too worldly-wise to commit these romantic escapades now.

LORD CAMPBELL.

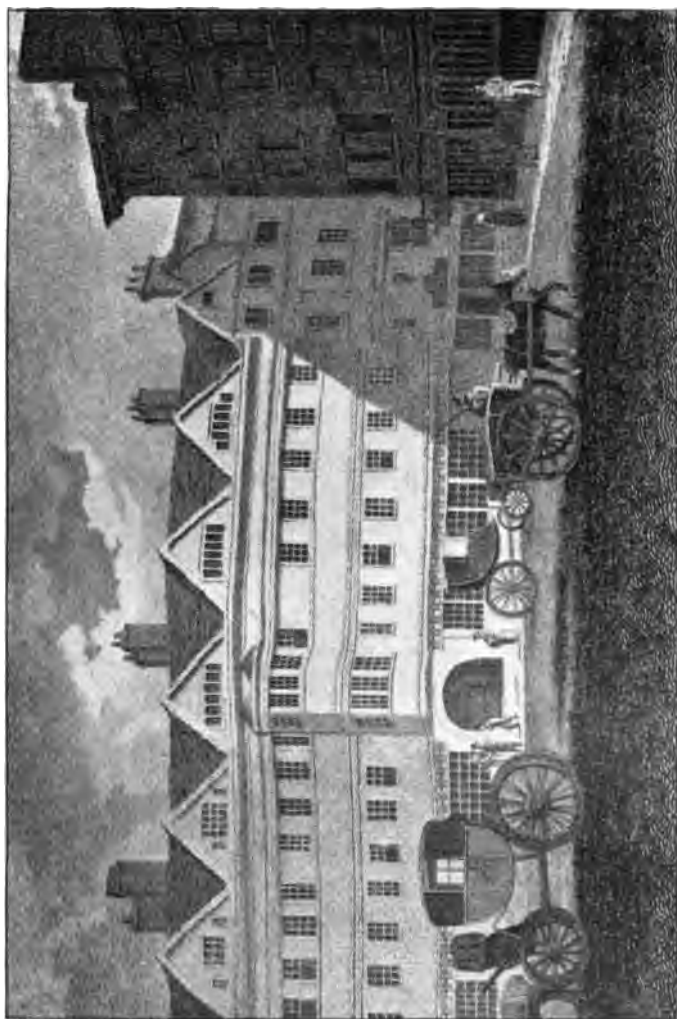
WHEN a Scotch gentleman once remarked to Dr. Johnson that Scotland had a great many noble wild prospects, the doctor replied, "I believe, sir, you have a great many. Norway, too, has noble wild prospects, and Lapland is remarkable for prodigious noble wild prospects. But, sir, let me tell you the noblest prospect which a Scotchman ever sees is the high road that leads him to England"—a sally, says Boswell, greeted with great laughter. Of all those—and they are many—who have travelled this road, there never was a more successful invader than John Campbell. His father was a Scotch minister and would have had him one too, but young Campbell had no wish to "wag his pow in a pulpit." "I think," he writes to his sister, "that when the path to wealth and fame is open for any man, he is bound for his own sake, but much more for the sake of his friends, to enter it without hesitation, though it should be steep and rugged, and strewn with thorns. I declare to you that I have scarcely a doubt I should rise at the English Bar, even to the Lord Chancellorship."

From his 9s. a week lodging in Tavistock-row he goes on:—

"When I am in low spirits and sitting alone in my gloomy garret, I contemplate with pleasure the idea of a settlement in the Church. I spurn it when I hear the eloquent addresses of Law, of Gibbs, of Erskine, and while my heart burns within me a secret voice assures me that if I make the attempt I shall be as great as they. Whether this impulse is the admonition of God or the instigation of the Devil we shall discuss at length when we meet."

"In about six years (!) after I am called to the Bar I expect to have distinguished myself so much as to be in possession of a silk gown and a seat in Parliament."

"There is nothing like aiming at something great."



STAPLE'S INN (HOLBORN).

As you cannot live, however, on prospects, however brilliant and assured, young Campbell, pending the silk gown, got an engagement on the *Morning Chronicle* as Parliamentary reporter and dramatic critic; at the same time he studied law hard in the chambers of Tidd, the celebrated special pleader.

Drilling with the Bloomsbury and Inns of Court Volunteers—Buonaparte was then threatening our coasts—and a modest half-pint of cider at the Cider Cellars, Maiden-lane, Covent-garden, supplied him with sufficient recreation. He soon found, however, the difficulty of combining newspaper work with practice, and he gives an amusing instance. "On one occasion, when 'Romeo and Juliet' was acted at Covent Garden, I was obliged to stay and draw a long and difficult plea, which must be on the file next morning to prevent judgment being signed. For the first and only time of my life I wrote a conjectural criticism, without having witnessed the performance, and I commented upon the Monument Scene as it is in Shakespeare, where Romeo dies from the poison before Juliet awakes from her trance. Having handed this to the printer, I proceeded for a little relaxation to the Cider Cellars in Maiden-lane. There, to my horror and consternation, I heard from a person who had been present, that this scene was that night represented according to the alteration by Cibber, who makes Juliet to wake while Romeo is still alive, but after he has swallowed the poison, which, in his ecstasy at her revival, he forgets till he feels its pangs. I ran to the *Morning Chronicle* office, altered my criticism, and introduced a compliment to the spirited and tender manner in which Romeo exclaimed, 'She lives, she moves, and we shall still be happy.'"

Among Tidd's pupils, besides Campbell, were Lyndhurst, Denman, and Cottenham—a glorious galaxy of genius—but Campbell seems to have commanded his confidence in a peculiar degree. "A barrister," Tidd used to say, "setting out without connections was like an attempt to launch a ship without water." Connections Campbell had none, and very glad he was, therefore, when the chance offered, to devil for Tidd for a small remuneration while waiting for clients of his own. It was to Tidd's friendly help at this juncture, and the experience which he gained in his chambers, that Campbell always ascribed his ultimate success. His call was a proud moment. "I have retained a hairdresser," he writes to his brother, "to cauliflower my head, and he has improved me 25 per cent. I look devilish knowing in

my gown, wig, and band, as you shall see when Wilkie's portrait reaches you."

Spite of the cauliflowering process and his knowing look, his progress was extremely slow, and he had many a fit of despondency, many a severe shock to his vanity. "*Vivendum et moriendum est mihi ignoto*," he sighs. It was about this time that he conceived the idea of his Reports. We were then engaged in war with France, and new questions were every day arising between underwriters and merchants, shipowners and shippers, consignors and English factors; questions as to blockades and violations of neutral commerce. On these and many similar questions Lord Ellenborough was then making the law, and Campbell justly thought that the reports of these decisions at *Nisi Prius* would be acceptable to the Profession, but he took the liberty of sitting on appeal from Lord Ellenborough. One dare hardly imagine the language that irascible old judge would have used had he known that, when Campbell arrived at the end of his fourth and last volume, he had "a whole drawerful of bad Ellenborough law."

One novelty which Campbell introduced into law reporting was that of giving the names of the attorneys engaged on both sides. Anyone who desired to get the details of a case could thus do so. This furnished a plausible reason, but the practice had the further merit that it led to "useful introductions," a merit to which Campbell was by no means insensible.

"I shall try," he writes to his brother, "and remember constantly your precept, 'Push on,' and he did. No one ever studied with a keener eye the art of self-advancement. "I am considered 'a plodder.' Shall I ever be able to show that I make myself a slave for the sake of power and distinction?"

Besides ingratiating himself with the Bench and the attorneys through his Reports, he was an indefatigable holder of briefs for other men. As his own briefs grew more numerous, he removed to 4, Paper-buildings, first floor, the most pleasant situation, he says, in the Temple, and he hugs himself with the reflection that "The attorneys as they pass will say: 'Ah! he is getting on. He must know something about it. We will try him.'"

He saw the value of good social influences, and straightway set himself at thirty-five to learn to dance: "I waited on a celebrated artist from the Opera House (*Chassé, Coupé, Brisé, one! two! three!*), and devoted one whole Long Vacation to the art.

I did not engage in special pleading with more eagerness. I went to my instructor regularly every morning at ten, and two or three times a week. I returned in the evening. You may be sure I was frightened out of my wits lest I should be seen by anyone I knew. My morning lessons were private, but to learn figures it was, of course, indispensably necessary to mix with others. I met several dancing-masters from the country, dashing young shopkeepers, ladies qualifying themselves for governesses, &c. If you were to see me perform you would call me *le dieu de la danse*. Seriously, I conceive I am qualified to join the most polite assemblies. Instead of shunning I shall now court opportunities of figuring upon the light fantastic toe. In short, I mean to become *un beau garçon!* Heaven knows but this dancing-master may be the means of giving you a daughter-in-law"—he is writing to his father—"before the year is out. If a pretty girl, of respectable connections, should fall in love with my brisés, I should have no objection to make her my partner for life."

He could afford to marry, for he was now making £2000 a year, but here again business was present to his thoughts. "If I am to marry, what ought I to aim at: wealth, birth, or beauty?" Fortunately, he had not to decide between these various competing claims, for he found all united in the person of Miss Scarlett. Twice he proposed, and twice he was rejected. It was a great blow, for he was genuinely in love now. However, he could say, like Gibbon under similar disappointment, "I feel dearer to myself for having been capable of this elegant and refined passion," and he tried hard to crush all thoughts of love and tenderness by writing about contingent remainders and executory devises; but speaking to papa Scarlett one day about opportunities of distinction, Scarlett remarked that a man need not complain of the want of opportunities who does not avail himself of those he has. Campbell pondered the words—thought he found in them a hidden significance, and persevered with his suit. Soon he was again at Miss Scarlett's side, riding round the Regent's Park in white duck trousers, a buff waistcoat, and olive-coloured morning frock coat, or showing her the woolsack which he meant to occupy; and lo! anon he is the accepted lover, and in transports of delight, the prelude to a happy wedded life of forty years. It is pleasing to read of this love of Campbell

for his wife, for his children, and his home. It shines in every page of the memoirs; it redeems all the defects of his character. In his public and professional life Campbell may have been too much of a self-seeker—his contemporaries seem to have been rather unfair, and to have put the worst construction on all he did—but in all that related to the “charities at home” Campbell, like Othello, was of a “constant, noble, loving nature.”

“The season being over,” he says, “I forgot all the mortifications in a delightful tour with my wife and two eldest daughters. We crossed over to Antwerp and proceeded by Liege and Aix la Chapelle to Cologne. The rapture of the girls when they first beheld the broad and rapid Rhine of which they had read and heard so much, and the sweet kisses they bestowed upon me for showing them such delightful scenery, gave me more true pleasure than I could have derived from official station, however eminent.” He was now not only the leader of the Oxford Circuit, working “like a galley slave” at his profession, but a potent voice in Parliament. To be a judge, to wear a red gown, and to be trumpeted into an assize town was not the way his ambition soared. “I should have no particle of pleasure in being stared at and called my Lord”—he refused a judgeship, indeed, more than once—“what I should like, above all things, would be to be in the House of Commons and to bring in Bills for the improvement of the law; and this he did, and rendered noble service to our law. We are familiar with the one small measure, Lord Campbell’s Act, associated with his name; but few realise that we owe to his learning, acuteness, and industry a whole catalogue of useful Acts—the Statute of Limitations (3 & 4 Will. 4, cc. 27 and 42), the Fines and Recoveries Act, the Dower Act, the Act for the Amendment of the Law of Inheritance, the Municipal Corporations Act, 1835, the Newspaper Libel Act, the Prisoners’ Counsel Act, the Obscene Publications Act, and many others. He amply earned—whatever detraction may say—the honours which were bestowed upon him, and they were great. To be successively Lord Chancellor of Ireland, Lord Chief Justice of England, and Lord High Chancellor, is an unrivalled judicial record. Greville calls the affair of the Irish Chancellorship “an outrageous job,” but Campbell knew nothing of Plunket’s enforced retirement, and magnanimously renounced his right to the pension of £4000, though doing so left him without a pro-

fession or a salary. It was during this period of comparative leisure that he wrote his celebrated "Lives of the Chancellors," following them up with the "Chief Justices."

His success as Lord Chief Justice was complete.

"Martin told me (says Greville) that he never heard anything better than the way in which Lord Campbell disposed of a variety of cases, motions for rules mostly, which were before him on Monday last. Baron Parke, too, who did not smile on the appointment, said he was doing very well. He is not popular, and he is wanting in taste and refinement, but he is an able lawyer"—a most able lawyer, though perhaps somewhat overbearing and irritable. Edwin James had on one occasion been trying to introduce irrelevant matter into a case. As he folded up his brief, after a long struggle with the Chief Justice, Serjeant Robinson heard him say, "I will retire, my Lord, and no longer trespass on your Lordship's impatience."

Fitzjames Stephen, then on the Midland Circuit, was "overpowered with admiration at Campbell's appearance. He was thickset as a navvy, as hard as nails, still full of vigour at the age of seventy-six, about the best Judge on the bench, and looking fit for ten or twelve years' more work."

Campbell, though a Scotchman, had a shrewd and poignant wit, and it makes his memoirs capital reading.

"I fired off a successful joke the last day of term. There was an ancient saying that there should be nothing but what is short the last day of term. On this occasion a barrister was arguing that a writ of error would not lie, and he said, 'My Lords, I maintain that the proper course would have been an *audita querela* (a laugh from the Bar). In spite of that laugh, my Lords, I do again assert that the proper course would have been an *audita querela* (redoubled laughter).' Chief Justice Campbell: 'Mr. C. remembers the rule that everything is to be short the last day of term (prodigious applause). There has always been a great disposition to laugh at the jests of the Chief Justice. I have several times sneered at this in my "Lives," but I have now the benefit of it.'"

"While I was sitting talking," says Mrs. Stowe in her Sunny Memories, "Lord Shaftesbury brought a gentleman and lady, whom he introduced as Lord Chief Justice Campbell and Lady Stratheden. Lord Campbell is a man of most dignified

and imposing personal presence. Tall, with a large frame, a fine high forehead, and strongly marked features. Naturally enough I did not suppose them to be husband and wife, and when I discovered that they were so, expressed a good deal of surprise at their difference of titles; to which she replied she did not wonder we Americans were sometimes puzzled among the number of titles."

Apropos of this, there is a story told of Chief Justice Cockburn, that he was in the habit of going down on Sundays to Richmond or elsewhere with a woman, and generally a different one, and the landlady of the inn he went to remembered that Sir A. Cockburn always brought Lady Cockburn with him, but that she never saw any woman who looked so different on different days. This gave rise to another story: When Lord Campbell went to some such place with Lady Stratheden (who had been raised to the peerage before her husband) the mistress of the house said Sir A. Cockburn always brought Lady Cockburn with him, but that the Chief Justice brought another lady, and not Lady Campbell.

Here is a glimpse of his life as Chief Justice:—

"I never rise in the morning to study, but get up to read the newspapers. By half-past eight we have prayers, and all breakfast together. Next I mount my horse to ride down to Westminster, through Kensington Gardens, Hyde Park, Constitution Hill, the Mall, or Birdcage Walk, my dear daughter usually accompanying me. I am the first in the judges' robing-room. In drop my lagging puisnes, and after a little friendly gossip we take our places on the bench. Here we sit from a few minutes past ten till about half-past four. I go to the House of Lords when it sits, continuing there till about six or seven, when their Lordships generally adjourn. I walk or ride home, and have a mutton chop, or some such repast ready for me, never taking above two glasses of wine. About eight the whole family meet at tea—a most delightful meal. I hate great dinners, although I am obliged to submit to them sometimes, both at home and abroad. In the evening I write judgments, or look into the Crown or Special papers for the following day, going to bed about one."

At seventy-nine (1859) he was made Chancellor. He held the office for two years, when he was found one Sunday morning

dead in his chair, from the bursting of one of the great arteries of the heart. The very day he died he had sat in court, and attended a Cabinet Council, dying, as he had lived, in harness.

His judgments as Lord Chief Justice will be found in the four last volumes of Queen's Bench Reports, the nine volumes of Ellis and Blackburn, and Ellis, Blackburn, and Ellis; his House of Lords speeches are in Clerk and Finnelly, and his criminal decisions in Bell and Dearsley's Crown Cases—a vast contribution to English law impossible to summarise. Among the most remarkable of the criminal cases that came before him was the trial of Palmer, the poisoner, and of Constance Kent.

Solicitors are so often employed as investors of money that it is well to remember the distinction drawn by Lord Campbell in *Harman v. Johnson* (2 E. & B. 61), that a solicitor receiving money for the purpose of investing it as soon as he can meet with a good security is not an act within the scope of his ordinary business, and therefore will not render a partner liable; if the money is deposited to be invested on a particular security it is different.

Humfreys v. Brogden (12 Q. B. 739) is a case of first-rate importance. In it Lord Campbell delivered a very learned judgment, declaring the well-known principle that at common law the owner of the surface is entitled to support from the subjacent strata, and may recover damages from the mine owner if he lets down the surface, however carefully he works.

In *Brass v. Maitland* (6 E. & B. 70) Lord Campbell held that there is an implied undertaking on the part of shippers of goods on board a general ship that they will not deliver to be carried on the voyage packages of a dangerous nature without notice. *Gott v. Gandy* (2 E. & B. 845) affirms a melancholy truth, that the landlord of premises, whatever be their state, is under no legal liability to repair on the request of his tenant.

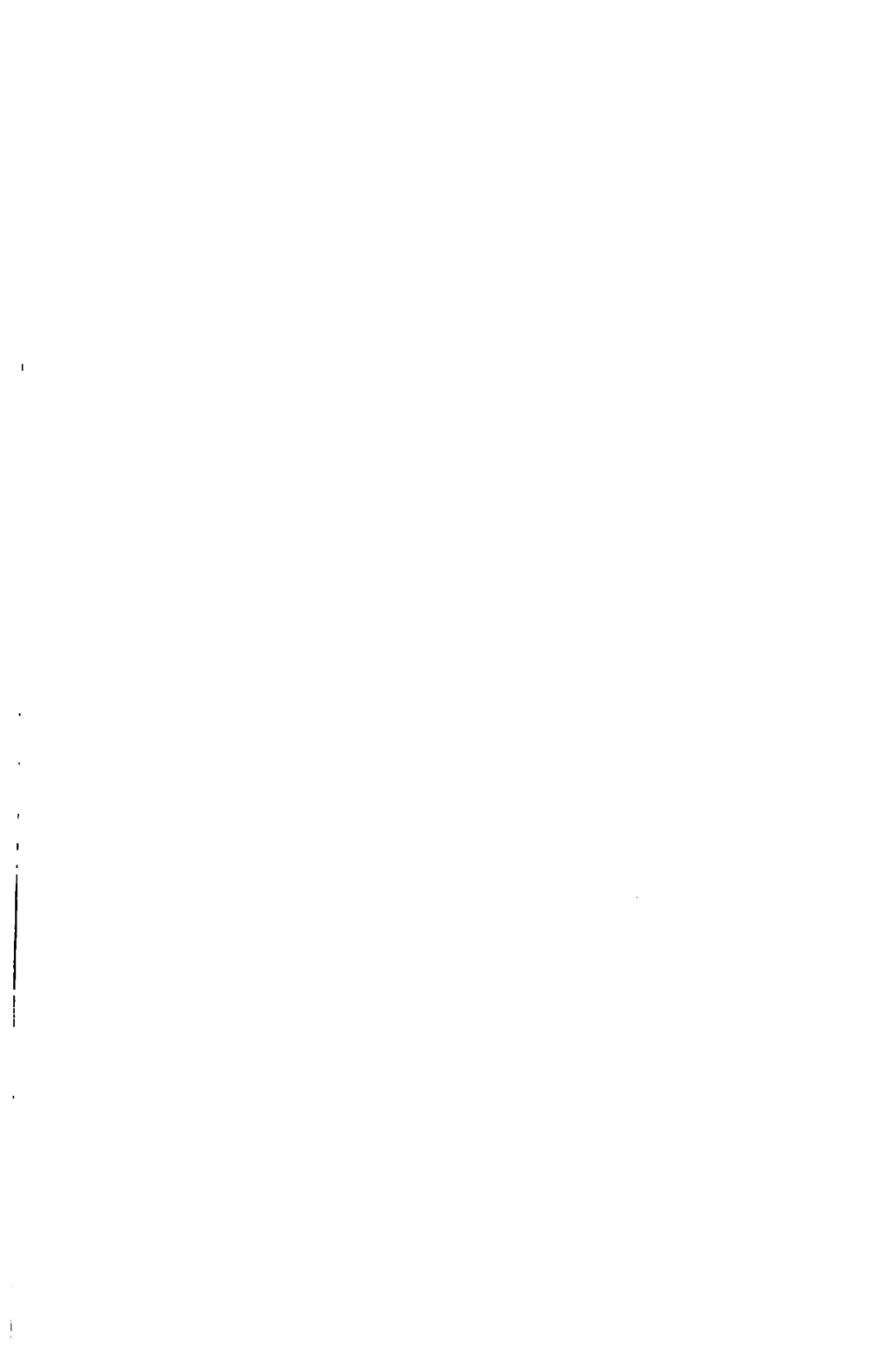
“So strong is the legal presumption of legitimacy, that if a white woman have a mulatto child, although the husband is white and the supposed paramour is black, the child is presumed legitimate if there were opportunities for intercourse.”

In *Levy v. Green* (8 E. & B. 575) certain crockery was ordered of a manufacturer, and the manufacturer sent a crate containing the crockery, together with other crockery which was not ordered. Was the vendee right in refusing acceptance? Lord Campbell and Mr. Justice Wightman thought so, though.

Justices Coleridge and Erle dissented. Campbell points out that, if the vendee in such a case silently takes the goods sent, he will be taken to have accepted the whole, and to be liable for the price; to avoid it, at least, he must write to the vendor, and the vendor has no right to cast such an obligation upon him. The point is a practical one, because shopkeepers are by no means unwilling to foist their goods on a customer in this way.

Dogs, strange to say, are not the subject of larceny at common law, because, according to the wisdom of Lord Hale, they do not serve for food. Stealing them is, however, now larceny by statute; but still in *Robinson's* case (Bell's Cr. Cas. 34) Lord Campbell held that a dog was not a chattel so as to render a person who obtained it by false pretences liable under 7 & 8 Vict. c. 29, s. 53.

It is a small point, but it is satisfactory to know that dominoes is not an unlawful game: (*Reg. v. Ashton*, 1 E. & B. 286).





MR. JUSTICE PATTESON.

MR. JUSTICE PATTESON.

BISHOP SELWYN mentions with some amusement how he was known at one time as the brother of Lord Justice Selwyn, and then as time went on how the Lord Justice came to be spoken of as "the Bishop's brother." Something like this has happened with Mr. Justice Patteson. The fame of his son, the noble-minded missionary bishop of Polynesia, has eclipsed or obscured that of the father. Yet Mr. Justice Patteson is one of those judges of whose "unsullied ermine" England is most justly proud. A great English jurist said of him that he never saw any man in whom the moral and intellectual qualities which go to form a perfect judge were combined in the same degree—high praise. This fine balance is what we want. Be temperate in all things and "*Incumbite remis*" summed up a wise man's advice to young men. Both were characteristic of Patteson. Actually and metaphorically he bent to the oar. Among "the sprightly race" of Eton, who, in Gray's words,

Delight to cleave
With pliant arm the glassy stream,
Or urge the flying ball,

Patteson was foremost. On and in the river, in the five court, and in the cricket field his fine physique, his quick and true eye made him unrivalled. We are accustomed to see athletes on the Bench or leaders of the Bar, and we have learnt to set a just value on such physical vigour. It means a presence which dignifies the law *coram populo*, and gives nerve in trying emergencies; it means, too, the *mens sana*, and what goes with it—good temper, patience, courtesy. All this Patteson had.

"Old Patteson" was his affectionate *soubriquet* among his schoolfellows. He thought he had been instrumental in getting a schoolfellow into trouble, and he sat up all night to do his imposition for him—the translation of Locke on the Human Understanding.

His master of the law, when he had once made up his mind for the Bar, was Littledale, one of the most learned, acute, and simple-minded of men—afterwards a member of the Court of King's Bench, at a time when, as Campbell said, that court presented the *beau ideal* of a court of justice. Deep learning often brings with it defects of over-subtlety or over-caution. We see it often now, but it was worse in those days of technicalities and special pleading. Littledale suffered from this complaint. In drawing, for instance, an indictment for murder which had been committed with a double-barrelled pistol, he spent many hours in endeavouring to invent some form of words by which to cover the possibility of the fact of the ball having issued from either barrel.

Papers had been left with him for an opinion, and remained with him for many months. When they were called for, Littledale intimated that he thought an action might possibly lie. The clerk thanked him and added, "The fact is, sir, that an action has already been brought, and judgment has been recovered." But you may learn a man's excellencies without his foibles, and Patteson did so in Littledale's chambers. One day a singular man entered the pupils' room for the first time, and presently announced to his companions that he had come there not only to qualify himself as a special pleader, but to study and elucidate the principles of law. The pupils smiled at his presumption, but, as Mr. Justice Patteson used to say, "We were wrong. He has really done what he proposed." The presumptuous pupil was John Austin.

One little circumstance speaks volumes for his assiduity. He had been engaged to his cousin, Miss Elizabeth Lee—his first wife—for four years. In 1818 he married her. He went into Norfolk on a Saturday, was married on Monday, reached town that night, and was in chambers as usual on Tuesday, sitting at the feet of his other mistress, the law. We should have preferred a little more romance, even in a lawyer. Perhaps the best monument of his learning and industry is the edition of Saunders, annotated by him and Vaughan Williams, commonly known as "The Pleadings' Bible." This method of bookmaking—notes upon notes—may not commend itself to our modern ideas, but the book is a rich mine of law. Of course he had his sensational episode. In *Rennell v. Bishop of Lincoln* (7 Barn. & Cress. 113) he maintained the proposition of law—which Sir Thomas More

might have used as a thesis to puzzle the wiseacres of Bruges instead of his "Averia capta in withernamia sunt irreplegibilia" —that when a prebendary having an advowson in right of his prebend dies while the church is vacant his personal representative has the right of presentation for that turn. At the close of Patteson's argument Mr. Justice Bayley threw down to the counsel from the bench a note in these terms:—"Dear P.—Per Chief Justice Tenterden: 'An admirable argument; shows him fit to be an early judge.'"

Tenterden's prediction was very soon verified. Within three years Patteson was raised to the Bench at the exceptionally early age of forty. He sat on the bench for over twenty-one years, under three chiefs, Tenterden, Denman, and Campbell. "I dined yesterday," says Campbell, "with my brother Patteson, to celebrate his entrance into the twenty-first year of his judgeship. He was appointed when I declined Lyndhurst's offer in 1830. We had a very jolly day, Lyndhurst himself being present, with six other judges whom he had made, and all excellent ones. I told him that his appointment of good judges would cover the multitude of sins. He said he had some thoughts of dying a Whig that I might deal mercifully with him, and asking me to drink wine with him, he declared that all enmities between us down to that moment were to be considered as buried and forgotten in the champagne. He has recovered his sight, and though he touches eighty he is as brisk as a bee."

Campbell, Patteson's last chief, said of him that "he never forgot anything," and two anecdotes are preserved by a writer in the *Law Magazine* illustrative of the retentiveness of his memory. Upon circuit one day a witness appeared in the box with a nose of remarkable length. Presently one of the junior barristers wrote down an excellent Greek epigram, which, having passed muster with the Bar as an original production, was handed up to the presiding judge, Mr. Justice Patteson. Unhappily for the young barrister, the judge had read not only the epigram in an old collection, but two translations of it into English. He at once wrote down the name of the collection and both the translations, and then, to the confusion of the pseudo author and the amusement of his legal friends, he handed the paper back. Of course the ambitious youth who had been convicted of this sharp practice was bantered not a little and felt somewhat confused. Recovering himself, however, he presently retorted,

"Why, none of you would have detected me had it not been for my Lord on the bench." Patteson was indeed an excellent scholar in an age of scholars, and would turn out a copy of witty and elegant Latin verse while he was waiting his turn to give judgment.

The other anecdote is this: At a public dinner at which the late Duke of Sussex presided, Mr. Justice Patteson sat on the left hand of the chairman and the Bishop of — on his right. The wine was of peculiar excellence, and *à propos* of its merits the Duke asked his right reverend friend upon his right in what part of the Bible it was said of wine that it "cheereth both God and man!" The Bishop, knowing probably that the Duke was not less celebrated for his love of good cheer than for the number and rarity of the editions of the Bible in his possession, somewhat timidly suggested that the passage to which his Royal Highness alluded was in the Book of Psalms, where the exact words are "wine that maketh glad the heart of man." "I have puzzled the Bishop," exclaimed his Royal Highness with infinite glee, and turning to his left-hand neighbour he put the question to him. The judge, however, with his usual accuracy of recollection, at once replied, "I think that the passage in question will be found in Jotham's parable." "By —!" exclaimed his Royal Highness, with a strength of asseveration worthy of the quarter-deck of other days, "the judge has beaten the Bishop." And presently, turning to Mr. Justice Patteson, he asked him how he happened to remember the quotation. "Your Royal Highness, no doubt, remembers," said the judge, with a humorous twinkle, "that the passage is to be found in the Book of Judges."

Mr. Gladstone recently told us that when someone condoled with the late Sir Andrew Clark on the approaching end of his vacation, the distinguished physician warmly replied, "Sir, I love my profession." Patteson loved his profession—the law; loved it so well that he was afraid he might like to go on sitting on the bench and solving delightful legal problems long after his increasing deafness made it expedient in the public interest that he should retire. So he exacted a promise from a friend that he would tell him directly he thought his want of hearing really unfitted him for sitting in court. The time came when it did, and Patteson thankfully accepted and acted on his friend's advice.

There have been many farewells by retiring judges, and much "moaning of the Bar" thereat; but it was more than the con-

ventional leave-taking—it was a deeply impressive scene—when Sir Alexander Cockburn, the then Attorney-General, rose to express, with an eloquence peculiarly his own, the deep and tender sentiments of esteem and veneration felt by all the members of the Profession for the aged Sir John; and no less affecting were the words in which the old judge asked pardon for what he thought his shortcomings. “I am aware,” he said, “that on some, and I fear too many occasions, I have given way to complaints and impatient expressions towards the Bar and the witnesses in court as if they were to blame, when in truth it was my own deficiency, and heartily sorry have I been and am for such want of control over myself. I have striven against its recurrence earnestly, though not always successfully.” He had no cause for such self-reproach, but, if he had, we may say, as Burke said of Johnson, “It is well for a man, sir, if, at the end of his life, he has nothing worse to look back on than a little roughness of manner.”

His home was Feniton Court, Honiton. “Patteson’s place,” said Denman, “is really magnificent, with a fine long avenue, and a charming undulation of ground.” He had lost his first wife, but in 1826 he married again, a most admirable woman, Frances Coleridge, niece of the poet, and sister of his brother judge and life-long friend, Sir John Taylor Coleridge. One day Selwyn, the Bishop of New Zealand, came on a visit to Feniton Court, and said to Lady Patteson, her little boy standing by, “Lady Patteson, will you give me Coley?” It was said, as such things are, hardly seriously, but it made a deep impression on the boy, and when, years after, the Bishop renewed his offer, young Coleridge Patteson felt that his call had come, and spoke his wishes to his father. We only mention the incident here because it throws a light on the fine character of the old judge. Sir John was startled, but at once said, “You have done quite right to speak to me and not to wait. It is my first impulse to say ‘No,’ but that would be very selfish.” Still the struggle was a hard one. “I can’t let him go.” “God forbid I should stop him.” To the Bishop he spoke of the great comfort he had in this son, cut off as he was by his infirmities from so much of society, and enjoying the young man’s coming in to talk about his work. “But there,” he added, “what right have I to stand in his way? How do I know that I may live another year?” And as the conversation ended, “Mind,” he said, “I give him wholly, not

with any thought of seeing him again. I will not have him thinking he must come home again to see me."

"Sir John Patteson," as Sir John Taylor Coleridge wrote, "has left few literary monuments to record what his intellectual powers were; even in our common profession the ordinary course and practice are so changed that I doubt whether many lawyers are familiar with his masterly judgments." The lament is true; but there are some changes over which we cannot drop a tear. Thus in *Reg. v. Bissett* (1 Cox C. C. 148) Mr. Justice Patteson held, as the law then stood, that, in setting out a former conviction in an indictment for uttering counterfeit coin, a variance in the name of one of the magistrates before whom the previous trial had been held was fatal. On the other hand, stating the day in the indictment to be "in the seventh year of our Sovereign Lady Victoria the Fourth" was held not fatal, "Fourth" being mere surplusage (*Reg. v. Bevis*, 1 Cox. C. C. 27)—it came, by the way, of using a William the Fourth form—curious and interesting points; but what we feel on reading such things is, that on subtleties like these life and liberty ought not to hang.

Ayre v. Craven (2 Ad. & Ell. 2) indicates an anomaly which still exists in our law—to wit, that an action does not lie for imputing adultery to a medical man because such imputation does not go to his professional skill; just as you may say of a lawyer he has no more wit than a jackanapes, but you must not say he has no more law than a jackanapes. In fact, we know that nothing could be more damaging to a doctor in his profession than such a charge. The inadequacy of this professional criterion was well illustrated in the recent case of *Alexander v. Jenkins* (66 L. T. Rep. N. S. 391; (1892) 1 Q. B. 79), where the imputation was one of drunkenness against a town councillor. Drunkenness, like licentiousness and swearing, was once admired as a gentlemanly failing, but it has quite ceased to be looked on in that light; and even in regard to swearing, we doubt whether there are many young ladies to-day to agree with the Scotch lassie who, while lamenting her brother's addiction to the habit, admitted that swearing was "a great set off to conversation."

Sutton v. Tatham (10 Ad. & Ell. 27) lays down a principle which has been recognised in many recent cases, that a person who employs a broker on the Stock Exchange gives him authority to act in accordance with the rules there established, though such principal may himself be ignorant of the rules. *Reg. v. Stewart*

(12 Ad. & Ell. 773) affirms the proposition, that every person dying in this country (and not within certain ecclesiastical prohibitions) is entitled to Christian burial. The subject of this leading case had died in a hospital. Her husband could not, and the hospital would not, bury her; there was no obligation on the overseers to do so under the Poor Law statutes of Elizabeth, so the Court had to discover the good old common law that, when a pauper dies in any parish house, or union, that circumstance casts on the union the duty to bury such pauper. By this same fine old common law there is an obligation on parishioners, of which all are not aware, to repair the body of the parish church, and this is not voluntary, but absolute and imperative: (*Burder v. Feley*, 12 Ad. & Ell. 233).

It was at one time supposed—and still is by a good many—that, if a person who is not a medical practitioner takes upon himself to prescribe for a patient, and the patient dies, the prescriber would be amenable to the law. But this is not so. If the prescriber does his best, but, owing to some unfortunate mistake, the patient dies, he is not any more amenable to the law than a regular practitioner. There must be gross rashness or want of caution, so Mr. Justice Patteson held in *Reg. v. Salmon* (unreported). This is too encouraging to the amateur doctor—worst form of all amateurism. When we find that the prisoner in the case in question had prescribed twenty of No. 1 of Morrison's Pills at night and twenty of No. 2 in the morning, we feel the jury could hardly do anything else but find him guilty, though they recommended him to mercy.

LORD WESTBURY.

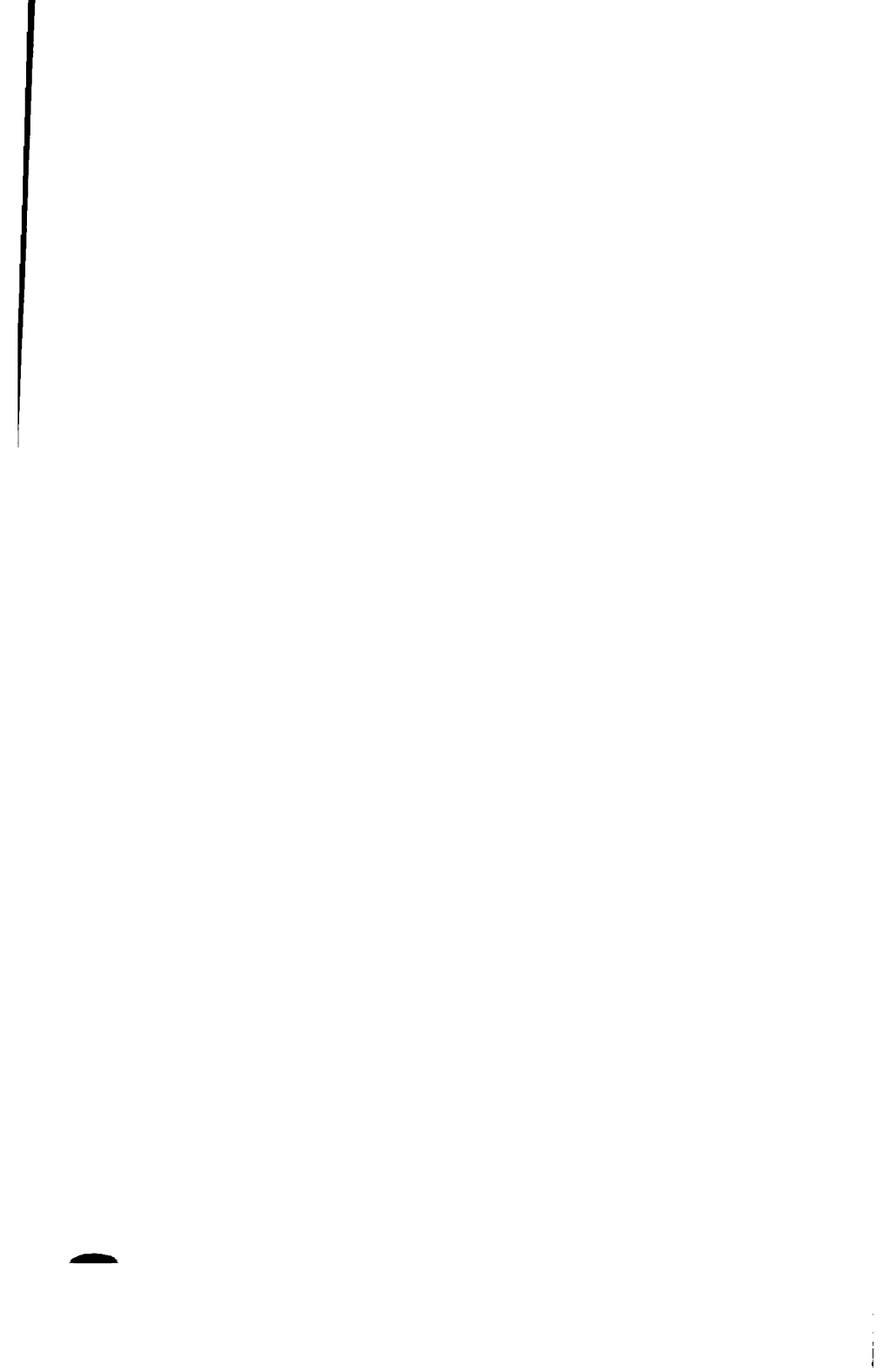
ONE day in October, 1814, a struggling country doctor, Dr. Bethell, of Bradford-on-Avon, took his son Richard, aged fourteen, to Oxford to Wadham College, and presented him to Dr. Tourney, the Warden, for matriculation. On seeing the small, eager-faced boy in his round jacket and frilled collar, Dr. Tourney turned to the father and remarked that children were not admitted to the college. "You will not find my son a child, sir, when he is examined; moreover, he has determined to win a scholarship for himself," was the reply. "What!" exclaimed the astonished Warden, "you will allow him to try for a scholarship at his age? Do you know that he will have to compete with young men of seventeen and eighteen? You must indeed think your son a prodigy?" "Sir, I do think him a prodigy," was the proud rejoinder.

Parents' estimates are not always to be trusted, but Dr. Bethell was not far wrong. The small boy in the "Toby" frill, if not a prodigy, had the stuff in him of which successful ambition is made, the energy and will which were destined to seat him on the woolsack. We guess little of what goes on in the youthful mind. Warren Hastings was only seven years old when, one bright summer day, lying on the bank of the rivulet which flows through the old domain of his house, he formed the resolution that he would recover the estate which had belonged to his fathers, that he would be Hastings of Daylesford. Chatterton, "the marvellous boy," was only a few years older when he planned the whole scheme of his famous literary forgeries. Bethell was a boy of this mettle. He was naturally ambitious, and the *res angustæ domi* helped to harden his resolution. He rose every morning at five winter and summer; he worked, as Mr. Gladstone once said of himself, "unmercifully"; he supported himself entirely from his seventeenth year; he got his first



LORD WESTBURY.

(From a photograph by Maul & Fox.)



—a brilliant one—at Oxford; he took pupils while reading for the Bar; he got to the Bar, and, once there, he showed that he was not to be put down. He had “the unconquerable will,” and not too thin a skin with it. Once, at the outset of his professional career, he had to draw exceptions to an answer under the old system of equity pleadings. He had never seen any exceptions before, so he drew them by the light of nature, and went before the master to support them. The master, on perusing the exceptions, observed that he had never seen any in that form before. “Most probably not, sir,” rejoined Bethell, “but I will defy my learned friend or anyone else to indicate any particular in which these exceptions fail to attain the object for which exceptions are designed.” Another man in his place would probably have stood abashed, confounded. Not so Bethell. It was the same in court. He carried everything—this new fledged junior—with a high hand and a calm assurance, which flabbergasted the old-fashioned practitioners. “A young man,” he said in after life, “must not be too sensitive. I had, when a young man, often disagreeable observations made to me by judges, but I always treated them with the most perfect indifference and contempt.” He never quite knew, he said, how his success came about, but, he believed, it was due to his self-confidence in difficulties and his painstaking industry. When he gave an opinion, too, he gave it confidently. “He was paid,” he said, “for his opinions, not his doubts.” Boldness, as Bacon remarks, is a child of ignorance and baseness, but it nevertheless fascinates mankind, and in Bethell it was backed up by first-rate ability. Bent as he was on getting on, it would be unfair to regard him as an incarnation of self-seeking ambition. “When I was made Lord Chancellor,” he said to Lord Palmerston, “I may truly say the chief feeling that rose in my mind was not that of pride or gratified vanity, but of sincere gratitude that I had lived to fulfil the predictions and fond hopes of my father, to whom I owed all my education and all the means that had enabled me to fulfil what, when they were first formed, were but wild anticipations.” What slight things turn the wheel of fortune. At his *viva voce* examination in the final school at Oxford, Bethell had been put on at a difficult ode of Pindar, which he rendered with admirable grace and spirit. The examiner was Dr. Gilbert, of Brasenose, and so impressed was he with Bethell’s ability that when some years afterwards Brase-

nose College got involved in a lawsuit about a matter of the utmost moment to the College revenues—some £700 a year—he insisted on Bethell being retained. A compromise had been suggested, but Bethell would not hear of it. He fought the case before Sir John Leach and the House of Lords and won it. He won, too, the eternal gratitude of the College, and he trebled his practice. He soon had as much, or more than he could do, and, in course of time, as leader of the Chancery Bar, was making for several years the almost unprecedented income of £24,000, an intoxicating success. What with his masterfulness, his knowledge of law and skill in advocacy—Baron Parke said he was the finest advocate he ever listened to—it is not to be wondered at that he acquired a rather too marked ascendancy over easy, good-natured Vice-Chancellor Shadwell. The riddle went the round of the courts, “Why is Shadwell like King Jeroboam?” “Because he has set up an idol in Bethell.” There is a subtle magic—Bacon rightly calls it a “fascination”—in an overweening belief by a man in his own powers, and a corresponding contempt, too often ill-disguised, for others, like that of Bethell’s. A judge once appealed to him to be addressed at least as “a vertebrate animal.”

There were certain days in the Court of Appeal on which only motions of course—that is, matters of a *quasi* formal character which are unopposed—were taken. On one of such days, so Serjeant Robinson relates, Bethell moved for the re-hearing of a case which had been tried before a judge whose decisions were not unfrequently reversed. “But I thought, Sir Richard,” interrupted the Chancellor, “that we only took to-day motions of course?” “This, my Lord, is a motion of course, or, at all events, equivalent to it; it is a judgment of Vice-Chancellor —.” On another occasion he had finished an elaborate address just before the court rose for the mid-day adjournment. His junior, who would in the ordinary course follow on the same side after lunch, observed, “Mr. Attorney, you have evidently made a strong impression on the court.” “I think so, too,” said Bethell, “don’t disturb it.”

When he was arguing a case as counsel and the judge pointed out that he had repeated himself, he adroitly rejoined, “Quite true, my Lord, but it is by the continual dripping of water upon a stone that an impression is made.”

“What fools those judges are,” he once ejaculated, and it

would seem he was as contemptuous of his brethren's physique as of their intellect. He complained to Lord Palmerston of the difficulty of finding men physically strong enough for the Bench. "There used to be lawyers," he added, "who could stand anything, but the race seems wearing out." When Coleridge, the poet, was hissed while lecturing as a revolutionary at Bristol in his young days, he exclaimed, "What can you expect when the cool waters of reason come in contact with red-hot Toryism but—a hiss." Bethell was as ready at repartee. At a meeting of his constituents at Aylesbury, he was defending the consistency of his political conduct with legal astuteness—he had rather a mincing or finicking voice—when an old fox-hunting squire shouted in a stentorian voice, from the further end of the room, "Speak up!" "I should have thought," replied Bethel, in his quiet tone, "that the honourable gentleman's ears were long enough to catch my articulate utterances even at that distance." (a) It must be confessed, however, that some of Bethell's *bon mots* and epigrams verge on rudeness. He was, as Sir Laurence Peel said, a man of wit, and a witty tongue often wags and offends when there is no malice in the heart. Lord Derby once described him when in Parliament as "standing up, and for upwards of an hour pouring upon the head of a political opponent a continuous stream of vitriolic acid." With a gift like this of sarcasm and invective, he was naturally an invaluable party man. He ranged himself with the Liberals, but he had odd traits of Conservatism about him. Speaking of primogeniture, for instance, he said, "I do not know anything that is more important to preserve in this country than the great rule by which the landed property of the father passes to his eldest son." But it was to the cause of law reform that his heart and all his energies were given. "I shall go down to posterity," said Napoleon, "with the Code in my hand." Lord Westbury thought that he would go down to posterity with the Land Registry Act in his hand. "If there is one measure," he said, "on which I can put my finger with the hope of being hereafter remembered, it will undoubtedly be this

(a) When a solicitor handed him—then Sir Richard Bethell—a case in which he had advised years before in a sense directly opposed to the line he was now taking, his only remark was: "It is a matter of astonishment to me that anyone capable of penning such an opinion should have risen to the eminence I have the honour to enjoy."

Bill, when its utility and the relief which it is calculated to give to owners of landed property shall have been fully developed."

Malignant fate sat by and smiled.

We know what has befallen the Land Registry Act. But, if he failed to solve a problem which has baffled three of our ablest Chancellors, the Divorce Act, the Succession Duty Act, the Fraudulent Trustees Act, and the Bankruptcy Act, 1861, are all monuments to his zeal and industry. No less honourable were his efforts in the cause of statute law revision, and of legal education. He dwelt especially on the importance of the study of the civil law. "F——" (thus to a young friend), "read the Pandects; not only read the Pandects; absorb them."

His remarks in vacating the presidency of the Juridical Society in 1859 are worth reproducing: "Let each of you," he said, "call back to his mind how these matters stood in your time—what you were called on to do. The students went untrained, unformed, uneducated into the chambers of a special pleader or a conveyancer. What was the repulsive occupation there! Drudgery, the meaning of which it was impossible for him to understand. After following it for some time, certain practical modes of procedure, certain habits of thought, and the knowledge of a few established cases formed the staple of what was done. If the chambers were those of a conveyancer, a great book was brought down, and the unfortunate alumnus compelled to copy it from week to week until his very gorge rose at the task. If there were a proper course of education provided for the students, and the necessity imposed on them to attend, many a young man would be rescued from the snares of the metropolis, and his time would not be frittered away, and the number of good lawyers and legislators would be indefinitely increased."

It was a keen disappointment when, on Lord Chelmsford's retirement, Campbell was made Chancellor. It is amusing to witness this new comedy of "The Rivals." "Bethell," says Campbell, "hardly attempts to disguise his eagerness to clutch the Great Seal." "Personally," says Bethell, speaking to Palmerston, "I am utterly indifferent about the Great Seal, but I am bound to support the claims of the Equity Bar." This *nolo episcopari* in anybody else would, we fancy, have called forth some scathing satire from Bethell. But, on Campbell's death and his own elevation to the woolsack, he had his revenge, and much he

relished reversing his rival's decisions, adding, as he did so, that all the case required was the knowledge of a few *elementary* rules of law. In person Bethell was slightly below middle height, with a massive, well-shaped head, dandified in his youth, and with a drawing affectation of speech, but no way wanting in manliness. He was a capital oar and a crack shot, though there are legends of his having bagged a beater or a keeper occasionally. In sport, not any more than in business, did he "suffer fools gladly," as the following anecdote of his biographer, Nash, illustrates :

A Greek nobleman, Count M., an old friend of his, used to shoot sometimes at Hackwood. The Count, besides being a very bad shot, was wont to fire in a wild and dangerous manner, and Lord Westbury delighted in "wiping his eye." One day the Count, after missing every shot he had, severely peppered one of the dogs, and then twice claimed for himself birds which had dropped to his host's gun. He capped this performance a few minutes later by nearly settling the whole line of shooters, keepers, and beaters in a turnip-field, his previous misdeeds and the wiggings he got for them having made him completely lose his head. This was too much for Lord Westbury. He at once ordered a keeper to take from the excited and protesting Count his gun and cartridges, and sent the offending sportsman home to the ladies, to the great amusement and relief of the rest of the party. The incident vividly recalls a celebrated occasion, on which Mr. Pickwick administered similar summary justice to the unfortunate Winkle.

Another anecdote illustrates his presence of mind. He was being driven in his carriage when the horses bolted. "I can't hold them, sir," said the coachman, turning to Lord Westbury, "what shall I do?" The instinct of the lawyer did not desert Lord Westbury. "Drive into something cheap," he replied coolly.

One of the most amusing incidents of his Chancellorship was his passage of arms with the whole bench of Bishops. It arose out of the well-known "Essays and Reviews." The Upper House of Convocation had pronounced what was called a "synodical judgment" on the book, as containing heretical teachings, and Lord Houghton, in the House of Lords, put a question as to the jurisdiction of Convocation in the matter. The opportunity was too tempting for Lord Westbury. In a vein of contemptuous sarcasm, of mingled ridicule and reprobation—the then Bishop

of Oxford, Wilberforce, called it "ribaldry"—he lectured the bishops severely upon the impropriety and illegality of their proceeding. "I am afraid," he said, "my noble friend, Lord Houghton, has not considered what the pains and penalties of a *premunire* are, or his gentle heart would have melted at the prospect. The most reverend Primate and the bishops would have to appear at this Bar, not in the solemn state in which we see them here, but as penitents in sackcloth and ashes. And what would be the sentence? I observe that the most reverend Primate gave two votes, his original vote and a casting vote. I will take the measure of his sentence from the sentence passed by a bishop on one of these authors—a year's deprivation of his benefice. For two years, therefore, the most reverend Primate might be condemned to have all the revenues of his high position sequestrated. I have not ventured—I say it seriously—I have not ventured to present this question to Her Majesty's Government, for, my Lords, only imagine what a temptation it would be for my Right Hon. friend the Chancellor of the Exchequer to spread his net and in one haul take in £30,000 from the highest dignitary, not to speak of the *οἱ πολλοί*, the bishops, deacons, archdeacons, canons, vicars, all included in one common crime, all subject to one common penalty." Then he turned to the judgment: "The most reverend Prelate has not favoured me with a copy of the judgment, and therefore I have been obliged to have recourse to the ordinary sources of information. But, assuming that the report of the judgment which I have read is a correct one, I am happy to tell your Lordships that what is called a synodical judgment is a well lubricated set of words, a sentence so oily and saponaceous that no one can grasp it. Like an eel it slips through your fingers. It is simply nothing, and I am glad to tell my noble friend (Lord Houghton) that it is literally no sentence at all . . . *solvuntur risu tabulae*," and he went on to warn those who did not approve, whenever there was any attempt to carry Convocation beyond its proper limits, that their best security would be, after protesting, "to gather up their garments and flee, and, remembering the pillar of salt, not to cast a look behind."

In 1865, after four years of office, Lord Westbury felt himself called upon to resign, owing to some scandals connected with the dispensing of his patronage. As to this it is sufficient to say that the scandal was caused by a culpable laxity of administration, but

there was nothing which reflected in the slightest degree on the personal honour of the Chancellor. After his retirement he rendered valuable judicial service in the Privy Council, but he was at his best as arbitrator in the winding-up of "The European," a Herculean task, involving innumerable difficult and intricate questions, especially of novation.

Lord Westbury once expressed a wish that there was no case law. Lord Campbell, on the other hand, much preferred judge made law—and with good reason—to what he calls the "crude enactments of the Legislature." Lord Westbury's decisions are perhaps the best refutation of his own theory.

Perhaps the most frequently cited of these decisions is that of *Holroyd v. Marshall* (10 H. L. Cas. 191, 210). It laid down the important principle that an assignment of future property for value operates in equity by way of agreement, binding the conscience of the assignor, and so binding the property from the moment when the contract becomes capable of being performed, on the principle that equity considers as done that which ought to be done. In another oft-quoted case, *St. Helens Smelting Company v. Tipping* (11 H. L. Cas. 642), he drew the important distinction between nuisance producing injury to property and nuisance producing mere personal discomfort, as that of a philosopher who goes to live in a noisy town. In *Roberts v. Brett* (11 H. L. Cas. 337) he explains that what is or is not a condition precedent depends not on merely technical words, but on the plain intention of the parties to be deduced from the whole instrument. *Enohin v. Wylie* (10 H. L. Cas. 1) is, and will always be, a leading case on domicile, deciding as it does that the administration of the personal estate of a deceased, the question of his testacy or intestacy, and the construction of his will belong to the court of the country where the deceased was domiciled at the date of his death; but *Enohin v. Wylie* must now be read with *Ewing v. Orr Ewing* (50 L. T. Rep. N. S. 401; 9 App. Cas. 34) and *Eames v. Hacon* (45 L. T. Rep. N. S. 196; 18 Ch. Div. 347). *Backhouse v. Bonomi* (9 H. L. Cas. 503) decides that the right of a person to the support of the land immediately around his house is not an easement, but the ordinary right of enjoying property. *New Brunswick and Canada Railway Company v. Conybeare* (9 H. L. Cas. 711) affirms a principle often since invoked, that a company cannot keep pro-

perty which it has acquired through the false representations of its agents.

Lord Westbury delivered the judgment of the Privy Council in the "Essays and Reviews" case (*Bishop of Salisbury v. Wilson*, 2 Moore P. C. 375), exonerating Dr. Williams from the charge of heresy preferred against him. The irony of the situation—of Lord Westbury expounding articles of faith—is amusing. A wag said that he had by the judgment taken away from orthodox churchmen "their last hope of eternal damnation."





LORD CHIEF JUSTICE COCKBURN

(From a photograph by the London Stereoscopic Company.)

CHIEF JUSTICE COCKBURN.

CROKER, in his Diary, relates how a young friend of his was going on a visit to Sir Robert (then Mr.) Peel, at Maresfield. On his way in a gig he heard from an innkeeper that the statesman had posted up to town that morning, so he turned back to London. Knocking at Peel's door, with Croker, it was opened by a servant who it seems did not know his person (all the old servants were in the country). To the inquiry whether Mr. Peel was at home the man replied that he was out of town. "Oh, no," said the visitor, "I know he came to town this morning." This altered the porter's note, who in a most respectful whisper asked, "Sir, are you the Lord Chancellor?" "Why, no—not yet," said the visitor, "but I hope to be soon." "Oh, sir, in that case my master has desired that you should be admitted." And admitted he was, to the great astonishment of Peel and the great amusement of Croker. The young visitor was Mr. Alexander Cockburn, then aged twenty-six. "Coming events cast their shadows before." Cockburn was one predestined to greatness:

Discernment, eloquence, and grace,
Proclaimed him born to sway
The balance in the highest place,
And bear the palm away.

"*Entre nous*," said young Disraeli to his sister, after hearing all the most distinguished speakers of the House of Commons, "*entre nous*, I could floor them all." Cockburn was not conceited enough to say the same, whatever he felt, but he had a just confidence in his powers, as the following anecdote by Mr. C. Underwood shows: "I was articled," writes Mr. C. Underwood, "in 1838 to a solicitor who lived and carried on his profession in Ely-place, Holborn, and who was intimate with Mr. Cockburn, then practising before the Election Committees in the House of Commons. In the early days of my articles Mr. Cockburn was

dining in Ely-place, I being present, and, addressing his host, he said, 'I have been offered a judgeship in India with £2000.' His host, who knew he was then heavily weighted with debts which he had incurred at college, congratulated him, and said, 'When are you going?' He replied, 'I have declined the offer; I am going in for something better than that.' Nevertheless, he was not like Disraeli, Campbell, or Bethell, consumed with ambition.

He was in youth a man of gaiety and gallantry; he wandered along "the primrose paths of dalliance," loitered on "the lower slopes" before he set himself to climb the toilsome ascent "where Fame's proud torch shines afar."

Though fairly successful at the Devonshire Sessions, so doubtful was he of his success in London that he took no trouble even to keep his chambers open until at the persuasion of a friend he consented to employ a boy to remain at his chambers between ten and six. But powers of advocacy like his could not long remain hid. "Even when a junior," says Lord Selborne, "upon the Western Circuit, the reports which came up from the Assizes to the London Press described the eloquence of his addresses to juries in terms so unusual as to produce among those who were strangers to him the impression that he must have a puffer among the reporters."

His opportunity came with *McNaghten's* case (10 Cl. & Fin. 200). This case caused a great sensation, because the bullet which killed Drummond, Sir Robert Peel's private secretary, was believed to have been intended for the Minister himself. Cockburn was retained for the defence, and the *Morning Chronicle* devoted ten columns to his eloquent harangue. *McNaghten's* case, apart from its sensational character, settled the law once and for all as to the criminal responsibility of lunatics.

The Running Rein fraud was another case which gained him great celebrity—the case already mentioned in connection with Baron Alderson, in which a four-year-old was palmed off as a three-year-old, and won the Derby.

It was while Cockburn was thus making for himself a high reputation at the Bar that a Jewish gentleman, with the inappropriate name of Don Pacifico, nearly brought about a European war. He was a British subject resident at Athens, and in an anti-Semitic outbreak his house was wrecked by a mob in which Greek soldiers and gendarmes were conspicuous. Compensation was demanded and refused, and Lord Palmerston sent the British

fleet to the Piræus and seized all the Greek vessels he could find. Lord Stanley and others thought it was a case of Great Britain bullying a small power, and moved a vote of censure in the Lords which was carried. The Government replied by getting Roebuck to move a vote of confidence in the Commons. It was on this occasion that Palmerston made his memorable defence of his foreign policy. His speech lasted for five hours, and in a fine peroration which has become historical, he asked the House of Commons to decide by its verdict "whether, as the Roman in days of old held himself free from indignity when he could say 'I am a Roman citizen,' so also a British subject, in whatever land he may be, shall feel confident that the watchful eye and the strong arm of England will protect him against injustice and wrong."

"Of the many fine speeches made during this brilliant debate we must," says Mr. McCarthy in his "History of our own Times," "notice one in particular. It was that of Mr. Cockburn, then member for Southampton. Never in our time has a reputation been more suddenly, completely, and deservedly made than Mr. Cockburn won by his brilliant display of ingenious argument and stirring words. The manner of the speaker lent additional effect to his clever and captivating eloquence. He had a clear, sweet, penetrating voice, a fluency that seemed so easy as to make listeners sometimes fancy that it ought to cost no effort, and a grace of gesture such as, it must be owned, the courts of law where he had had his training do not often teach. Mr. Cockburn defended the policy of Palmerston with an effect only inferior to that produced by Palmerston's own speech, and with a rhetorical grace and finish to which Palmerston made no pretension. Mr. Cockburn's career was safe from that hour. It is needless to say that he well upheld in after years the reputation he won in a night. The brilliant and sudden success of the member for Southampton was but the fitting prelude to the abiding distinction won by the Lord Chief Justice of England."

As an advocate he was only second to Erskine, and much surpassed Erskine as a Parliamentary orator. One who had heard Samuel Wilberforce, Bishop of Oxford, speak, said, "He rose up a pigmy and sat down a giant." It was the same with Cockburn. Though small in person, he did not look so, so dignified was his demeanour, so striking the intellectuality of his countenance.

"Cockburn," writes Greville in his diary, alluding to the Don

Pacifico debate, "made a slashing speech, which will probably procure for him the post of Solicitor-General." He was right. On Jervis's appointment, a few months later, as Chief Justice of the Common Pleas, Cockburn became Solicitor-General, and shortly afterwards Attorney-General. It was while he was Attorney-General that he conducted the prosecution in the Palmer poisoning case.

He told a friend, says a writer in the *World*, how, as Attorney-General, he read the notes of the case, and of the earlier examinations, and became convinced not merely of Palmer's guilt, but of the manner in which his crime was carried out. He told him how he worked night and day in studying the effects of various poisons, and finally submitted himself to an examination by friendly experts to prove to himself that he had mastered the subject. He told, too, how, having been called away by his duties as Attorney-General to Westminster, he returned to the Old Bailey as Lord Campbell was summing up, and, looking down from a gallery into the court, "I knew," said he, "by the look of John Campbell's face, that Palmer was a dead man." It was in connection with the Palmer trial that he told the same writer he experienced what he considered the greatest compliment ever paid to him. Palmer was in the habit, as he stood in the dock, of writing instructions or suggestions to his attorney, Mr. Smith, screwing them up into little pellets and tossing them over to their destination. One of these, which he wrote immediately after the verdict of guilty had been pronounced by the jury, was afterwards handed to Sir Alexander Cockburn. It merely contained these words, "It's the riding that has done it," conveying thereby, in sporting metaphor which Palmer was constantly using, the prisoner's opinion that it was solely due to the Attorney-General's conduct of the case that the verdict against him had been obtained.

There are many men for whom the life of an advocate possesses far more charms than the Bench, to whom the Bench is as dull after the Bar as the House of Lords is to one who has been accustomed to cheer on the fierce debate in the House of Commons. Cockburn was one of these, and when on the death of Chief Justice Jervis he became entitled to repose on what Coke calls the cushion of the Common Pleas, he was much averse to taking it, but everyone pressed him to accept, and he yielded.

"He gives up," as Greville says, "Parliament for which he is

well adapted, where he acts a conspicuous part, being a capital speaker, and which he likes and feels is his element. He gives up the highest place at the Bar, where he is a successful advocate and makes £15,000 or £16,000 a year, and he sees that he shall be obliged to give up in a great measure his loose habits and assume more decorous behaviour, which will be a great sacrifice to him, and he becomes a judge with £6000 a year for life, not being a good lawyer and conscious that he will be inferior to his colleagues, and to the puisne judges in his own court."

But the dignified repose of the Bench had also its compensatory charms for a nature like Cockburn's, and he adapted himself with characteristic versatility to his new position. He studied decorum, and, as the landlady at Richmond said, he always brought *Lady* Cockburn with him when he drove down to dine, though she never, she added, saw any lady who looked so different on different days. He was not a learned lawyer when he was raised to the Bench—not a Parke or a Patteson. He was—as Lord Selborne said—splendid rather than learned or profound. But he soon became a judge of the first rank. It was jestingly said that he acquired his great legal knowledge by sitting on the bench with Mr. Justice Blackburn; but in truth he had a transcendent genius which would have enabled him to master anything on which he set his mind. He might have been a great writer, as his articles in the *Contemporary Review* on the History of the Chase and his Letters of Junius testify. He might have been a great scientist. He chose to be a great judge and a great jurist, and to leave as the record of a life's labour his Award on the Alabama Claims, his Essay on Nationality, his weighty and luminous judgments and charges. From being a vehement advocate he became a most calm, temperate, and dispassionate judge. No one was more ready to admit unfounded prepossessions. No one could show more amiability and kindness to juniors. No one could better maintain the dignity of his court. He was said, and said truly, to be the best bred man on the Bench, and his courtesy was not assumed; it came of his good birth and high breeding—all his life he had moved in the best society—and partly perhaps he owed it, like his wit and eloquence, to his French mother, a daughter of the Vicomte de Vignier. However derived, it invested him with a peculiar charm. It was at Nisi Prius that he shone more especially. There his grace of manner, his refined and eloquent diction, his lucid and orderly intellect, his knowledge

of the world, and his convincing way of putting the facts in their true light, combined to render him an ideal judge. A lady once said, "I don't know how it is, but I always seem to understand Sir Alexander Cockburn's cases; he makes them so clear to me." He had the intellect of a Mansfield with the dignity of a Denman.^(a)

One foible he had. "Chief Justice Cockburn," said Lord Bramwell, "liked a page of the Times daily devoted to him and his performances, and he picked out of the general list cases which would afford him that gratification." This will account for the number of *causes célèbres* which came before him. In private life he was a most accomplished man—a musician, a linguist, an admirable host, an excellent raconteur. He told his stories quietly, but with much dramatic power in a voice, the musical qualities of which, says a friend, I never heard equalled, and possessed that rare quality in a clever man—the faculty of listening. He was, perhaps, seen at his best when, most of his guests having gone, he would adjourn with two or three to his library, and, over his cigar, would pour forth his reminiscences of personal history in which he, during his long and splendid career, had played a distinguished part. "I see him now," says Mr. Percy Fitzgerald, "with his pippin-like face, strained eyes, and high stock, his thin form arrayed in clothes of a somewhat old-fashioned cut. He could be most agreeable, and had what are called 'easy manners' to perfection. There was a finished style about him which I think is lost at the present moment when everything is rather brusque, and when it seems to me people go straight to what they want without any intervening graces or delicacies. I occasionally encountered the Chief Justice of an afternoon at the house of some attractive dame, whom he had enrolled among his favourites, and though he must have been not overpleased to find an intrusive third person present, I admired his tranquil good humour and accessibility, even though he were outstayed. This kind of man is rare. What would best describe his charm is the word 'finish.'" His favourite amusement was cruising in his yacht the *Zouave*. He was a shot, but an indifferent one.

(a) The Chief Justice did not much relish the changes wrought by the Judicature Acts—especially his title of "President." He humorously complained that an aged charwoman, whose duty it was to light the fires in the judges' rooms, had been carried off by the Treasury in her declining years to undergo a Civil Service examination.

"One day when there was a 'shoot' in Lord Westbury's home coverts," as Nash relates, "Sir A. Cockburn was of the party. The wood culminated in a steep 'sidling,' upon which two guns were posted to stop the game going forward, while Lord Westbury and the Chief Justice remained below with the beaters. The pheasants kept on rising at the top of the 'sidling' near the upper guns, rocketing back high above the sportsmen in the lower ride. The Chief Justice, who was an indifferent shot, and much preferred the luncheon, with its opportunities for some racy story-telling, to the sport, did not notice any of the birds until one of the upper guns dropped a cock pheasant, which came crashing down through the trees, narrowly missing Sir Alexander's head. Greatly startled, and supposing himself to be in peril, he called out, 'Fire high! hullo, there, fire high!' in a state of some excitement. Whereupon Lord Westbury said, 'Don't you be alarmed, Chief Justice, you are quite safe. You are not as near heaven as that bird was when it was shot, and I am sadly afraid, after those sultry stories of yours, that you never will be.'"

On November 18th and 19th he sat to try special jury cases; on the 20th he presided with all his usual brilliancy in the Court of Crown Cases Reserved, walked home to his house, 40, Hertford-street, Mayfair, dined, was seized with an attack of angina pectoris near midnight, and died within a quarter of an hour. "I had been sitting with him in the Court of Appeal," says Lord Selborne, "a few days before, and he told me with great calmness that he was suffering from angina pectoris, the fatal nature of which he evidently knew. He looked so well and vigorous that I could not help hoping and saying that his physicians might be mistaken. But the event proved there was no mistake." "The long line of illustrious Chief Justices of England," as an eminent Queen's Counsel said, "had closed in fitting splendour."

Among the most important of Chief Justice Cockburn's civil cases is *Campbell v. Spottiswoode* (3 F. & F. 421). His direction to the jury in this case has always been considered the leading authority on the law of libel in reference to newspaper articles. It was an action against the printers of the *Saturday Review* for a characteristic article, "pungent, bitter, caustic," as the Chief Justice called it, commenting on a circular inviting subscriptions for mission work in China. "When," said the Chief Justice, "a writer in a newspaper or elsewhere commenting on public matters makes imputations on the character of individuals concerned in

them which are false and libellous as being beyond the limits of fair comment, it is no defence that he *bonâ fide* believed in the truth of those imputations." *Re Bahia and San Francisco Railway Company* (18 L. T. Rep. N. S. 467; L. Rep. 3 Q. B. 584) is another case often since cited on the doctrine of estoppel by certificate. It could not be better put than by him: "By giving the certificate the company practically armed the vendors with the means of holding themselves out as the holders of the shares." In *Sugden v. Lord St. Leonards* (34 L. T. Rep. N. S. 369; 1 P. Div. 154) he delivered an elaborate judgment on the law as to proving the contents of a lost will by secondary evidence. In *Reg. v. Keyn* (L. T. 2 Ex. Div. 63)—*The Franconia* case—he held that the Central Criminal Court had no right to try for manslaughter a foreigner who in command of a foreign ship passing within three miles of the English coast had run down a British ship and drowned a passenger—a conclusion of law which had to be met by the passing of the Territorial Waters Jurisdiction Act, 1878. The charge in *Reg. v. Brand*, arising out of the execution of Gordon, in Jamaica, under Governor Eyre, is a masterly disquisition on martial law, and has been published. His genius as an enlightened jurist is well illustrated in *Goodwin v. Roberts* (L. R. 10 Ex. 337), where he vindicated the principle that the "law merchant" is a living, growing branch of the law. The question was, how far modern custom was competent to attach negotiability to a mercantile document—scrip to bearer issued by Messrs. Rothschilds for the Russian Government. "The substance of Mr. Benjamin's argument," said the Chief Justice in giving judgment, "is that because the scrip does not correspond with any of the forms of the securities for money which have been hitherto held to be negotiable by the law merchant, and does not contain a direct promise to pay money but only a promise to give security for money, it is not a security to which by the law merchant the character of negotiability can attach.

"Having given the fullest consideration to this argument we are of opinion that it cannot prevail. It is founded on the view that the law merchant thus referred to is fixed and stereotyped, and incapable of being expanded and enlarged so as to meet the wants and requirements of trade in the varying circumstances of commerce. It is true that the law merchant is sometimes spoken of as a fixed body of law forming part of the common law and as it were coeval with it. But as a matter of legal history this view

is altogether incorrect. The law merchant thus spoken of with reference to bills of exchange and other negotiable securities, though forming part of the general body of the *lex mercatoria*, is of comparatively recent origin. It is neither more nor less than the usages of merchants and traders in the different departments of trade, ratified by the decisions of courts of law, which upon such usages being proved before them have adopted them as settled law with a view to the interests of trade and the public convenience. By this process what before was usage only, unsanctioned by legal decision, has become engrafted upon or incorporated into the common law and may thus be said to form part of it. It thus appears that all these instruments which are said to have derived their negotiability from the law merchant had their origin, and that at no very remote period, in mercantile usage and were adopted into the law by our Courts as being in conformity with the usages of trade; of which, if it were needed, a further confirmation might be found in the fact that according to the old form of declaring on bills of exchange the declaration always was founded on the custom of merchants. Usage adopted by the Courts having been thus the origin of the whole of the so-called law merchant as to negotiable securities, what is there to prevent our acting up to the principle acted upon by our predecessors and followed in the precedents they have left to us? Why is it to be said that a new usage which has sprung up under altered circumstances is to be less admissible than the usages of past times? Why is the door to be now shut to the admission and adoption of usage in a matter altogether of cognate character as though the law had been finally stereotyped and settled by some positive and peremptory enactment?"

Among the many trials of popular interest over which he presided may be mentioned that of *Saurin v. Starr*, by a sister of mercy against her lady superior for assault—a case which revealed the miserable inner life of the convent, its triviality, spite, and petty tyranny; the hideous Wainwright murder case; and, of course, the great Tichborne case. The summing up of the Lord Chief Justice in this memorable case, apart from his admirable conduct of the trial generally, is an unparalleled feat in judicial annals. It fills two volumes of 800 pages each, and reads like a romance. Not less memorable was the dignified rebuke which he administered to the prisoner's counsel. He spoke of "the torrent of invective," "of dirty foul slime" which had been poured forth

on everybody and the necessity for the court intervening. "And how were we met?" he went on. "By constant disrespect, by insult and obloquy, by covert allusions to Scroggs and Jeffreys—judges of infamous repute—as though, by the way, if the spirit of Scroggs' and Jeffreys' skill animated the Bench in the administration of justice, the learned counsel would not have been pretty quickly laid by the heels and put to silence."

The following is a sample of Dr. Kenealy's rhetoric: "The assumption," he said, "of a man's guilt has never been the law of England, and in my judgment it is the law of Hell itself to assert that people are guilty at the very outset of a trial." The Lord Chief Justice retorted: "Dr. Kenealy, that is a very improper remark. We have no cognisance here of the laws of the place you have mentioned, nor ought they to be cited in a court of justice." "If your Lordship takes upon yourself to prescribe what language a counsel shall use——" "I take upon myself to forbid language which, if not blasphemous, is certainly most improper."

At the banquet given by the Bar in 1864 to the great French advocate, M. Berryer, Lord Brougham was present, and in a fine speech declared that "The first great quality of an advocate is to reckon everything subordinate to the interests of his client." A few minutes later the Lord Chief Justice was replying to the toast of "The Judges of England." "Much as I admire," he said, "the great abilities of M. Berryer, to my mind, his crowning virtue—as it ought to be that of every advocate—is that he has throughout his career conducted his cases with untarnished honour. The arms which an advocate wields he ought to use as a warrior, not as an assassin. He ought to uphold the interests of his clients *per fas* and not *per nefas*. He ought to know how to reconcile the interests of his client with the eternal interests of truth and justice." Those words are the best epitaph which can be bestowed on Sir Alexander Cockburn.

MR. JUSTICE WIGHTMAN.

MATTHEW GREEN, in his charming little poem entitled "The Spleen," describes:

Law grown a forest, where perplex
The mazes, and the brambles vex
Where it's twelve verderers (a) every day
Are changing still the public way:
Yet, if we miss our path and err,
We grievous penalties incur,
And wanderers tire and tear their skin,
And then get out where they went in.

Of course, we have changed all that:

Ἡμεῖς τοὶ πατέρων μετ' ἀμειβόμενοι ἐλευαί.

But in the days of special pleadings, the description was, alas! too near the truth. In reading the old cases, the thought that strikes us is what a mere chance it is whether the real issues are ever reached, whether the parties ever penetrate to the Temple of Justice through the jungle of technicalities which have grown up around it. But, whatever the fate of litigants in those days, the system of special pleading fostered a fine race of lawyers, experts in legal swordsmanship:

They practised every pass and ward,
To thrust, to strike, to feint, to guard.

Kenyon and Ellenborough, and Parke and Patteson, and last, not least, Wightman, were all men trained in this school.

But merits must come first in any legal system which is to last, must come before even costs or practice or pleading; hence to-day the special pleader is as extinct as the apterix or the dodo. One last solitary survivor is embalmed in the Law List. In a sense this is regrettable. Special pleading was not a tempting vocation—a well-known practitioner said to a friend who was

(a) In Green's time the judges were only twelve in number.

meditating it for his son, "Can he eat sawdust without butter?"—but practising below the Bar had one advantage, it enabled a man to form a connection before he risked his fate at the Bar. A common-law barrister, so Lord Brougham once said, can only get on by special pleading, by sessions, or by a miracle. Special pleading, in other words, was safe, and as such Wightman, despite the want of butter to the sawdust, adopted it. He was thirty-seven before he ventured to be called to the Bar. When he was called, he had no sensational *début*, he made no eloquent speeches, he never tried to get into Parliament, he never even applied for a silk gown. He had that strange and rare quality of a lawyer, an invincible modesty. So far from courting what ambitious juniors covet—the being called on to lead a cause in the absence of their leader—he actually shunned such opportunities of *éclat*, so his colleague Sir John Coleridge said; albeit, Sir John adds, "he would have led with exquisite judgment." Of the two great leaders of his circuit—the Northern—he has left us an interesting anecdote.

After the breaking up of the court on the last day of a long Yorkshire Assize, he (Wightman) found himself walking in the crowd cheek by jowl with a countryman whom he had seen serving day after day on the jury. Liking the look of the man, he got into conversation with him, and, finding that this was his first attendance at the assizes, asked him what he thought of the leading counsel. "Well," was the reply, "that Lawyer Brougham be a wonderful man; he can talk, he can; but I don't think nowt of Lawyer Scarlett." "Indeed!" exclaimed Wightman, "you surprise me. Why, you have been giving him all the verdicts." "Oh! there's nothing in that," said the juror; "he be so lucky you see, he be always on the right side."

But if Wightman himself never figured as a Scarlett or a Brougham, he steadily built up for himself the reputation of a lawyer. He was junior counsel to the Treasury for ten or twelve years, he was appointed on the Commission for the amendment of the law in 1830, and again on the Commission of 1833 for digesting the criminal law. These were, of course, stepping-stones to the Bench, and when the learned Littledale retired from the Court of Queen's Bench in 1840 Wightman was chosen by Lord Cottenham to fill his place. Here he sat for three-and-twenty years, dispensing justice with all the learning of a Littledale, and with a greater knowledge of the world and more

promptitude of decision than Littledale; the trusted colleague of three successive chief justices—Denman, Campbell, and Cockburn.

When he sat alone at Nisi Prius, or on the trial of criminal cases, it was—so says Sir John Coleridge as quoted by Mr. Foss—“in a good sense, a great judicial display—always careful as to his appearance and dress, dignified without the slightest ostentation; very courteous, yet very firm; quiet, saying little, but that little very pointedly, in the course of the case; very attentive and losing nothing, disposing of points as they arose shortly and with ease and distinctness, presenting the question and the circumstances as they bore on it to the jury with the greatest precision, and inevitably making them feel entire confidence in his impartiality. The man who had a good cause, or the innocent prisoner, rejoiced that he had him for a judge, while he against whom the verdict passed felt, at least, the satisfaction that no favourable point had been overlooked or undervalued, nothing adverse exaggerated or unduly pressed.”

After this panegyric, this portraiture of the ideal judge, it is refreshing to find that Wightman had some human frailty, and that under the stress of an anxious case he would occasionally indulge—not indeed in outbursts—but in slight “outpourings of querulousness”; but such outpourings were “free from ill-temper,” and no one was afterwards more ready to smile at them than himself.

A rich vein of humour ran through all his conversation, quite untranslatable, but the more racy to professional hearers from its very commonly clothing itself in quaint professional diction.

“I remember,” says Ballantine, upon a trial at the Maidstone Assizes, “a very excellent and learned friend of mine, not, however, famed for his brevity, had been for some time enforcing his arguments before a Kentish jury. Mr. Justice Wightman interposing said: ‘Mr. —, you have stated that before.’ ‘Have I, my lord?’ said the barrister; ‘I’m very sorry, I quite forgot it.’ ‘Don’t apologise, Mr. —,’ was the answer; ‘it was a very long time ago.’”

A witness in the box on another occasion was describing a certain person, and said:

“He is forty or forty-five years old. He is an independent ‘gent.’”

Wightman, J.—“Gentleman?”

Counsel.—“A ‘gent,’ my Lord.”

Wightman, J.—“That’s something short of a gentleman, isn’t it?”

The late Mr. Montagu Williams relates how, in an important case in which he was engaged, the cases in front of his crumbled away as they do, and he found himself called on unexpectedly, in the absence of his leaders, to open; so he prayed an adjournment on the ground that he had “only come to take a note.” Good-natured Mr. Justice Wightman (he was indeed one of the pleasantest and most kind-hearted men that ever lived) looking at me indulgently (remembering perhaps his own modesty at the Bar), said, “Oh! you only came here to take a note, did you?” Then he turned to Cockburn, and I overheard him say, “He’s very young; I don’t think we ought to press him,” and the case was adjourned, much to the relief of the embarrassed junior. The writer remembers the late Sir John Rigby when at the Bar making a similar appeal for indulgence to the old Court of Appeal at Lincoln’s Inn. His was made in vain. “You were not called yesterday, Mr. Rigby,” said Sir George Jessel with a genial smile; “I think you can go on.”

Writing in a most affectionate strain to his chief, Lord Denman, on New Year’s Eve, he says: “I am sitting, as I suppose you are, in the midst of children and grandchildren, which is as happy a state as can be wished for on the last day of 1849 by one who was born some years before the end of last century; but, after all, I am not so old as my years would indicate, for I was young enough on Friday last, the 29th instant, at the instigation of my youngest daughter, to go with her to Vauxhall to see the effects of the prodigious tide which we were assured by the philosophers would take place on that day. But it did so happen that the tide, instead of being higher, was rather lower than usual, leaving the philosophers no other consolation than the belief that their theory was right, and that it ought to have been higher. . . . How do you manage for the air and exercise I know you delight in? Is it not too cold for open carriages of any sort? But I believe that any kind of going out into the air is better than sitting with nose and knees over the fire reading the ‘Memoirs of Mrs. Hannah More,’ as I have been doing all the morning. . . .”

Wightman’s literary studies were not confined to the excellent Hannah More. He astonished Lord Campbell when they were going the Northern Circuit together, by displaying stores of

literature, "for which," says Campbell, "I had never given him credit." His correspondence with Croker about Pope's *Judge Page* reveals him as a keen literary critic. This brutal old judge, satirised by Pope, Savage, and Fielding, was the judge who was asked one day by an acquaintance, as he shuffled out of court, about his health. "My dear sir," he replied, "I keep hanging on, hanging on." Wightman thought that, "happily for the judicial character," Page was the only instance since Jeffreys that could be cited; but what would he have said to the following related of a certain Scotch judge—one Braxfield—by Sir Walter Scott. Braxfield, whenever he went on a particular circuit, was in the habit of visiting a gentleman of good fortune in the neighbourhood of one of the assize towns and staying at least one night, which, being both of them ardent chess-players, they usually concluded with their favourite game. One spring circuit the battle was not decided at daybreak, so the Lord Justice said, "Weel, Donald, I must e'en come back this gate in the harvest and let the game lie over for the present"; and back he came in October, but not to his old friend's hospitable house, for that gentleman had in the interim been apprehended on a capital charge of forgery, and his name stood on the Porteous Roll, or list of those who were to be tried under his former guest's auspices. The laird was indicted and tried accordingly, and the jury returned a verdict of guilty. Braxfield forthwith put on his cocked hat (which answers to the black cap in England), and pronounced the sentence of the law in the usual terms: "To be hanged by the neck until you be dead, and may the Lord have mercy upon your unhappy soul." Having concluded this awful formula in his most sonorous cadence, Braxfield, dismounting his formidable beaver, gave a familiar nod to his unfortunate acquaintance, and said to him in a sort of chuckling whisper, "And now, Donald, my man, I think I've checkmated you for ance."

These judicial monsters—these Scroggs, Jeffreys, Pages, and Braxfields—are happily rarities, but they will always reappear from time to time. Though nearly eighty, Wightman started in November, 1863, to go the Northern Circuit. "As we parted," says Coleridge in the memoir above quoted, "I reminded him of the last winter circuit at York, on which we had been together, and how we had then both agreed that that should be our last. He only smiled, and we parted without a foreboding on either side." He found at York a heavy calendar, and from the begin-

ning it seemed to oppress him more than was usually the case. We are apt after an event of importance has happened to recollect slight circumstances and casual expressions which, if nothing had happened, we should have forgotten or thought quite immaterial. It is remembered now that the chaplain had omitted to mention him in the bidding prayer before his assize sermon. "There was no one," said he after the service, "who more needed the prayers of the people than the judge who has this list of prisoners to dispose of."

On the last day of his life he was in court early and tried a complicated case, which lasted the whole day; it was one which excited much interest in the county, and the hall was crowded. He felt oppressed, but this did not appear so to the audience, who listened with admiration to a masterly summing-up of the long evidence—with admiration not unmingled with wonder to see such vigour of intellect and clearness of recollection supported by such activity of the bodily faculties at such an advanced age. But it was the bright burning of the taper before its sinking into darkness. He returned to his lodgings, where, happily for himself and for her, Miss Wightman was waiting for him. The father and child passed the evening quietly together. He complained a little of his work overcoming him, and spoke cheerfully of resignation and rambling on the Continent. He talked much, and with overflowing affection, of the different members of his family. So the evening passed, and he retired to his room. There was just a little in his tone and manner to excite uneasiness, and Miss Wightman, it is said, made an excuse some time after to tap at his door and inquire how he was. He answered cheerfully, but he never rose from his bed. The old man's strength had been too severely tried, and he sank on the following day.

Wightman's decisions will be found in the portly volumes of Adolphus and Ellis, Ellis and Blackburn, and in Cox's Criminal Cases. *Young v. Hichens* (6 Q. B. 606) raised the nice question at what time animals *feræ naturæ* are reduced into the possession and become the property of the hunter. The first striker of a whale does not acquire the property if the line break, and another party may then take it: (*Littledale v. Scarth*, 1 Taunt. 243, note). On the other hand, in *Hogarth v. Jackson* (1 Moo. & M. 58), the custom was proved that, if the fish remained entangled in the line, and the line in the power of the striker, although the harpoon was detached, the whale still was in the possession of the

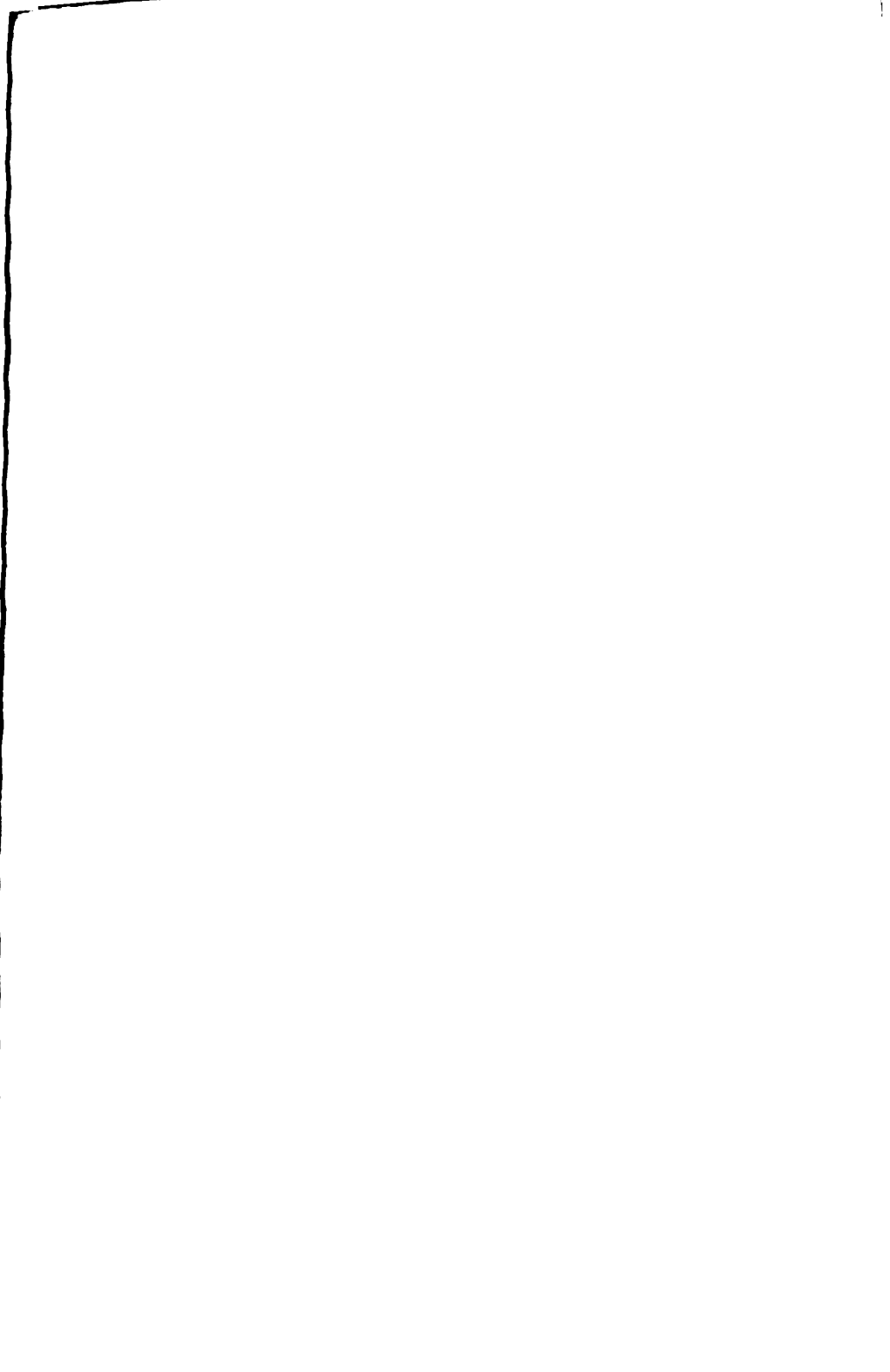
striker. In *Young v. Hichens* it was not a whale, but a shoal of pilchards, which some fishermen had almost inclosed in their net—almost, but not quite—when some rivals rowed their boat into the gap and frightened the fish away. It was a rather hard case, but the aggrieved fishermen could not establish trespass. No property had vested in them. These are the vicissitudes of the chase. *Reg. v. Cooper* (8 Q. B. 533) was another case—this time of libel—arising out of sport. A provincial paper published a story of how the “myrmidons” of a certain reverend gentleman (the prosecutor) had poisoned some foxes in the country hunted over by Sir W. M. Stanley’s hounds, and had hung their bodies up by the neck, and how the tenantry of Sir W. M. Stanley, by way of retaliation, had hung up effigies of the prosecutor and his brother, with foxes’ tails appended. This is amusing, but among some people to call a reverend gentleman a vulpecide is to bring him into odium, and it appeared that the defendant had told the editor the story with this purpose, and asked him to “show up” the unsportsmanlike parson—in other words, he had authorised the libel, and was answerable for it. Apart from the merits of the particular case, it is quite right that the person who prompts a libel should be the one to answer for it.

May v. Burdett (9 Q. B. 101) may be called the leading case on dog law. It lays down that the gist of the action against the owner of a dog that has bitten you is not negligence, but keeping the dog with knowledge of his mischievous propensities. This knowledge once brought home turns the dog into a wild beast, and the owner keeps him at his peril. In *Beaumont v. Reeve* (8 Q. B. 483) the Court held that an express promise upon a merely moral consideration does not support an assumpsit. Translated into plain language, this means that, if a man seduces a woman and then casts her off with a promise to pay her an annuity, the discarded mistress has no means of making the faithless lover pay. If she wants to secure herself, she must get a bond, which *primâ facie* imports a consideration. A yet greater anomaly of our law is that a parent cannot get damages for seduction of his daughter while out at service, he cannot plead “servitium amisit”: (*Davies v. Williams*, 10 Q. B. 725). *Allan v. Haywood* (7 Q. B. 960) emphasises a very important distinction in our law between a contractor and a servant. We are pretty well aware by this time that a man cannot marry his deceased wife’s sister, but probably few people know that the prohibition

extends to an illegitimate as well as a legitimate child of the late wife's parents: (*Reg. v. Chadwick*, 11 Q. B. 173). This does not help to make the rule any the more reasonable.

Doe on demise of Tatum v. Catmore (16 Q. B. 745) involves an important distinction. It decides that, as a deed cannot be altered after execution without fraud or wrong, the presumption, if an alteration appears, is that it was made before execution. A will is different, because it may be altered by the testator without any fraud or wrong.

The doctrine of our law which defines necessities for an infant according to the circumstances and condition of the infant makes it very elastic. Presents to a future bride of the infant, plated harness and jewelled solitaires, have been allowed; but the law must draw the line somewhere, and in *Wharton v. Mackenzie* (5 Q. B. 606) it drew it at wild ducks, grouse, desserts, ices, and confectionery for an undergraduate at Oxford. Does the Oxford tradesman then cease to supply these things to the infant undergraduate race except for cash? "Oh!" as Mr. Chadband would fervently say, "Let us trust so, my friends, let us trust so."





SERJEANTS' INN (FLEET STREET).

LORD HATHERLEY.

WHEN William Page Wood was a youth of nineteen he was introduced to Her late Gracious Majesty the Queen, then in her cradle, and had the honour of kissing the baby hand. He little thought at the time that forty-eight years later he would be kissing the same Royal hand on his appointment as Lord High Chancellor. The honour of this cradle presentation he owed to his father's (Alderman Wood) services to the Duke of Kent. Alderman Wood, the hop merchant, was a conspicuous figure in the days of the Regency. He espoused the cause of the injured Queen Caroline with a chivalrous ardour and devotion equal to that of Denman; it was he who insisted on her coming from St. Omer to England to assert her rights; it was he who sat beside her in the carriage as she entered London; indeed, he made Lord Brougham, the rival protagonist of the drama, quite jealous, a jealousy which he vented by mischievously saying that A. W. (Alderman Wood) stood for "absolute wisdom," and hinting to Denman that he supposed the Queen would have Wood for her Attorney-General. It was Alderman Wood, too, who induced the Duke of Kent to remove from Brussels, where he was living owing to his embarrassments, and come to England, so that the Princess Victoria might be born on British soil, and who found the funds for this purpose. Under the auspices of a father so energetic and public spirited, twice Lord Mayor of London, and for many years the Parliamentary representative of the City of London, young Page Wood was early introduced to scenes of public life and public men, and early imbibed Whig principles. He had soon an opportunity of putting them in practice, the tyrant to be withstood being Dr. Gabell, head master of Winchester. The good and gentle Addison—so Miss Aitken tells us—was the ring-leader of a barring-out; the amiable Southey was expelled from

Westminster for insubordination; but it is still more strange to find the mild and religious Page Wood, while a prefect at Winchester, engaging in a rebellion so serious that it could only be quelled by the intervention of the military. The *émeute* ended in the expulsion of the ringleaders. Page Wood might have been spared, but he preferred to share the fate of his comrades. In losing him even the outraged Dr. Gabell had to confess that Winchester had lost one of its brightest ornaments.

"My father," says Page Wood, "by virtue of his office as alderman, was bound from time to time to attend the sessions for the trial of prisoners at the Old Bailey, and he frequently took his sons with him, riding in on horseback with them from Highbury. I soon became very much interested in these trials; perhaps they gave me an early inclination for that profession to which my father, when I was about fourteen, told me I was destined. I was, however, very early shocked at the course of Old Bailey procedure. Capital offences were at that time almost the rule, and minor offences the exception. Stealing above the value of 40s. from a dwelling-house was capital. The criminals who had been capitally convicted were brought up at the close of the session and condemned wholesale. I once saw thirty or forty so condemned, some of whom were making grimaces at the judge, whilst others, who expected to be left for execution, were deeply distressed. The scenes were sometimes most painful, and the chaplain or ordinary, whose conversation I sometimes overheard when dining at the Old Bailey, but too nearly resembled him who is depicted in Jonathan Wild." Deeply impressed with "our accursed system of penal law," it was natural enough that when Page Wood was called to the Bar he did not choose the Old Bailey to practise in, but the genteel Court of Chancery instead. Leach was then Master of the Rolls, and, in his demeanour, imitated the surly Thurlow. There was, according to the testimony of an eye-witness, something significant in his mode of dispensing law. Two large fan shades were placed in such a position as not only to screen the light from the Master's eyes, but to render him invisible to the court. After the counsel, who was addressing the court, had finished and resumed his seat, there would be an awful pause for a minute or two; when at length out of the darkness which surrounded the chair of justice would come a voice distinct, awful, solemn, but with the solemnity of suppressed anger, "The bill is dismissed with costs!" No

explanations, no long series of arguments, were advanced to support the conclusion.

"I remember," says Page Wood himself, "standing in great awe of Sir John Leach; the first brief I held before him was merely to ask for payment to executors of the small arrears of an annuity (a few pounds), when the principal sum was about to be paid out on the death of the annuitant to the parties entitled in remainder. This at present is a matter of course. Then, in strictness, a separate petition, costing more than the money itself, was formally required. I simply asked, as instructed, that this might be dispensed with, and the money paid. The answer from the bench was: 'Sir, you might as well ask me to pay it to the porter at Lincoln's Inn gate.'" We may contrast with this Wood's first appearance at the Bar of the House of Lords. On the conclusion of his leader's speech, the House said they did not intend to hear any more counsel; the leader said "his friend Mr. Wood expected to be heard," and Lord Lyndhurst, with his usual courtesy and kind consideration for young men, said, "Oh! let us hear him."

It is said that Lethe flows between the Bar and the Bench, but Wood did not forget the courtesy of Lyndhurst or the churlishness of Leach. A friend who was walking home with him one day from his court, remarked on the tedious lengthiness of the speech of a junior counsel, and the unnecessary number of cases he had cited. "True," the Vice-Chancellor replied, "it was wearisome, for he assumed that I was ignorant of the A B C of the law, but I recollected how I was once snubbed by Leach when I was a junior, and I resolved to hear him out."

Slowly, but steadily, he rose until he won the Solicitor-Generalship. But at the very time when Sir William Page Wood seemed fairly to have gained a place in the front ranks, and when the great prize, for which all barristers are supposed to be contending, was at least within view, he suddenly stepped aside from the race and left it to others. And what was the reason? It was very simple, and yet it was a reason which, we venture to say, no successful lawyer ever gave before for such a course. Sir William found that the heavy labours imposed on him as Solicitor-General "so seriously interfered with the duties of domestic life and the comfort of his home, that he felt bound to relinquish his honourable position; it subjected her" (his wife) "to too much loneliness." Ambitious men would have voted

such an act quixotic—scoffed at the very idea of it; but Page Wood thought more nobly of domestic life. He, like Burns, held that

To make a happy fireside clime,
For weans and wife,
That's the true pathos and sublime
O' human life.

He found a much more congenial sphere a year or two later on his appointment as Vice-Chancellor. "No one," says a writer in the *St. James's Review*, "who has ever penetrated into the dingy little court in the purlieus of Lincoln's Inn, where Vice-Chancellor Wood presided, will readily forget the admirable manner in which that learned judge discharged his functions. His unfailing urbanity towards all parties, the quickness and accuracy with which he perceived the main issues of the various cases brought before him, and the impartiality and soundness of his decisions, united to make him the favourite alike of counsel, attorneys, and suitors. He had only one fault—he thought too quickly. In delivering his judgment, his ideas followed each other so rapidly through the brain, that he had not time to express them fully. The shorthand-writers toiled after him in vain, desperately endeavouring to fix upon paper the stream of broken words which he poured forth, and finding often when they had done so that they had only got a string of unfinished sentences."

Lord Campbell once, when an appeal from the Vice-Chancellor came before him, commented very strongly on the "prodigious length" and slipshod style of his judgments. "They tended," he said, "to unsettle rather than to settle the law." The other Vice-Chancellors protested against Lord Campbell's strictures on their colleague. Page Wood quietly went on as usual. He thought written judgments would be a delay of justice to suitors, and writing upset his digestion. It had been made loathsome to him by the heavy toil which he had gone through in equity drafting; but if his judgments were not perfect in form and finish, there were few sounder expositions of the law.

"I cannot forbear," says Ballantine, "relating an anecdote in connection with one of the most amiable and excellent of judges, the late Lord Hatherley, when he was Vice-Chancellor. I was counsel before him, and had to cross-examine a very plausible, but certainly not truthful, witness. I did so with some severity, and

I imagined that I should have been successful before a jury. His Lordship, however, was of a different opinion, and was much struck with the ingenuousness of the young man, and he evidently thought that he had been exposed to a cruel ordeal. As the witness himself was going out of court, he was heard to whisper to a friend, 'Why, the old gent'—he used a stonger term—'believed every word I swore.'"

It was rumoured that he was to be one of the new Lords Justices, and, *à propos* of the rumour, he gives a characteristic sketch of Brougham in a letter to Dean Hook: "You will have seen the Lord Justice story going the round of the papers like your numerous bishoprics, and with the same foundation. I met Lord Brougham as my lady and I were taking a holiday at the British Museum on my birthday, and he at once congratulated me and claimed the merit of the whole, apparently much astonished when I told him it was not true. I introduced him to Charlotte, when he bowed and kissed her hand, standing uncovered till he had obtained her permission to put on his hat, to the great amusement of numerous bystanders, and patting me on the shoulders." The appointment was made, however, and a graceful incident occurred in connection with it. A short time previously Sir Jasper Selwyn, the Conservative Solicitor-General, had been made a Justice of Appeal, and when Lord Cairns was raised from the same court to the Lord Chancellorship, and the vacancy created which was subsequently filled by Sir William Page Wood, Sir Jasper became, as matter of right, senior Lord Justice. But when Vice-Chancellor Wood was promoted, Lord Justice Selwyn insisted upon giving up to him the first place in the court, and accordingly Sir William Page Wood became at once senior Lord Justice. He had not been a Lord Justice of Appeal more than six months when, to nobody's surprise more than his own, he received a letter from Mr. Gladstone offering him the Chancellorship. Speaking of the composition of the Cabinet, Mr. McCarthy, in his "History of Our Own Times," mentions a curious circumstance. "John Bright," he says, "was President of the Board of Trade. The Lord Chancellor was Lord Hatherley, formerly Sir William Page Wood. Many years before, when Lord Hatherley was only known as a rising man among advanced Liberals, and when Mr. Bright was still regarded by all true Conservatives as a Radical demagogue, Mr. Bright and Mr. Wood were talking of the political possibilities of the future. Mr. Bright

jestingly expressed a hope that whenever he came to be member of a Cabinet, Mr. Wood might be the Lord Chancellor. Nothing could then have seemed less likely to come to pass. As Lord Hatherley and Mr. Bright met on their way to Windsor to wait on the Queen, Mr. Bright reminded his colleague of the jest that had apparently been prophetic."

The choice did not escape criticism. A more brilliant speaker might have been found in Chief Justice Cockburn, a more finished scholar and statesman in Sir John Coleridge, but the appointment was no mistake. In England character counts for more than brilliancy, for more than oratorical style and finish, and in Lord Hatherley the highest moral tone was found united with a powerful mind and great legal learning.

Any sketch of Lord Hatherley which omitted the religious element in his character would be not only defective, but misleading. Religion governed every action of his private and public life; his deep humility, his sense of his own sinfulness, seem almost morbid; but they were the shadow of his high ideals. For forty years, both when in Parliament and when he was sitting as Vice-Chancellor at Lincoln's Inn, Sir William Page Wood laboured every Sunday, when he was in town, as Sunday-school teacher at St. Margaret, Westminster; and every morning, winter and summer, fair weather and foul, his erect and powerful form might be seen at the early service at Westminster Abbey. His lifelong friend, Dean Hook, said that Lord Hatherley was the best man he had ever known. When he died Dean Stanley said he felt as if a pillar in Westminster Abbey had fallen. No less admirable was his devotion to his wife. In this he resembled Lord Eldon. When Lord Chancellor, he dined at Trinity College, Cambridge, and in replying to the toast of his health said: "The day on which I became a fellow of Trinity was the proudest and happiest day of my life except one, and that was the day on which I ceased to be a fellow of Trinity." He alluded to his marriage. Every year, as Swift did to Stella, he wrote his wife a birthday ode, and a wedding-day ode. Some years before his death, Lord Hatherley having to attend the Queen as Lord Chancellor, was bidden to stay as Her Majesty's guest after the business for which he had come was finished. He betrayed some hesitation at this command, and, being pressed to explain, told Her Majesty that it was the first occasion in his married life on which he had passed twenty-four hours away from Lady Hatherley. The Queen

allowed him to depart, and graciously commanded that the next time the Lord Chancellor visited her he should be accompanied by Lady Hatherley. "Hatherley," said Lord Westbury, "is a mere bundle of virtues, without one redeeming vice."

His decisions will be found in Kay and Johnson, in Hemming and Johnson, Hemming and Miller, and in Law Reports, House of Lords, 1868-72.

Reade v. Lacy (1 J. & H. 524) is an interesting case. Charles Reade, the popular novelist, had written a play called "Gold." He had also written a well-known novel called "Never Too Late to Mend," and in the novel he had incorporated long passages taken bodily from the play. The defendant had not seen the play, but he thought the novel a good one for dramatic purposes, and he dramatised it. This our law allows; but it does not allow infringement of copyright, and it so happened that many of the passages which the defendant had dramatised were passages incorporated in the novel; so the novelist, who was plaintiff in person, got his injunction. Ignorance is no more a defence to infringement of copyright than of patent right. It is curious to see, in *Warne and Co. v. Seebohm* (39 Ch. Div. 73)—the *Little Lord Fauntleroy* case—how history repeats itself.

Mayhew v. Maxwell (1 J. & H. 312) is another noticeable case on copyright. It decided that the right of the author of an article in a periodical under sect. 18 of the Act to prevent a separate publication is not copyright within the meaning of the 24th section, and it is no objection, therefore, to a motion for an injunction in such a case that the author has not entered his work at Stationers' Hall.

Where a debt arises out of a felonious act of the debtor, public justice must be vindicated before the civil remedy can be pursued—the policy of the law obviously being to prevent attempts to compromise a felony by compensating the person injured on the terms of allowing the criminal to escape prosecution; but the civil right is only suspended until justice is satisfied, and justice is satisfied if the offender is indicted, though he is sentenced on a different charge (*Dudley v. West Bromwich Banking Company* (1 J. & H. 14).

Lord Scarsdale v. Curzon (1 J. & H. 40) is a case well known to the conveyancer. It decided that a bequest or settlement of chattels upon the same limitations as real estate, whether imme-

diate or by way of trust executed, vests them absolutely in the first tenant-in-tail at birth. *Wellesley v. The Earl of Mornington* (2 K. & J. 143), deciding that an appointment by a father to a languishing child, for the father's benefit and not the child's, is a fraud on the power, is a case often cited. So is the *Glenfield Starch case* (L. Rep. 5 H. L. 508), the leading case on property in a trade name. *Reese River Silver Mining Company v. Smith* (L. Rep. 4 H. of L. 64) lays down the law as to the effect of misrepresentation on a contract to take shares, and *Webb v. Whiffin* (L. Rep. 5 H. of L. 711) and *Helbert v. Banner* (L. Rep. 5 H. of L. 28) define with great elaboration the liability of past-member contributories. *Thames Ironworks Company v. Patent Derrick Company* (1 J. & H. 93) affirms the proposition that a common law lien does not in general authorise a sale.

The contract of marriage is in its essence a consent on the part of a man and woman to cohabit with each other, and with each other only. The religious element does not require anything more of the parties, so says the Vice-Chancellor in *Harrod v. Harrod* (1 K. & J. 4), and therefore it is not essential that all the words of the marriage service to be repeated by the man and woman should be actually said, but the ceremonies required by law—such as the publication of banns and the like—being complied with, when the hands of the parties are joined together, and the clergyman pronounces them to be husband and wife, if they understand that by that act they have agreed to cohabit together, and with no other person, they are married. Therefore deaf and dumb persons may marry. Everything is presumed in favour of marriage. This exposition is valuable because popular ideas on this subject are a little confused. The old parish clerk, Mr. Macey, in “*Silas Marner*,” describes to the company at the Rainbow how his old clergyman at a certain wedding had put the questions “by the rule o’ contrary like,” and he says: “‘Wilt thou have this man to thy wedded wife?’ says he; and then he says, ‘Wilt thou have this woman to thy wedded husband?’ says he; and I says to myself, ‘Is’t the meaning or the words as makes folks fast in wedlock?’ For the parson meant right and the bride and bridegroom meant right. But then, when you come to think on it, meaning goes but a little way i’ most things, for you may mean to stick things together and your glue may be bad, and then where are you? And so I says to mysen, ‘It isn’t the

meaning—it's the glue.' And I was worried as if I'd got three bells to pull at once when we went into the vestry and they began to sign their names; but the parson he made light of it. 'Pooh, pooh, Macey, make yourself easy,' he says; 'it's neither the meaning nor the words; it's the register does it—that's the glue.'"

MR. JUSTICE WILLES.

CAMPBELL, in his Diary for July, 1855, records: "Mr. Justice Maule has resigned. He is succeeded by a capital hand whom I warmly recommended to the Lord Chancellor—Willes, who is not only an admirable lawyer, but has delightful manners and a well-regulated mind." This is high eulogy coming from that keen critic of men, Lord Campbell.

"It is not too much to say," says a writer in the *Law Magazine*, "that Mr. Justice Willes was the most learned lawyer of our day"—"a consummate lawyer" is the verdict of Sir Frederick Pollock. It used to be said of Wordsworth, the late Bishop of Lincoln, that he was the only divine who had ever read "The Fathers" through. Willes has the reputation of being the only lawyer who has ever read through the Reports—the whole Reports—from the first of the Year-books to the last number of Meeson and Welsby—happily for him he had not to cope with the multiplicity of modern reports—he had certainly a greater knowledge of case law than any man at the Bar, and report said that he had committed to memory all the practical forms of writs occurring and used in common law proceedings. He knew by heart every old term of law, every maxim, every cantilena of our law; and he was not only a profoundly learned lawyer, of whom there have been many, but a scientific lawyer, of which there have been few. Too many English lawyers live, and move, and have their being in a chaotic world of legal rules and technicalities. Willes, in Platonic metaphor, had ascended the mount of vision, and before his philosophic eye the whole domain of jurisprudence lay displayed in ordered beauty. Of him, too, it might with truth be said, as of our great philosophic Chancellor, that he had "taken all knowledge to be his province." There was scarcely a subject on which the judge was not a well-read man, and what he had once read he seemed never to forget.

The classics were his familiar companions down to his latest years. Homer, especially, was his favourite, and was always ready at hand for reference or quotation; and he was one of those, says Sir Frederick Pollock, "whose knowledge is radiant and kindles answering fire." "To set down," he goes on to say, "all I owe to him is beyond my means. . . . From Willes I learnt to taste the Year-books and to pursue the history of the law in authorities which were collectively and compendiously despised as 'black letter.'" It was Willes, too, who suggested and inspired Sir Frederick's admirable treatise on the "Law of Torts." Thus is perpetuated the spiritual lineage—the apostolic succession of the law.

Cork is a city fruitful in lawyers and learned men; it has given many judges to the Irish Bench, but it has no worthier alumnus than Bernard Shaw Willes. But Willes was one, like Burke, "born for the universe," and he gravitated, as so many brilliant young Irishmen do, to London, and settled down to "live laborious days" in the chambers of Chitty, the celebrated pleader. In those days unassisted merit had still a chance, and Willes, though he had no connection of any sort, except what he had made for himself by his legitimate exertions, got rapidly into business, and soon acquired a great reputation among his contemporaries. It was in Westminster Hall that he chiefly shone. In arguing demurrers and special cases even the great Parke owned his skill and disdained not to cross swords with him. He was not much seen on circuit. He was, as he himself said when once proposing prosperity to the Home Circuit, "a town mouse rather than a country mouse."

"It was his practice," so a friend relates in the *Solicitors' Journal*, "after working up till a late hour at night, to take a walk in the Temple Gardens, a habit which was shared by the late Mr. T. W. Smith, the learned author of the *Leading Cases*. It was in these midnight walks that these two distinguished lawyers first formed an acquaintance which soon ripened into intimacy, both being, indeed, kindred spirits, for the late Mr. Smith was a man of extraordinary wide and varied culture. These walks, which were frequently prolonged into the small hours of the morning, became a fixed custom, and possibly had a share in precipitating the disease which caused the untimely death of Mr. Smith. At his request Willes consented to undertake the third edition of '*Smith's Leading Cases*,' only stipulating that Mr.

Keating, who was also Mr. Smith's intimate friend and executor, should be joined in the task." But his reputation, though rising at the common law bar, had not yet reached the remote precincts of Lincoln's Inn, and he, like Pitt, had to suffer for the crime of being a young man, and a rather positive young man. Serjeant Robinson relates how in one case at a conference with his two leaders Sir Richard Bethell and Serjeant Hayes, of witty memory, young Willes had the temerity to differ from his two seniors, and to give his reasons at some length. "Well, Serjeant Hayes," said the sarcastic Bethell, "we have come to a clear opinion on this case, and this young—I forget his name (referring to the back of his brief). Ah! I see, Mr. Wills, or Willes, or some such appellation—I understand differs from us. Perhaps he will be kind enough to write out the conclusion we have come to and send it to us for our signatures." Willes turned out to be right, but he never quite forgave Bethell for his marked discourtesy. These things sometimes happen still. Willes, however, was not to be snuffed out by a sarcasm. He became Tubman of the Exchequer, an odd but honourable post, and, more flattering still, he was employed with Bramwell to prepare the Common Law Procedure Acts. No better man could possibly have been found for the task. Few men with his mastery of technical detail would have been able to emancipate themselves from its trammels, but his clear sense, while recognising to the full the necessity of distinct and accurate rules, was able to cast aside the useless subtleties and effete technicalities which incumbered the law down to that period. No one less thoroughly familiar with the system which he destroyed could have done the work so completely, but he knew exactly how much was worth retaining and how much ought to be rejected. It is difficult for men trained under the modern system to realise the extent of the revolution which was quietly and effectually brought about by these Acts. The next year saw his elevation to his proper sphere—the Bench. Campbell was then Chief Justice. He enters in his diary: "Much amused and pleased with a scene yesterday in the Queen's Bench. At the sittings of the court my brother Willes presented himself at the extreme right of the Bench to take the oaths. All stood up, judges, barristers, and strangers, with much solemnity. When the judicial juror came to the oaths of abjuration, he did not repeat the words after the officer, who with much emphasis was reading it. I made a private sign to Willes that he should

repeat, but with no effect. At last the words being pronounced by which he ought to have abjured 'the said James and the descendants of the said James,' and he still uttering no sound, I said, 'Brother Willes, you should repeat those words after the officer of the court, that we may know that you abjure King James and his descendants.' Willes, J.: 'My Lord, I am abjuring them in my mind.' Chief Justice: 'That is not enough, Brother Willes. The statute requires the words to be "spoken" by you. Although there be no "Pretender," and there have long ceased to be any "descendants of the said James," you are bound with a loud voice to abjure them. I am sorry that the law should require such a farce, but while the law exists the farce must be played.' Brother Willes then repeated the remainder of the oath to the end of it and kissed the book. "The abjuration oath," adds Campbell, "certainly is a monstrous profanation which ought now to be done away with. We may safely trust to the simple oath of allegiance."

"Oh! Plato, Plato!" exclaimed the Emperor Julian when he was going through his martial exercises, "what an occupation for a philosopher." When the Inns of Court Volunteers were formed in 1859 Willes, with characteristic sense of duty, though then on the Bench, joined as a private, and continued to serve in its ranks till shortly before his death, nor is it recorded of him that he uttered any sentiment at all equal to that of Julian, or deemed it in the least derogatory to his dignity to drill with the Devil's Own. Did not the late Lord Justice Cotton go to parade with his appointment as Lord Justice in his pocket? But truth will out, and the story runs that Sergeant-Major Dod, of that redoubtable corps, with soldierly bluntness, once remarked that Willes might be "a d—d good judge, but he was a d—d bad drill."

It must have been in this capacity that Sir Frederick Pollock apostrophises him as "a wise and valiant judge." Wise he assuredly was. In no judge had the mercantile community greater confidence. They knew that he was thoroughly acquainted with commercial law, and would apply it in a wise and liberal spirit.

An old Scotch judge being asked how he prepared his judgments replied, "Oh! I just read over the pleadings and let them wamble in my wame with the whiskey for twa or three days, and then I gie my ain interlocutor." This was not Willes' way. In all his admirable judgments, extending over a period of seventeen

years, are displayed the patience, the research, the absolute impartiality which are the great glory of our judicial Bench. Only on one occasion did he intervene in the factious world of politics, and that was on the occasion of what Chief Justice Cockburn wittily called "the Collier explosion," when Sir Robert Collier, to secure a literal compliance with the words of an Act of Parliament, had been appointed to sit for one day as a judge of the Common Pleas to qualify as a Privy Council judge. Mr. Justice Willes gallantly came to the aid of the Chancellor, Lord Hatherley, and rightly characterised the comments on the appointment as "sensational"; whereupon Lord Westbury wrote a highly characteristic letter, holding up Mr. Justice Willes as an object lesson of the inferiority of common law morality to equity and of the importance of a fusion, and also of the need of a higher standard of legal education. The letter is smart and amusing, but its sarcasm overreaches itself, as Pope's did when he caricatured Addison as Atticus and elevated clever Colley Cibber to the throne of Dulness.

Some years before his death, finding himself unequal to the fatigues of social intercourse in London, Willes withdrew to the neighbourhood of Watford (the chosen home of another legal luminary, the late Lord Esher). There, on summer evenings, he was to be found paddling in his boat on the stream which ran through his place at Otterspool, and feeding with his own hands the trout which seemed to know him, and over whom he never suffered a fly on a hook to be thrown. It was his chief delight to take his visitors to the familiar corners where his favourites lay, and to point them out as they swam to receive the food which he flung to them.

Ruskin once said that he hoped the day would come when an Englishman would rather look at a bird than shoot it. The time had come to Willes. In youth he had been a great sportsman, and, in particular, passionately fond of fishing. From Wordsworth, of whom he was an ardent admirer, he had learned

Never to blend our pleasure or our pride
With sorrow of the meanest thing that lives.

In private life he possessed the tenderness of a woman. He has been known to retire to his room and shed tears before passing sentence on a criminal, and the most serious shock to his constitution—a shock from which he never quite recovered—was due to the death of a favourite brother.

Serjeant Ballantine speaks of him as "singularly emotional," and describes how on an election petition in which he was engaged—it was that of Penzance—Willes exhibited this trait in what he calls "a ridiculous manner." "An allegation," he says, of bribery against a doctor—I am not sure he was not a veterinary surgeon—was strongly relied upon, and appeared to me to be fully made out, but his Lordship almost burst into tears at the idea of a member of that "noble profession" being guilty of such a crime. Willes' was a "finely touched spirit." But there are persons to whom sensibility always seems silly, and the "fine frenzy of the poet" nothing but the ravings of the Sibyl. Childless himself—he married the year after he was raised to the Bench—his manner with children was singularly winning, and three favourite dogs were always the companions of his walks.

In his indefatigable pursuit of knowledge, says a friend in the *Law Magazine*, he denied himself the rest which he had so well earned, and which he so much needed. Next to law his favourite pursuits were language and travel. He found time to master all the principal spoken languages of Europe, and had also a considerable acquaintance with the Oriental tongues. In his different vacations he visited Spain, Italy, America, and the East. These long and rapid journeys in hot climates and in the hot period of the year must, no doubt, have acted injuriously upon an already overtaxed constitution. Indeed, a fever at Damascus had once well-nigh proved fatal; but he was one "who could not rest from travel—he would drain life to the dregs."

He came home from the Northern Circuit from Liverpool on August 24th, 1872. He had been on circuit several weeks. It was a very heavy circuit—sheer hard work without any interval. The judge said to his doctor, on leaving Liverpool, "I feel worn out; I could sleep for a fortnight or three weeks." A little later he said to his old clerk, who had gone to visit him, "I am tired and sleepy—can't get rest." He had been at home then more than three weeks. "I have had no sleep for a fortnight." His clerk asked him what he had been doing. He replied, "Reading German." "God bless my soul," said the old clerk, "why don't you take rest?"

A few weeks later he was found with a revolver lying by him, and the blood trickling from a wound in his heart. His mind was overwrought, as the jury found. He died a victim to overwork.

Byron's fine lines to Kirke White may aptly be applied to him:

Oh, what a noble heart was here undone
 When Science' self destroyed her favourite son.
 Yes, she too much indulged thy fond pursuit,
 She sow'd the seeds, but death has reaped the fruit.
 'Twas thine own genius gave the final blow
 And helped to plant the wound that laid thee low.
 So the struck eagle stretched upon the plain,
 No more through rolling clouds to soar again,
 Viewed his own feather on the fatal dart,
 And winged the shaft that quivered in his heart.
 Keen were his pangs, but keener far to feel,
 He nursed the pinion which impelled the steel;
 While the same plumage that had warmed his nest
 Drank the last life drop of his bleeding breast.

Selection from Willes' many admirable judgments is a difficult task. *Smith v. Great Eastern Railway Company* (15 L. T. Rep. N. S. 246; L. Rep. 2 C. P. 4) is a rather startling decision, viz., that a railway company is not liable to a passenger who has been bitten by a stray dog running about the company's station, unless there is evidence of negligence by the company in not getting rid of the dog, but it is a consolation to find from the adjacent case of *Worth v. Gilling* (L. Rep. 2 C. P. 1), that it is not necessary, in order to sustain an action against a person for keeping a ferocious dog, to show that the animal has actually bitten another person before he bit the plaintiff. It is enough that the dog has, to the knowledge of his owner, evinced a savage disposition by attempting to bite.

Jacobs v. Seward (20 L. T. Rep. N. S. 448; L. Rep. 4 C. P. 328) is a useful reminder that one tenant in common cannot maintain trespass against another tenant in common for cutting in due season and carrying away the whole produce of the common property, e.g., a crop of hay. The remedy is action for account.

Lover v. Davidson (1 C. B. N. S. 182) is important to composers. It decides that one who adapts words of his own to an old air, adding thereto a prelude and accompaniment also his own, acquires a copyright in the combination, and may describe himself as proprietor against a person pirating.

Cooper v. Lloyd (6 C. B. N. S. 519) lays down a very reasonable rule, viz., that the adultery of a wife living apart from her husband destroys her implied agency to bind him by her contracts for necessaries. The matrimonial obligations are ended. Our

law is very humane, perhaps too humane, in excluding evidence of character against a man; but if a prisoner chooses to call evidence of general good character the prosecutor may call evidence to rebut it. This is *Reg. v. Rowton* (10 Cox C. C. 25). Bigamy is sometimes a very serious offence, and sometimes a very venial one—an Enoch Arden misadventure. The law will not presume the *mens rea*. When, therefore, it was proved on an indictment for bigamy that the prisoner and his wife had been living apart for seven years preceding the second marriage, and it was equally probable that he did not know as that he did know that his wife was living at the date of the second marriage, the Court held that it was for the prosecution to prove that he did know that fact: (*Reg. v. Curgenvven*, 10 Cox C. C. 152). *Raphael v. Bank of England* (17 C. B. 161) illustrates how far the policy of our law goes in favour of negotiability. A person who takes a bank-note or other negotiable security *bonâ fide*, that is, giving value for it and having no notice at the time that the party from whom he takes has no title, is entitled to recover upon it, even though he may at the time have had the means of knowing the want of title, and has neglected to avail himself of it. Especially worthy of attention is Willes' masterly judgment in *Lloyd v. Guibert* (1 Q. B. Div. 115) in the Exchequer Chamber, laying down the principle that, where the contract of affreightment does not provide otherwise as between the parties to the contract in respect of sea damage and its incidents, the law of the country to which the ship belongs must be taken to be the law to which they have submitted themselves. In an action for breach of promise, where the plaintiff has been seduced by the defendant, the jury may not add to the damages a solatium for the outraged feelings of the mother and family of the girl, but they may take into consideration the altered social position of the girl in relation to her home and family through the seducer's conduct; in other words, the difference between her position as a cast-off mistress and as a virtuous and respected member of the family: (*Berry v. Da Costa*, L. Rep. 1 C. P. 331). It is often urged that breach of promise actions should be abolished. *Berry v. Da Costa* is a good argument against such abolition. It shows how, through the machinery of such an action, the court may redress a wrong of a peculiarly base and cowardly kind, which, but for such an action, would be without a remedy.

LORD BRAMWELL.

BOBUS SMITH, Sidney's lawyer brother, was once discussing with a doctor the merits of their respective professions. "Well," said the doctor, "you must admit that your profession does not make angels of men." "No," replied Bobus, "your profession gives them the first chance of that." It is a very common fallacy that of the doctor's. "Gentlemen of your profession," said Mr. Pickwick to Serjeant Snubbin, "see the worst side of human nature. All its disputes, all its ill-will and bad blood rise up before you." Those who hold these crude views can never have seen Lord Bramwell. Law made no cynic of him. It never soured the milk of human kindness, or froze the genial current of his soul, and for this reason he was one of the most popular judges who ever sat upon the bench. No one was more anxious to give a patient hearing to counsel, or to assist them to state a proposition. All "the young ones," as he called them, regarded him as their "particular friend." One unpleasantness only he could recall, he said, in responding to his health at his retirement banquet. "Once a very old and dear friend of mine"—and he looked hard as he said it at Montague Chambers—"provoked me so much and made me so angry, that I actually threatened to commit him, and I remember that, on my asking him what he would have done if I had committed him, he answered promptly, 'Move for my own discharge.'"

We fancy a golden age then of the Bar, but at the time when Bramwell was being called to the Bar in 1838—he was then thirty—we find Sidney Smith writing thus: "It seems a paradoxical statement, but the fact is that the respectability of the Bar as well as of the Church is almost entirely preserved by the unequal division of their revenues. A Bar of 100 lawyers travel the Northern Circuit, enlightening provincial ignorance, curing local partialities, diffusing knowledge, and dispensing justice in their route; it is quite certain that all they gain is not equal



LORD BRAMWELL.

(From a photograph by the London Stereoscopic Company.)



to all they spend ; if the profits were equally divided, there would not be six-and-eightpence for each person, and there would be no Bar at all. At present the success of their leader animates them all—each man hopes to be a Scarlett or a Brougham—and takes out his ticket in a lottery by which the mass must infallibly lose, trusting (as mankind are apt to do) to his good fortune, and believing that the prize is reserved for him, disappointment and defeat for others.”

So that we see that even then the Bar was a fatal mirage ; we know it only too well now. Bramwell, however, was not one of those “ born to blush unseen.” He was well equipped with the self-confidence which is the first qualification for the Bar. “ I have it in me, and by G—— it shall come out,” exclaimed Sheridan as he declared for a political career. Lord Bramwell had the same belief in himself, and before he had got a brief at the Bar he was telling his intimates that he had got it in him and meant to rise to a seat on the Bench. In some men such confidence would be mere bumptiousness, but in men like Lord Campbell, Lord Westbury, Lord Beaconsfield, or Lord Bramwell it sprang from the conscious possession of great powers. He had a clear, powerful, and analytic intellect, and a vigorous epigrammatic style of expression. With him, like Dr. Johnson, there was no flourishing with the sword. He was through your body in an instant. He had gained, too, in the counting-house of his father’s bank before he began law, a knowledge of business in general and banking in particular, which served him in good stead in after life in conducting commercial cases. It was not long before he had an opportunity of making “ a good impression ” in court.

“ One day I was sitting in my chambers, when there came a shagbag attorney with a brief for Maidstone, Platt to lead me. In the course of the case the counsel on the other side raised an objection. Platt answered the point indifferently, and the judge thought so. I whispered something to Platt and found myself on my legs giving my answer. ‘ Oh, that is quite a different matter, Mr. Platt,’ said the judge, satisfied and convinced, and I sat down, having made a very good impression. I thought briefs would be showered upon me, but they were not ; that attorneys would be at my chambers when I returned, but they were not. Still, from that time, somehow, I never looked back.”

An anecdote told by Mr. Fairfield in his Memorials shows how strongly his acuteness impressed his contemporaries. A schoolfellow of his, Channell—afterwards the Baron—held a brief at the Maidstone Assizes. Consultation with the solicitors revealed a technical flaw in the pleadings drawn by them, which in those days would have proved absolutely fatal. The solicitors could only hope that it would not be discovered. "Who is against us?" asked Channell. "Oh!" was the reply, "a Mr. Bramwell. Nobody ever heard of him before." "Then, gentlemen, we're done," was the advocate's remark. "I was at school with that gentleman." And done they were.

Supremely successful or brilliant at the Bar Bramwell was not. His worth, as Mr. John Macdonell has said, was only fully admitted when he became a judge. He was never an eloquent advocate; indeed, he had not much liking or respect for forensic eloquence, and he was too much alive to the defects of his own case to be always convincing. A circuit squib sings how—

Bramwell, blushing with a maiden grace,
Strives to look honest in a jury's face,
While stubborn juries, proof against his wiles,
Pronounce for Nokes while he appears for Styles.

"Honest" he could not help looking, however bad his case might be. *Propos* of this—the ethics of advocacy—he makes some very sensible remarks:

"A man's rights are to be determined by the court, not by his attorney or counsel. It is for want of remembering this that foolish people object to lawyers that they will advocate a case against their own opinions. A client is entitled to say to his counsel: 'I want your advocacy, not your judgment; I prefer that of the court.'"

This is just what Dr. Johnson said. "Sir," he said to Boswell, "a lawyer has no business with the justice or injustice of the causes he undertakes. The justice or injustice of the cause is to be decided by the judge. A lawyer is not to tell what he knows to be a lie, but he is not to usurp the province of the jury and the judge."

But it is one thing to decide on the justice or injustice of a case, and another to have to urge bad law, and to the sensitive conscience of the true lawyer—to a Bramwell or a Bowen—it is as painful to urge bad law—that a judgment is not an estoppel *inter partes*, for instance—as it would be to an orthodox clergy-

man to preach from the pulpit that the Scriptures are not inspired, or any other grievous heresy.

Though brought up after the straightest sect, a special pleader—and no one was more cunning of fence—Bramwell had no love for the system: a system in which—as Lord Russell of Killowen said—truth and justice and the substance of the thing were sacrificed to the science of artificial statement. “I think,” he said, “that some twenty or thirty years hence, when the present generation of lawyers has ceased to exist, it will scarcely be believed that such a state of things did exist in a civilised country.” “For a quarter of a century,” he adds, “I did my best to get rid of it.” He helped with Willes to deal it its death-blow in the Common Law Procedure Acts which they jointly drafted. Later on, when the fusion of law and equity embodied in the Judicature Acts was proposed, he gave it his hearty support. This large-mindedness, coupled with his mastery of the common law, and his robust good sense, pointed him out as a judge eminently suited to preside over the transition from the old system to the new, and as a Baron of the Exchequer he amply justified the choice which was made of him in 1856. “The force of common sense,” it was said, “could no further go than in his pregnant summings-up.” Among other *causes célèbres*, in which his fine judicial qualities exhibited themselves, were the Clerkenwell Explosion Case and the Gas Strikers’ Case.

Those whose memory carries them back some thirty years will not readily forget the garotting scare that then fluttered society. Is it not sketched in the pages of the genial Leech? but, in truth, it was no laughing matter, and to Bramwell belongs the credit of having rid us of this nightmare:

In the court of Old Bailey, 'twas Bramwell that spoke :
 “The Crown can't allow all these crowns to be broke;
 So let each skulking thief who funks justice and me,
 Just attend to the warning of bold Baron B.

Just hand me my notes, and some ink for my pen,
 And, gaoler, look sharp, and bring up all your men.
 Under five years of servitude none shall go free,
 For it's up with the dander of bold Baron B.”

“Bold” was quite the right epithet for the Baron. He never hesitated to speak out what he thought. When a Welsh jury, in defiance of the clearest evidence, insisted on acquitting, on national principles, a countryman charged with embezzlement, Bramwell gave them “a bit of his mind”; told them plainly that

they had not done their duty, and warned the prosecutor not to trust his property where juries would give him no protection. When the *Times* gave currency to some cock-and-bull story about counsel on the Western Circuit carrying off their briefs from Bristol to another assize town, and leaving the court at Bristol impotent, Bramwell characterised it expressively as "rubbish," and added that "so long as there are people who take a pleasure in reading scandal, some will be duly produced for their perusal"—a sentiment which was too near the truth not to get him into hot water with the Press.

On another occasion a hubbub was raised because he did not insist upon a witness taking off his glove while the oath was being administered to him. On another because he had passed sentence on a prisoner in an unconventional manner: "My duty," he had said, "is to pass upon you the sentence of death, and that is my only duty." But Bramwell had the courage of his opinions, and cared for none of these things. Many are the witty sayings recorded of him, judicial and extra-judicial. A prisoner had been found guilty, and Baron Bramwell was proceeding to exhort the culprit to repent and amend.

"You have been convicted——" he began.

Prisoner (interrupting): "How much?"

Bramwell, B. (laconically): "Nine months."

A prisoner was once tried before him at an assize town on a charge of stealing a ham. The day was hot, the counsel were loquacious, and the ham perspired in the crowded court. At last, everyone being weary, came the Baron's turn to address the jury, and he summed up the case in these words:

"There, gentlemen, is the prisoner, and there, gentlemen, is the ham. Consider your verdict."

"Drink, yes, drink. I mean by that, drink which cheers and, if you take too much, inebriates—drink, as Mr. Justice Maule understood it when he was asked by the bailiff who had sworn to give the jurymen 'no meat or drink,' whether he might give a jurymen some water. 'Well,' said the judge, 'it is not meat, and I should not call it drink; yes, you may.'"

When counsel for a prisoner urged that his client was suffering from kleptomania, "That," said Bramwell, "is a disease which I am here to cure."

"What to do with a termagant wife! Chain her up" (facetiously).

"The law is so dry? I deny it. . . . Of the four volumes of Blackstone's Commentaries, three, to my mind, are most agreeable reading."

"If the clerk had presented the writ to the Aldgate pump, he might as well say he had made reasonable efforts to effect personal service."

A fellow member of a political economy society had been indulging in a tirade against the House of Lords as composed of idlers. "If," said Bramwell—he was then in the gilded chamber—"what he says of us is true, I am not fit to be a member here, and if it isn't he is not fit."

"It's your own fault," he once said to a purchaser who was complaining that his vendor, an Oriental of very unprepossessing appearance, had cheated him; "he has *caveat emptor* written on his face."

"Deceased wife's sister: The most enormous paradox in the world to say that the right way for a man and woman to live together without scandal is that they should not be able to marry."

Lord Bramwell was a great lawyer and a great judge, but he had too original a mind and too independent a judgment to be kept confined within the ring-fence of positive law. He realised, as every true lawyer must, that the law is inextricably interwoven with morality, with politics, with political economy, with sociology generally; and with his vigorous intellect and shrewd commonsense it was an irresistible temptation to make raids into the demesnes adjoining the law's bailiwick and try his cut-and-thrust logic on the passing problems of the day. Whatever it was which was the theme, whether Nationalisation of the Land, or Drink, or Liberty and Property Defence, or Bargains and sticking to them, or the sale of Serjeants' Inn, or Marriage with a Deceased Wife's Sister, Lord Bramwell had always something interesting to say about it, and said it in such a striking way as compelled attention. There was always an admirable sanity too about his views: witness for instance his criticism of the apologists of kleptomania and weak-minded criminals.

The giant growth of joint-stock enterprise is one of the most remarkable phenomena of this century. The number of companies registered has been steadily growing. In 1898 it reached the enormous total of 4700 registered in one year. The key which has unlocked this marvellous commercial enterprise is

"Limited Liability," and the credit of it belongs very much to Lord Bramwell. There was no objection to the principle of a company making a special form of contract. Plenty of insurance companies had done so in their policies, limiting liability to the assets, but if an ordinary trading company was to adopt it in all its business transactions, how was the public to have notice? Bramwell suggested the simple expedient of adding the word "Limited" to the company's name, and the greatest commercial revolution ever inaugurated was accomplished. He was proud of the invention. "Mention it in my life," he said, jocularly. The Companies Acts were in aid of freedom of contract, and as such he entirely approved them, but he strongly deprecated making contracts for people, whether it was the Legislature which did it, or equity. "Grandmotherly protection," as he called it, was his special *bête noir*. His motto was *Laissez faire*. "Please govern me," he said, "as little as possible." "Socialism would never succeed," he added, "until we are as honest as the bees. Suppose my friend and I had to think for each other's wants, instead of each for his own, I am afraid I should feed him sometimes when he was not hungry, and he occasionally would put me to bed when I was not sleepy. I should take him, for his good, to the Liberty and Property Defence League, and he would take me, for mine, to a Social Science Congress, to the edification of neither." But Cassandra prophesied in vain. The Socialistic tide, whether we will or not, rises higher every day, submerging the old landmarks of personal liberty and private property. In the same spirit he held it a sound rule of criminal jurisprudence not to multiply crimes, to make as few matters as possible the subject of criminal law, and to trust as much as could be to the operation of the civil law for the prevention and remedy of wrongs.

After twenty years in the Exchequer, Baron Bramwell was made a Lord Justice of Appeal, and there was probably no judge who gave more weight and authority to that court at a critical period of our jurisprudence. To say that he was as much in his element at Lincoln's Inn as in Westminster Hall would be flattery. "I sat daily," says Lord Campbell—he had just been made Chancellor—"through the whole of Michaelmas Term with Lords Justices Knight-Bruce and Turner. I might have been compared to a wild elephant broken in between two tame ones." It was much the same with Lord Justice Bramwell sitting at

Lincoln's Inn with the two tame elephants Lord Justice James and Jessel, M.R. He had one day to hear a case involving points of equity only. The case occupied the day. When the Chancery Lords Justices had given their judgment, and his turn came, he said simply: "Having listened all day to things which I don't think I ever heard of before, I can safely say I am of the same opinion and for the same reasons." But he had that good sense, which is itself a natural equity. Cato, as we know, began the study of Greek at eighty. Lord Bramwell at the same age beginning the study of equity (see *Salt v. Marquess of Northampton*, 65 L. T. Rep. N. S. 765; (1892) A. C. 19) affords a fine historical parallel. The result of his lucubrations was to doubt whether it would not have been better to have held people to their bargains, and taught them by experience not to make unwise ones rather than relieve them when they had done so. But "piety, or the love of fees of those who administered equity, has thought otherwise." He, like Selden, was inclined to think equity a "roguish thing."

His country house was at Edenbridge. One spring day, Mr. Fairfield tells us, in the year 1889 the local constable at Edenbridge noticed Lord Bramwell intently watching a noisy group of village boys apparently much excited about something. It was the first day of the cricket season, and they were in fact drawing up rules for their cricket club. Fancying they might have annoyed the old lord in some way, the constable approached and asked whether such was the case. "No, no," said Lord Bramwell; "those lads have been teaching me something—how the Common Law was invented." The constable considered this a remarkable proof of juvenile precocity, and observed: "It is wonderful what they do learn at school nowadays, my lord—over-education, I call it."

How true it is that the mind sees what it brings! The constable saw nothing but a pack of noisy boys. Before the eyes of the old judge—the master of the Common Law—there was unrolling itself on that village green the long pageant of our legal history.

How he retired from the Bench in 1887; how on the occasion of that retirement a unique tribute was paid him by Bench and Bar, in a complimentary banquet; how he was raised to the peerage as Baron Bramwell of Hever; how vigorously he dissented from many of the decisions of the other Law Lords as to

the mind of a corporation, as to constructive fraud, as to the much-vexed maxim "Volenti non fit injuria"—all these things are fresh in our recollection, and need not be dwelt upon. When he died, in 1892, it might be said of him as of Julius Cæsar:

Satis vixit et naturæ et gloriæ.

One of his last utterances may be heartily commended to the Profession, to Bar Associations, and Law Institutions: "The great thing to be done—that which they ought all to seek to do—was, to cheapen law—to cheapen the administration of the law. High costs, it is said, are a good thing in stopping a great deal of improper litigation. Yes, so they are, but they also stop a great deal of proper litigation."

"Hold to your bargain" was one of his first principles, but he made an exception to breach of promise actions. "I cannot help thinking," he says, "that these are actions which ought not to be encouraged. If people change their minds, it is better that they should do so before marriage than when it is too late" (*Anon.*, 41 L. T. 71). This would be a good argument in the days when courts enforced specific performance of a promise to marry, but that appalling jurisdiction is now at an end. The law allows you to be fickle, but it is a luxury for which you pay, and for which you ought to pay.

His remarks in *Ryder v. Wombwell* (19 L. T. Rep. N. S. 491; L. Rep. 3 Ex. 95) on infants' contracts are very pertinent. "The law as to such contracts is not," he says, "a law for the indemnity and defence of the infant who is such merely: it is a law to deter people from trusting infants, and so save them from the consequences of the improvidence and inexperience of their age—an improvidence which would lead them into loss, though all their dealings were with honest people, an inexperience which causes them to be no match for rogues." Insanity, again, is not a "privilege" but a misfortune. It must not be allowed to injure innocent persons: (*Drew v. Nunn*, 40 L. T. Rep. N. S. 671; 4 Q. B. Div. 668).

In *Stonor v. Fowle* (58 L. T. Rep. N. S. 1; 13 App Cas. 20) he points out that so-called imprisonment for debt is not really imprisonment for debt, but for dishonesty—the debtor not paying when he has the means. Properly understood, it is only kindness in disguise. "A learned County Court judge once told me," he says, "that at first he used to make orders for committal

for a short time, and he found that the people went to prison. He then lengthened the period, and found that fewer people went to prison, and he found that the longer the period for which he committed people to prison for not paying, the shorter was the total amount of imprisonment suffered by debtors; because when they were committed for the whole six weeks they moved heaven and earth among their friends to get the funds and pay; whereas, if the term was a short one, they underwent the imprisonment.

But is this squeezing of friends quite justifiable?

That thinking an abducted girl over age is no defence (*Reg. v. Prince*, 13 Cox C. C. 143); that there is no such thing as absolute or intrinsic negligence (*Degg v. Midland Railway Company*, 1 H. & N. 781); that an occupier may not shoot a trespasser; that if a man has the misfortune to lose his spring by his neighbour digging a well, he must dig his own well deeper (*Ibbotson v. Peat*, 3 H. & C. 650); that a wife cannot pledge her husband's credit without authority (*Debenham v. Mellon*, 42 L. T. Rep. N. S. 577; 5 Q. B. Div. 399); that boxing (*Reg. v. Young*, 10 Cox C. C. 371) or football (*Reg. v. Bradshaw*, 14 Cox C. C. 84) are unlawful if played in such a way as to be likely to cause the death of another, are but a few out of his many valuable decisions.

He never would assent to the view that posting acceptance of an offer which never reaches the offerer constituted a contract: (*British and American Telegraph Company v. Colson*, 23 L. T. Rep. N. S. 868; L. Rep. 6 Ex. 118; *Household Fire Insurance Company v. Grant*, 41 L. T. Rep. N. S. 298; 4 Ex. Div. 216).

Circumstantial evidence sometimes presents difficulties, but sometimes "res ipsa loquitur." The claimant in the *Lovat Peerage Case* (10 App. Cas. 803) had certainly some serious difficulties to contend with, as Lord Bramwell with fine irony points out. "Alexander," he remarks, "must—on the claimant's hypothesis—have been working at manual labour when he was at least 112 years old. He must have remained unmarried till he was at least seventy-five years of age, and then eloped with a young woman and had a child when he was at least ninety-five." No less piquant are his remarks about the claimant's "grievance." "The next point, as I understand it, is this: The plaintiff, in error, has been sentenced to seven years' penal servitude upon each count, but he ought, in addition to that, to have

been sentenced to some amount of fine and imprisonment. I very much doubt whether he has any right to make such a complaint. He cannot say any wrong has been done him. The utmost that he can say is that he has not had sufficient punishment awarded to him, and I very much doubt whether error will lie at the suit of the person indicted under these circumstances": (*Reg. v. Castro*, 5 Q. B. Div. 507). It is an extravagant degree of conscientiousness.

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LORD CAIRNS.

(From a photograph by the London Stereoscopic Company.)

LORD CAIRNS.

"WHY, sir," said Dr. Johnson, "if a man were to go by chance at the same time with Burke under a shed to shun a shower he would say, 'This is an extraordinary man.' If Burke should go to a stable to see his horse dressed, the ostler would say, 'We have had an extraordinary man here.'" What was said here by Dr. Johnson, of Cairns' great countryman, might with equal appropriateness have been said of Cairns himself. He was one who impressed everyone with whom he came in contact with a sense of power, of mastery. "That young man will undoubtedly rise to the top of his profession," said Lord Westbury to the solicitor after a consultation with young Cairns, then an obscure junior. He not only rose to the top of his profession, but he achieved the highest eminence as a statesman, a legislator, and a law reformer. His was

A life in civic action warm,
A soul on highest mission sent,
A potent voice in Parliament,
A pillar stedfast in the storm.

Cairns was born in the same year as her late Gracious Majesty, among the fresh green glades of the charming wooded retreat Cultra—an ancient seat of the Kennedys—in county Down.

He was an Irishman of the true Ulster breed—shrewd, capable, resolute. His father would have had him a clergyman, and no doubt he would have made an admirable one, but he showed such a marked predilection for law that his Trinity College tutor, who had had the training of Willes, Palles, Fitzgibbon, and Henry Law, begged that his bent might not be balked; so to London he came, and studied common law in the chambers of Chitty, the celebrated pleader, and equity and conveyancing in the chambers of Mr. (afterwards Sir Richard) Malins, who, if he dispensed a home-brewed equity of his own,

was at least an excellent conveyancer. It is said Malins never quite forgave his illustrious pupil for not making him a Lord Justice.

It is an odd thing, considering his brilliancy as a debater in after life, that Cairns should have been at the outset of his career, as we are told he was, so diffident and so nervous a speaker that he thought himself unfit for anything but chamber practice and conveyancing; but was not the great Erskine himself to the last seized with a tremor when called upon to speak in public? The orator's organisation is a highly strung one, and vibrates to every breath of emotion.

Cairns had come to London without a friend, but he was soon found out by the solicitors, notably by Mr. Gregory, of Bedford-row.

His two great rivals at the Equity Bar were Rolt and Palmer. "All," says Mr. Bryce, in his recent "Biographical Sketches," "were admirable lawyers. Rolt excelled in his spirited presentation of a case and the lively vigour of his argument. Palmer was conspicuous for inexhaustible ingenuity and for a subtlety which sometimes led him into reasoning too fine for the court to follow. Cairns was broad, massive, convincing with a robust urgency of logic which seemed to grasp and fix you, so that while he spoke you could fancy no conclusion possible save that toward which he moved. His habit was to seize upon what he deemed the central and vital point of the case, throwing the whole force of his argument upon that one point and holding the judge's mind fast to it."

It is a very striking instance of his religious conscientiousness that he returned one of his first briefs—a very important one from a leading solicitor—because the circumstances of the case would have required him to devote the hours of Sunday to the study involved: "Six days a week," he said in returning it, "I am your man; on the seventh day I am God's man only." As he got on at the Bar and briefs came trooping gaily, it was his habit to refuse briefs not only for Sunday but for Saturday, and to take that day as a holiday—often in the hunting-field—for the benefit of his health—always delicate. His autumn vacations were spent in shooting over the Scotch moors, sometimes in fishing. The sport, the exercise, the fine air, and the picturesque surroundings all delighted him; but his love of sport was of the old-fashioned type. For the modern battue and driving systems

of butchery and slaughter he always expressed an unbounded contempt and abhorrence.

One adventitious advantage Cairns had, and that was millionaire kinsmen, in the McCalmonts. It was by their aid and influence, backed, of course, by his own ability, that he was enabled to become member for Belfast in 1852, eight years after his call. Lord Campbell was even then complaining that the House of Commons was "infested" with lawyers. We know that the floor of the House is strewn with the wrecks of their reputations, but Cairns was an illustrious exception to the rule. His stately presence, his calm, unimpassioned, but convincing logic, his clear head and resolute will, won him before long the ear of that most critical and difficult of all assemblages, the House of Commons, and soon he had gained such a standing that the news that "Cairns was up" sufficed to fill the benches in the House and empty the smoking-room and library. Shortly after his appointment as Solicitor-General, Disraeli, in his official letter to the Queen, on May 14th, 1858, the night of the debate on Lord John Russell's vote of censure on Lord Ellenborough's Indian Administration, writes: "Two of the greatest speeches ever delivered in Parliament, by Sir Edward Lytton and the Solicitor-General, Sir Hugh Cairns. Cairns devoted an hour to a reply to Lord John's resolution, and to a vindication of the Government Bill, which charmed everyone by its lucidity and controlled everyone by its logic." This quality of "lucidity" in which, according to Matthew Arnold, Englishmen are so lamentably deficient, was at all times the especial excellence of Cairns' speaking. In 1866 he became Attorney-General, and his words on the occasion, spoken at a banquet at Belfast, are worth quoting. "As a proof," he said, "of the intimate and complete union and incorporation of Ireland with England, and of the absence of any jealousy or narrow-mindedness towards Ireland on the part of the sister country, I appeal to the fact that I, an Irishman, and an Irish representative, have been intrusted with an office which never before was filled except by a native of Great Britain." The Solicitor-Generalship is, according to Bacon, "one of the hardest places in the kingdom," but the Attorney-Generalship is harder, and Cairns' health obliged him for a time to seek repose on the bench. Knight-Bruce was just retiring. Cairns took his place and a peerage. But he was too valuable a political ally to be dispensed with, and when Disraeli formed his Administration in

1868 he chose Lord Cairns as his Chancellor. To do so he had to pass over Lord Chelmsford, the ex-Conservative Chancellor, and thereout arose much heart-burning. Chelmsford complained that he had been "dismissed with less courtesy than if he had been a butler," (a) but in truth the selection was amply justified. Lord Chelmsford was seventy-five, too old for the post, while Cairns was forty-eight, in full vigour of mind and body, a better lawyer, and a much abler debater, and, as Disraeli used to say, "great in counsel." On the bench Cairns was eminently judicial. If he was great as an advocate, he was still greater as a judge, "a model of judicial excellence." The late Mr. Benjamin pronounced him the greatest lawyer before whom he had ever argued a case. The most complex legal problem presented no difficulty to him. It passed out of his hands, placed by his mere statement in so simple and clear a light that the wonder was there could ever have been any difficulty about it. He disembarassed himself of details, he grasped principles. In delivering his judgments his words, too, and his manner clear, cold, and dispassionate, sounded like the very "voice of the recorded law"; they carried conviction inexorably to the hearer. For a judge to hear well, as Mr. Hemming has well said, is for him to get the greatest amount of aid which can be got from the arguments of counsel, and at the same time to check effectually waste of time upon ingenious sophistry. This was what Lord Cairns did.

One of the new Lords of Appeal had acquired, in a court in which speed was considered rather than orderliness, the habit of interrupting the arguments by questions in the nature of posers. On his reverting to this habit in the House of Lords, Lord Cairns interposed from the woolsack before the question could be answered with the words, "I think the House is desirous of hearing the argument of counsel, and not of putting questions to him." The interposition was made by Lord Cairns in a voice not musical like that of the late Chief Justice Cockburn, but possessing with his the quality that it could not be gainsaid.

The interruption of judges often make it extremely difficult for counsel to maintain any connected argument. The late Mr. Benjamin had a strong objection to them. A learned law lord, having more than once interposed, met a proposition of his at

(a) A wit said that Dizzy had erected Cairns over Lord Chelmsford in honour of the ex-Chancellor.

last with the ejaculation "Monstrous!" Mr. Benjamin quietly tied up his papers, bowed, and retired from the House of Lords. The noble lord afterwards, with his usual generosity, publicly sent a conciliatory letter to Mr. Benjamin. Mr. Justice Willee—not Bernard Shaw—had this bad habit of interrupting. "Your Lordship," said the counsel on the occasion of one of these checks, "is even a greater man than your father the Chief Baron. The Chief Baron used to understand me after I had done, but your Lordship understands me before I begin."

The late Lord Chief Justice Coleridge has testified in an interesting passage to Lord Cairns' strict sense of duty in the distribution of his patronage. "It chanced from circumstances," he says, "with which I need not trouble your Lordships, that when I was Chief Justice of the Common Pleas Lord Cairns often consulted me as to judicial appointments which he had to fill, and which had been usually filled by members of the Common Law Bar, with whom, in the nature of things, he could not have had much acquaintance. I do not say that he always took my advice. Lord Cairns was too great a man, he had too independent a mind, not to rely in the last resort upon his own judgment. He used the judgment of other men as materials to form his own. But this I may say, as those who knew him best must know, that he was always guided by the severest integrity and always animated by a single-minded desire to do his duty as he understood it. It might be said that by those on both sides who disposed of judicial appointments politics have for many years been disregarded; but anyone acquainted with public affairs must know that it is not an easy thing to resist the importunities of men who, perhaps from the nature of the case, are not aware of the great public mischief that is done by incompetent persons acting in a judicial position. I may venture to say that Lord Cairns paid marked disregard to the importunity of such men, and would not appoint anyone whom he did not believe fully competent. In one case I suggested to him, to fill a judicial position, one whose competency no one who knew him would venture to deny, and he declined to appoint him. I may speak of the case now without risk of doing any harm. I suggested that the late Mr. Benjamin should be appointed to the Bench—a man whom I was anxious to have seen among the judges of England, and who, to my knowledge, would have felt himself honoured by being placed among them. But Lord Cairns

refused to consider his claims, and he refused on grounds which, I cannot help admitting, were at the time urgent and forcible, and would by most men be held to be conclusive. I am sure that in not appointing that eminent person Lord Cairns acted against his own wishes and from the purest and most patriotic motives." It was, indeed, Lord Cairns himself who had paid Mr. Benjamin the compliment of shortening his probation for the English Bar. As to Lord Cairns' legislative achievements, are they not recorded in the admirably drawn Conveyancing Acts, in the Vendors and Purchasers Act, the Settled Land Acts, the Judicature Acts, and many others? It was no fault of his that his Land Registry Act was a failure. The time was not ripe.

Lord Cairns was cold and unresponsive in manner; his oratory has been called "frozen"; he did not readily "give his heart," as a friend said; but there was suppressed fire within him, and it leapt out sometimes when he was deeply moved. One of these occasions was the struggle over the disestablishment of the Irish Church. "Never," says Mr. Wemyss Reid, "will those who witnessed the brilliant scene presented by the House of Peers on that memorable night forget it! Our hereditary legislators had mustered in stronger force than upon almost any previous occasion within the recollection of living men: the galleries were crowded by the peeresses, dazzling in their beauty and jewels, the most notable men in the House of Commons were huddled together at the Bar or on the steps of the Throne, whilst at the side of the woolsack stood the Lord Chancellor, pale and emaciated, evidently very ill, but possessed by a spirit which no physical infirmities could overcome, and pouring forth for hours an unbroken stream of clear and logical eloquence against the measure before the House. Everyone in the crowded chamber listened spellbound. Men who had known Hugh Cairns for a score of years were lost in admiration at the power which he had now developed, and which so far surpassed all their previous experience of him. Cheer upon cheer rolled from the Ministerial benches at the close of each glowing period, and when the Lord Chancellor resumed his seat upon the woolsack all Torydom sent forth a rapturous shout,

And even the ranks of Tuscany
Could scarce forbear a cheer.

while the ladies rose in their enthusiasm and joined in the general

applause by the waving of fans and handkerchiefs." It was Cairns, too, who, though he could not recommend resistance to the House of Lords, extorted the best terms of capitulation, and changed in many respects the character of the Bill for the better. (a)

The cause of the Irish Church was in fact one which enlisted the deepest feelings of his nature. Religion was to him throughout life the paramount consideration, the one thing needful. All else—wealth, honour, recreation, reputation—were, as he once said to the Young Men's Christian Association, "nothing, absolutely nothing," in comparison of it. When he was asked, after his elevation to the woolsack, whether he would not now be compelled to give up Sunday School work, he emphatically answered "Certainly not." He took the deepest interest in the welfare of innumerable religious and missionary societies, the Bible Society, the Church Missionary Society, the Jews' Society, the Open Air Mission, the Soldiers' Friendly Society, to mention only a few; and he extended a warm welcome to Messrs. Moody and Sankey, the Evangelists, on their visit to England, and was a frequent and attentive listener at their services. The story is that, while Messrs. Moody and Sankey were at the Haymarket, in 1875, a Jew went to one of the services to ridicule. He was surprised to see Lord Cairns, so busy a man, with leisure and will to be there, and he had such a high opinion of Lord Cairns' intellect and powers that he thought, if Lord Cairns listened to such preaching, he would listen too. He was further surprised to see Lord Cairns shake hands with Mr. Moody, and could not believe his eyes when Lord Cairns took from his pocket a Bible and hymn books. The Jew returned the following Sunday, and found Lord Cairns in the same place. He stayed to the after meeting, became a changed man, and six weeks afterwards sought Christian baptism.

One stirring peroration may be quoted from Lord Cairns. It was on our national humiliation in the Transvaal War. "I wish," he said, "that while still the Transvaal remains, as you say it does, under our control, the British flag had not been first

(a) Punch's cartoon pictures the Archbishop—it should have been Cairns—as a gipsy nurse giving back a changeling instead of the child intrusted to her. Nurse Canterbury: "Which we've took the greatest care of 'im mem, and 'ope you'll think 'im grow'd."—Mrs. Prime Minister: "This is not *my* child. Not in the least like it."

reversed and then trailed in insult through the mud. I wish that the moment when you are weakening our empire in the East had not been selected for dismembering our empire in South Africa. These are the aggravations of the transaction. You have used no pains to conceal what was humbling, and a shame which was real you have made burning. But the transaction without the aggravations is bad enough. It has already touched, and will every day touch more deeply the heart of the nation. Other reverses we have had, other disasters; but a reverse is not dishonour, and a disaster does not necessarily imply disgrace. To Her Majesty's Government we owe a sensation which to this country of ours is new, and is certainly not agreeable:

In all the ills the years have brought:
 In all the griefs we bore,
 We sighed, we wept, we toiled, we fought,
 We never blushed before."

A year or two later Lord Cairns was caught in a shower while riding out at Bournemouth; chill and congestion followed, and his earthly career was ended. His death was little short of a calamity to the Conservative party.

A writer laughingly says of him that he had but one human weakness, and that was for immaculate bands in court and for a flower in his buttonhole; but in the following little narrative we have something which is not only one touch of nature, but honourable to the heart of the great Chancellor.

"Many years ago," says the narrator P. B., "I was a member of the North-Eastern Circuit, which traverses the province of Ulster, and I thus became acquainted with the provincial capital of Belfast. I discovered in that town a very famous pastrycook justly celebrated for the manufacture of superior raspberry tarts. These delicacies I was providentially the means of introducing at the Bar mess, which highly approved of my tarts, and patronised Mrs. Linden with a liberality which was quite surprising. Not long ago, having occasion to go to the North of Ireland, I paid a visit to our old friend, whom I found grown uncommonly stout and, I was glad to learn, wealthy. Speaking to her of old times, I observed upon the counter a bridal cake of stupendous dimensions glittering all over with gorgeous decorations. The cake was for a royal bride—one of the princesses—Mrs. Linden proudly informed me, and she was going to take the delicacy herself to Windsor.

“ ‘And pray,’ I inquired, ‘how did you become a recipient of the orders of Royalty? Have the London confectioners lost their cunning?’

“ ‘It was Sir Hugh Cairns got me the order,’ Mrs. Linden replied. ‘He used to come in here often and eat raspberry tarts just as you did, when he was a boy, and got to like them.’

“ I must confess when I saw this great personage on the first day of term presiding in the Court of Chancery seated in the marble chair, and the Queen’s Counsel, whom he had entertained at breakfast that morning, bowing before him in their silken robes and full-bottomed wigs, my thoughts flew back to the pleasant association of Trinity College when we were students thirty years before, and I remembered, too, the little dingy back shop in Bridge-street, Belfast, where the youth, who was destined to become Lord Chancellor of England, indulged his innocent proclivities. I wondered if he could eat a raspberry tart with the same zest as he did then, or if the many banquets at which he has presided in solemn official dignity, and the vast stores of legal learning which he has accumulated, would cause such trifles to pall on the great man’s taste.”

Lord Cairns was Lord Justice and Chancellor at a time when many important questions of company law under the Companies Acts were daily arising, and he may be said to have moulded more than any other judge this branch of our law. In *Re Barned’s Banking Corporation; Ex parte The Contract Corporation* (17 L. T. Rep. N. S. 269; 3 Ch. App. 105) he decided that a limited company may become a shareholder in another company if authorised by its own memorandum and articles of association to do so; in *Peel’s case* (16 L. T. Rep. N. S. 780; 2 Ch. App. 674), that the certificate of registration of a company’s memorandum of association is conclusive, though the memorandum has been improperly altered—a principle which has now received statutory recognition in the Companies Act 1900; in *Sahlgreen and Carrall’s case* (3 Ch. App. 323) that for an allotment of shares to be binding it must be communicated to the applicant. In *Coles v. Bristowe* (19 L. T. Rep. N. S. 403; 4 Ch. App. 3) he defined a jobber’s liability under the custom of the Stock Exchange; in *Elkington’s case* (16 L. T. Rep. N. S. 301; 2 Ch. App. 511) and *Pellatt’s case* (16 L. T. Rep. N. S. 442; 2 Ch. App. 527) he gave judgments as to paying for shares in goods which led to the well-known sect. 25 of the Companies Act 1867

being passed; in *Evans's* case (16 L. T. Rep. N. S. 252; 2 Ch. App. 427) he defined the liability of a subscriber of the memorandum of association. *Re Natal Investment Company* (18 L. T. Rep. N. S. 171; 3 Ch. App. 355) is an important case on the assignment of debentures free of equities; so is *Re The Suburban Hotel Company* (17 L. T. Rep. N. S. 22; 2 Ch. App. 737), a winding-up case in which Lord Cairns introduced the now familiar phrase, a company's "substratum." *Webb v. Whiffin* (L. Rep. 5 H. of L. 711), another winding-up case, explains the position of "past member contributories"; but unquestionably the most important of these company cases is *Erlanger v. New Sombrero Phosphate Company* (39 L. T. Rep. N. S. 269; L. Rep. 3 H. of L. 1218), deciding that persons who purchase property and then create a company to purchase the property from them stand in a fiduciary position towards the company which they have brought into existence, and must faithfully state to the company the facts which apply to the property, and which would influence the company in deciding on the reasonableness of acquiring it. *Gardner v. London, Chatham, and Dover Railway Company* (15 L. T. Rep. N. S. 644; 2 Ch. App. 217) is always associated with Lord Cairns. In a luminous judgment he there lays it down that a railway company is a fruit-bearing tree, and that debenture-holders are entitled only to "the fruit of the tree," the produce dedicated to the contract, and are not entitled to cut the tree down.

Other notable decisions of Lord Cairns are *Tilley v. Thomas* (17 L. T. Rep. N. S. 422; 3 Ch. App. 61), where he explains that time is only not of the essence of a contract where there is nothing in the express stipulations between the parties, the nature of the property, or the surrounding circumstances which would make it inequitable to interfere with and modify the legal right; *Hill v. Crook* (L. Rep. 6 H. of L. 285) on the construction of gifts to illegitimate children; *Rylands v. Fletcher* (19 L. T. Rep. N. S. 220; L. Rep. 3 H. of L. 330), deciding that if a person brings or accumulates on his land anything—such as fire, flood water, explosives, poisons—which if it should escape may cause damage to his neighbours, he does so at his peril; he is responsible, that is, if it does escape, however careful he may have been, and whatever precautions he may have taken; and the much-vexed case of *Hussey v. Horne Payne* (38 L. T. Rep. N. S. 543; 4 App. Cas. 311), where he lays it down that, where a court has to find a

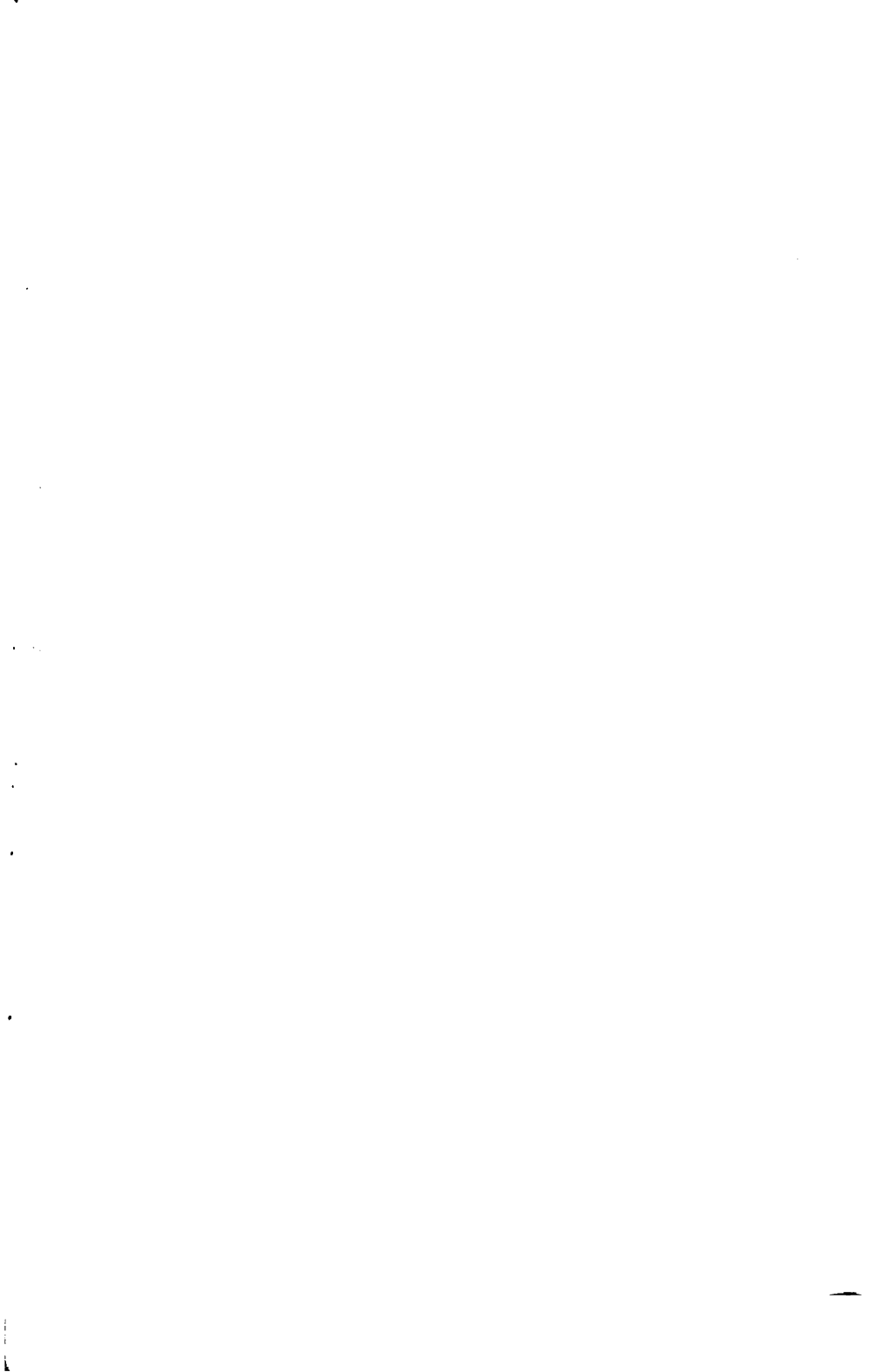
contract in a correspondence and not in one particular note or memorandum formally signed, the whole of that which has passed between the parties must be taken into consideration.

In *Bank of Portugal v. Waddell* his elaborate judgment was delivered without a single note, and was as perfect in reasoning and expression as if he had devoted days to its preparation.

Fanny Kemble, the popular actress, when early in the last century she married and settled down in the wilds of Pennsylvania, set herself to learn book-keeping by double entry, but while she was reading of bankruptcies, losses of ships and cargoes, fires, failing securities, and unlucky speculations, instead of attending to their business aspect, her imagination, she tells us, would fly off to the dramatic, passionate, human element involved in such accidents, and think of all manner of plays and novels instead of cash accounts to be extracted therefrom. The actress's sympathetic imagination was too strong, in fact. What would be the lawyer's fate if he had this keen realisation of the tragic elements in all the cases in which he was called on to advise or to act: if on perusing an abstract of title, for instance, there pictured themselves all the pathetic vicissitudes, the family scenes of joy and sorrow, through which the abstract conducts him? In fact, we know that the conveyancer plods through the long record of deaths, mortgages, bankruptcies, broken vows, and broken contracts with philosophic equanimity, as undisturbed as Cowper's postboy by the contents of his "heart-shaking budget." Perhaps it is this which gives the lawyer his character for hard-heartedness, just as the metaphysician—dealing in abstractions—has been called the most callous of mortals. In both cases the charge is unjust. The lawyer is no more impervious to sentimental considerations than other people, but such considerations are, as he knows, beside his proper sphere. The facts are for him just so many algebraic symbols, from which he works to his legal conclusion. And yet at times does not even the lawyer pause to sigh, to sympathise, or to moralise at the strange drama of life unrolled before him? Lord Cairns did so in the *Glasgow Bank* case (40 L. T. N. S. 339; L. R. 4 Ch. 387), where he was driven to hold trustees of stock in the bank personally liable. "It is difficult," he said in concluding his judgment, "to use words which will adequately express the sympathy I feel for all those who have been overwhelmed in the disaster of the Glasgow Bank, and that sympathy is peculiarly due to those who, without

possibility of benefit to themselves, and probably without any trust estate behind sufficient to indemnify them, have become subject to loss or ruin by entering, for the advantage of others, into a partnership attended with risks of which they probably were forgetful, or which they did not fully realise. The duty of your Lordships, however, is to declare the law. . . .”

Lord Bramwell, in recommending limited liability, might well declare that many a pitched battle had caused less misery than that “horrible Glasgow Bank case.”





BARON MARTIN.

(From a photograph by the London Stereoscopic Company)

BARON MARTIN.

LAW to many, perhaps most persons, represents the Great Goddess of Dulness herself. "Law is so dry!" they say. "I deny it," said Lord Bramwell stoutly; "of the four volumes of Blackstone, three are, to my mind, most agreeable reading." Baron Martin was of the same opinion. To him law was not "harsh and crabbed"—though he had his training under the old system of special pleading—but "musical as is Apollo's lute, and a perpetual feast of nectared sweets." Law sufficed him, as science sufficed Darwin. Neither felt the want of poetry or *belles lettres* to relieve it.

Serjeant Robinson relates that on one circuit Baron Martin took Frank Talfourd round with him as his marshal. One evening after dinner, rousing himself from a short nap, the Baron found Frank reading Shakespeare.

"I find, Frank," he said, "you are always reading plays, and especially Shakespeare. I never found time to read him myself, but I suppose he is a big fellow."

"Yes, Baron," was the reply, "he is generally acknowledged to be the greatest poet the world ever produced."

"Well," said the judge, "I think I should like to read one of his works, just to see what it is like. Which do you recommend?"

"They are all admirable productions," replied the marshal, "but I have just been again reading 'Measure for Measure,' and I think that will, perhaps, please you as well as any."

"All right," said the Baron; "lend it to me, and I will read it before I go to sleep."

The next morning he was, of course, asked how he liked the play.

"Well," was the Baron's reply, "I can't say I think much of it; it contains atrociously bad law, and I am of opinion that your friend Shakespeare is a very overrated man."

The library in his chambers overlooking the fountain in the Middle Temple consisted of law books, the Bible, and the *Racing Calendar*. It was characteristic. He had taken to heart Coke's maxim that "Lady Common Law must lie alone." Yet Martin was not without literature. He knew English history and Scott's novels thoroughly well; he had even taken a small excursion into literature himself in the shape of a short but sound treatise on Lord Tenterden's Act.

Like Cairns and Willes, Martin was one of those alumni of Trinity College, Dublin, who yearly came to seek their fortune at the English Bar. Martin had none of the special gifts of wit or eloquence which so often distinguish Erin's sons. He was not brilliant or versatile, but he had what is better in a lawyer, a clear, strong, sagacious intellect, and a sound knowledge of law. He learnt his law, or rather the elements of it, in the chambers of Frederick Pollock, afterwards the Chief Baron. In those days—terrible to relate—busy barristers had no "evenings at home" at all. Consultations were held as a matter of course in the evenings, sometimes three or four, so that dining out or receiving company was out of the question except on Saturdays or Sundays. Not unfrequently, however, as the Chief Baron's son relates in his *Remembrances*, "my father would bring home to dinner one or two men from his pupil room," but even then the revel was a short one, for "at fifteen or twenty minutes to seven the inexorable hackney coach would come to the door, and carry off host and guests together to the Temple, where consultations and answering of cases occupied the rest of the evening until ten o'clock, when the return home would again be made in a hackney coach." What more natural than that on these visits, when host and pupil snatched a hurried meal, an attachment should spring up between the young Irish barrister and a daughter of the house of Pollock. It resulted in a happy union of more than thirty years' duration, the fruit of it a daughter, Arabella, now Lady Macnaghten. If there is anything in heredity, the genius of law should run strong in the Macnaghten race.

Martin's first brief was in a turf case raising the question whether a horse called Bloomsbury, which had won the St. Leger, was disqualified or not for being misdescribed. There was a peculiar appropriateness in the circumstance, for, beyond most Irishmen, he was a lover of horses, and deeply interested in all that concerned them. His knowledge of the *Racing Calendar*

was something extraordinary, though he never made a bet, and when he first began to take a great interest in the subject of the turf he had never seen a race. In the old days of the Northern Circuit, when the journey had still to be made by coach, Martin knew every team on the road, and when in Yorkshire the way lay by racing paddocks, he would point out and give the particular history of the horses in the paddocks that could be seen from the coach-top. Once, on a visit to a large house in Yorkshire, where there were a quantity of racing cups on the sideboard in the dining-room, he was able at once to name the races at which they had each been won and to give the names of the winners.

But it was in commercial, not turf, cases that he was destined to attain eminence at the Bar. One who had seen Erskine's briefs tells us that the notes and interlineations were few, but that particular parts were doubled down and dashed with peculiar emphasis, his plan being to throw all his strength upon the grand features of the case instead of frittering it away upon details. It was the same with Martin as an advocate. He bore in mind the golden maxim not to perplex the jury with too many details, but to put his best point to them, and to put it strongly. When after thirteen years at the junior Bar he took silk, he stepped at once into the leading practice at the Guildhall. Something of his success he probably owed to the Chief Baron, his father-in-law. With him Martin was a great favourite, and the partiality with which he regarded him caused some jealousy in the Profession, culminating on one occasion in an unpleasant scene in court between the Chief Baron and Sir F. Thesiger. Certain it is, nothing could have been further from the intentions of the Chief Baron than any favouritism. But human nature is the same under the ermine as under any other dress, and anyone conversant with our court in the past or the present will know that counsel—kinship or no kinship—will sometimes acquire an ascendancy over the judge before whom they practise. Two years after taking silk, Martin successfully contested Pontefract against the late Lord Houghton, then Monckton Milnes. It was on this occasion that a voter, who was in the condition which police-court witnesses are apt to describe as not drunk, but decidedly in liquor, presented himself at the poll, and, being asked for whom he voted, replied, "I vote for Mr. Gully's friend." The poll clerk not unnaturally refused at first to take the vote. It was Mr. Monckton Milnes, afterwards Lord Houghton, who inter-

posed with, "We all know what that means. Take the vote for Martin."

But his senatorial life was a short one. In 1850 Baron Rolfe was made a vice-chancellor, and Martin was appointed to fill his place. Bramwell, Willes, and Martin have been classed as the three strongest judges of this century, and the description is true in this sense, that they were all judges who were not led by counsel, but took decided views of their own, and had abundant learning to give good legal reasons for any view they took. Not long after Martin's appointment, Campbell enters in his diary, "I have had a very agreeable circuit, the Oxford, my colleague being Baron Martin, an excellent lawyer and an exceedingly good-natured fellow. We got through the whole of our business together extremely well, at every place leaving no remanets, and asking for no assistance."

On the Bench, as at the Bar, Baron Martin sought to reduce matters to a small compass. After a mass of contradictory evidence had been given, and long speeches made in a case which the Baron was trying, he summed up as follows: "Gentlemen of the jury, you have heard the evidence and the speeches of the learned counsel; if you believe the old woman in red, you will find the prisoner guilty; if you do not believe her, you will find him not guilty." On another occasion—the tradition runs—he summed up thus: "Gentlemen of the jury, the man stole the boots; consider your verdict." The length of his charge was not a criterion of the anxiety with which he considered the cases he had to try. After pronouncing a severe sentence in court, he would sometimes modify it in favour of the prisoner before signing the charge sheet. Once when a sentence of death had been pronounced by another judge who went circuit with him, Baron Martin persuaded his learned brother that the prisoner ought not to be hanged, and settled with him a letter to that effect, which he caused to be written out and despatched to the Home Secretary before he would dine. He had an absolute repugnance to trying capital cases with the chance of having to sentence a prisoner to death, and when it was unavoidable that he should try a capital-case it was a weight upon his mind for days and weeks beforehand. His kindly nature sometimes overflowed in charity to those whose woes came before him in court. A wandering boy fiddler, as a writer in the *Times* related, had been robbed by gipsies and left tied to a tree. The scoundrels

who had pillaged him were discovered and sentenced by Baron Martin. The learned judge made inquiries about the prosecutor, found he was alone in the world, used influence to get him into a school, and regularly sent him a hamper while he was there. The object of this wisely directed assistance now occupies a respectable position in life. A miserable creature who had committed some trifling offence was brought before Baron Martin on circuit and sentenced to three days' imprisonment, which meant immediate release. Baron Martin was struck by his wretched demeanour, sent round to know whether he had any money, and, on hearing that he was penniless, made the culprit whom he had just condemned a present of £10. His mercy, however, was not weakly indiscriminate. Once at Liverpool he had before him a man who had committed a peculiarly atrocious crime. Baron Martin, in charging the jury, had worked himself up to such a fervour of honest indignation that when they immediately returned a verdict of "Guilty" he felt he could hardly trust himself to give judgment calmly; so he turned to the prisoner and said, "Would you like to have sentence to-night or to-morrow morning?" The convict, who had felt every word of the judge's summing up like a blow of the lash, cowered in the box, and, hoping that the night would mitigate the judge's wrath, asked for a respite to next morning. Next morning the judge, having slept on the case, was cool and collected. "Put that man up," he said, and the warder caused the prisoner to appear. Baron Martin then sentenced him to the heaviest punishment the law could inflict. Another version of this story says that on the morning in question the court was crowded with people, expectant of some such elaborate and eloquent speech to the prisoner as some judges would not have lost the chance of making. All that Baron Martin said was: "Prisoner at the bar, you're a very bad man. You'll have ten years of it." Such a laconic sentence is certainly better than the method of the Scotch Judge Eskgrove. He had to condemn two or three persons to die who had broken into a house at Luss, and assaulted Sir James Colquhoun and others, and robbed them of a large sum of money. He first, as was his wont, explained the nature of the various crimes, assault, robbery, and hame sucken, of which last he gave them the etymology, and he then reminded them that they attacked the house and the persons within it; and then came the climax:

"And all this you did, and God preserve us! joost when they were sitten doon to their denner."

One of the most sensational cases tried before Baron Martin was the Hatton Garden murder, in which an Italian had been stabbed in a low public-house brawl. The curious thing was the question of identity raised. Baron Martin convicted one man, Mr. Justice Byles another, so that two prisoners were lying under sentence of death for the same crime, one only of whom was guilty. The slow poisoning case referred to in 26 *LAW TIMES*, p. 159, was another case of his which attracted much attention at the time.

We have lately had the question raised whether a Prime Minister ought to own a Derby favourite. Baron Martin had no such scruples, and very nearly won the Goodwood Cup; nor was he shocked at a judge being elected on the committee of the Jockey Club.

Serjeant Robinson tells the story of how once, when he went as a judge on the Western Circuit, he was invited with several members of the Bar to dine with the Dean of Winchester, whom he had never met before. A few days afterwards a friend asked the dean what he thought of Baron Martin.

"Well," was the reply, "he does not appear to me to be a man of enlarged information. He actually had never heard of William of Wykeham, and wanted to know who he was."

Baron Martin was asked by someone what he thought of the Dean of Winchester.

"Well," he said, "I can't say I think much of him. He seems very deficient in a knowledge of what is going on in the world; he absolutely did not know what horse had won the last Derby."

Judges have been known to resort to various expedients for going to the Derby, encouraging compromises, making up a rotten, or even a dummy cause list. Baron Martin had the courage of his tastes. It was on the Assizes at Liverpool—so the story runs—and the eve of the Grand National. "Gentlemen," he said, "to-morrow an event of national importance is to take place, cannot we get on a little faster?" A friend met him once in the Bois de Boulogne at Paris on a Sunday when the races were going on, and said, "It would not do for you, Baron, to be seen in England amid such scenes as this on the Sabbath

day." "Well," said the Baron, piteously, "I cannot help it. What would you have me do when they will not race here on any other day than Sunday?"

Justice may be blind, it has been well said, but she must not be also deaf. Baron Martin felt this, felt that his increasing deafness counselled retirement, and early in 1873 he retired, after three-and-twenty years of judicial life, amid the universal regrets of Bar and Bench—regrets felt not only for the loss to the Bench of a most able, but of a most kindly and genial judge. For the remaining ten years of his life he lived six months of every year in Ireland on his estate in his native county of Londonderry, and the other six months in his chambers in Piccadilly, reading a great deal, taking a keen interest in the Bar, and in the coming men, and dining daily at Brooke's. He was one of the many instances of judicial longevity; but even judicial longevity must have a limit. "I'm breaking up," he said to a visitor a short time before his death. He died in 1883 at the age of eighty-two. His epitaph, he would jestingly say, he wished to be—

Here lies a judge who never left a remanet.

One of the most interesting cases which came before Baron Martin was that of *Müller v. Salomons* (7 Ex. Rep. 475), raising the question on which Macaulay so eloquently and convincingly argued, as to the civil disabilities of Jews. It was an action against a Jew, Member of Parliament for Greenwich, to recover penalties for having voted without properly taking the oath of abjuration, *i.e.*, omitting the words, "On the faith of a true Christian." The issue really narrowed itself to this, whether the words in question "on the faith of a true Christian" were surplusage, in the sense that it was sufficient that the terms of the oath without them would bind the conscience of the abjurer, or whether they were designed to obtain a profession of Christian faith. The majority of the Court were of opinion that they were so designed. Baron Martin dissented, and delivered an elaborate judgment, and it must be confessed that common sense was on his side, but the words of the statute were too strong to be got over. The whole subject, as we know, was threshed out again, but under somewhat different conditions, by the late Charles Bradlaugh.

Embrey v. Owen (6 Ex. Rep. 353) is an important case on water rights. Flowing water, it decides is *publici juris* in this sense only that all may reasonably use it who have a right of

access to it, and that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only. The same principles apply to air and light.

Crossed cheques are a great mystery to the uninitiated. *Bellamy v. Marjoribanks* (7 Ex. Rep. 389) is a very instructive case on their origin and meaning. According to it the crossing of a cheque payable to bearer with the name of a banker, whether made by the drawer or bearer, does not restrict the negotiability of the cheque to such banker or to a banker only, but is a mere memorandum that the holder is to present it for payment through some banker. The practice of crossing cheques originated, it seems, at the clearing house; the clerks of the different bankers who did business there having been accustomed to write across the cheques the names of their employers, so as to enable the clearing house clerks to make up the accounts.

We are so frequently told on the best authority that an Englishman's house is his castle that it is rather startling to find that, though it is illegal to break open outer doors or commit violence, a landlord is entitled to enter the premises for the purpose of distraining by turning the key, by drawing a bolt, by raising a latch, or by any other means usually adopted by the tenant: (*Ryan v. Shilcock*, 7 Ex. Rep. 72). Other notable decisions of Baron Martin, or of the Court of Exchequer while he was a member of it, are: that an infant defendant to an action for calls must plead that he repudiated within a reasonable time after he came of age (*Dublin and Wicklow Railway Company v. Black*, 8 Ex. Rep. 181); that a husband living with his wife, and who makes her a sufficient allowance for dress, is not liable for dresses supplied to her without his knowledge (*Reneaux v. Teakle*, 8 Ex. 680)—a doctrine now to be found fully expounded in *Debenham v. Mellon* (43 L. T. 673; 6 App. Cas. 24); that a governess engaged at a yearly salary is not within the rule relating to domestic or menial servants by which the contract of service may be dissolved upon a month's warning or a month's wages (*Todd v. Kerrieh*, 8 Ex. 151); that the master of a vessel has no power to charge his owner by signing bills of lading for a greater quantity of goods than those on board (*Hubbersty v. Ward*, 8 Ex. Rep. 330); that a husband is liable for necessaries supplied to his wife during the period of

his lunacy (*Read v. Legard*, 6 Ex. 636); that an attorney's clerk is not privileged from arrest whilst going to a judge's chambers for the purpose of there conducting the attorney's business (*Phillips v. Pound*, 7 Ex. Rep. 881).

A very able judgment of his is to be found in *Crouch v. Great Northern Railway Company* (11 Ex. Rep. 742), which decided that a railway company cannot legally charge a greater sum for the carriage of a package containing several parcels belonging to different persons than for a package containing several parcels all belonging to one person. The plaintiff in this case had devised the ingenious plan of collecting a number of small parcels, putting them in one large crate, and sending the crate by railway at a considerable profit to himself on the transaction. The company's contention was, that a misdelivery in the case of a package containing several parcels would expose them to several actions of trover. This was the legal objection: the real one, of course, was loss of business. Baron Martin points out very clearly that the proper action against a carrier for misdelivery is an action on the custom of the realm or bailment, in other words on the contract, and that upon a single bailment there could not be two actions.

SIR GEORGE JESSEL.

YOUNG CYRUS we know played the king among his schoolfellows, and Charles Kingsley preached sermons to the nursery at five; but history does not record whether Jessel in boyhood assumed the rôle of the judge and composed the disputes of the playground. Certain it is that he was born with what may be called a judicial genius. There has been no judge like him in this century at least. There have been judges more learned, judges more subtle, judges more eloquent, but none who have possessed his rare combination of clearness, vigour of understanding, varied knowledge, swiftness of apprehension, and mastery of legal principles. He had, as Lord Selborne expressed it in homely but happy phrase, the faculty of always "hitting the right nail on the head."

We all know the Scotch minister's prayer, "Lord, gie us a guid conceit o' oursels." It is a prayer which should be put up always by young barristers. Jessel undoubtedly had this primary qualification for the Bar without any praying—in his case, we might term it, a just confidence in his own powers—and he had also the next best qualification, an unlimited capacity for work. Only a short time before he died, in distributing prizes to some school children near his country home, he energetically preached to them the doctrine of hard work, and he acted on it consistently through life. His Jewish faith debarred him from a degree at Oxford or Cambridge, but he won abundant laurels at University College, London, in natural philosophy, in vegetable physiology, in structural botany, in mathematics, and he was fond of telling how, when studying law in the chambers of the late Sir Barnes Peacock, he used to work with him till the small hours of the morning. *Sic itur ad astra*. Though without any adventitious aids of birth or family—his father Zadok Jessel was a coral merchant of Savile-row—he came to the Bar—it was in 1847—with a reputation for ability ready made, and by way of meeting



SIR GEORGE JESSEL.

(From a photograph by the London Stereoscopic Company.)



success half-way he at once took spacious chambers in Stone-buildings. His earnings for his first year at the Bar were £52; for his second, £346; for his third, £795. The next year it reached £1000, and there it remained for some time—so long, indeed, that the future Master of the Rolls began to think he had after all missed his vocation. This period of checked ambition, of a miserable £1000 a year, had its use, however; it was like his forefather Moses' sojourn—so Mr. Willis puts it—with his father-in-law Jethro before facing Pharaoh—it prepared Jessel for his mission of delivering us from the bondage of the old Court of Chancery and its time-honoured abuses,

The magic chain of words and forms
And definitions vain,

by laying deep the foundations of his knowledge of equity law and practice. He had to wait eighteen years, indeed, for a silk gown. Perhaps in keeping him waiting for four years after he had applied, Lord Westbury was not sorry to snub a man like Jessel. But Jessel's chance came at last with his advent to Parliament as member for Dover. The Bankruptcy Bill of 1868 was then before the House, and Jessel made a speech so lucid, so logical, evincing such acquaintance with the mode of dealing with the problem of insolvency in other systems of law, ancient and modern, as produced a strong impression on Mr. Gladstone, and when the Solicitor-Generalship became vacant by the promotion of Sir Robert Collier to the Judicial Committee of the Privy Council, it was offered by him to Jessel. Up to this time Jessel was comparatively unknown to the outside world. Now he was flooded with work. With the exception of Charles Austin when he practised before Parliamentary Committees during the great railway mania, Jessel's income at this time as Solicitor-General exceeded any on record. It was between £20,000 and £25,000. In Parliament he was not so successful. He was not a good debater, and he was too dogmatic in his tone for the House. He had, too, certain peculiarities of manner.

"I heard a story to-day," says Greville, "which is worth jotting down, the hero of which is Sir George Jessel, the Solicitor-General, an indisputably excellent lawyer and a most cheery and pleasant fellow, but proverbial for being terribly innocent of his h's. Some short time since he was arguing a case of patent law rights against a French company who were sued for the infringement of an English patent relating to steam boilers and con-

deners. As the Solicitor-General mistrusted his French he had recourse to an interpreter in cross-examining the foreign witnesses. One of these mistaking the drift of the question put to him, Jessel said to the interpreter, 'No, no; do tell the man that he don't seize my point. My question has nothing to do with 'eating the pipes.' This was rendered literally by the interpreter saying: 'Monsieur l'avocat vous prie de croire qu'il ne s'agit nullement, dans son interrogatoire, de manger les tuyaux.' I was repeating this saying to Cockburn, Chief Justice, when he capped it by one to illustrate Lord Chelmsford's readiness. 'Many years ago, when Thesiger and I were at the bar and leading our respective circuits, we were opposed to each other in a patent case that was being tried by old Jock Campbell (afterwards Lord Chancellor) and where there were many French witnesses under examination. As Thesiger and I were both good French scholars, and as the jury chanced to understand the language, all went on swimmingly, until old Jock bethought him of taking one of the French witnesses in hand. His lingo was so hopelessly unintelligible that the poor devil of a witness was unable to understand one solitary word of Campbell's remarks. Having in vain tried to stop the judge, I at length sat down, saying to Thesiger, who was next to me, 'This is past endurance; why on earth does Campbell murder French as he does?' To which Thesiger replied, 'No; he does not go to the length of murdering it, he only scotches it.'"

This, again, by the way, recalls a story of the Regent. A friend mentioned to him Moore's "Life of Sheridan," and added that Moore had murdered Sheridan. "No," said the Regent, "He has only attempted his life." But *à propos* of this failing of Jessel's, Mr. Willis in his admirable lecture tells a good anecdote. "Some little creature," he says, "sitting behind while Jessel was speaking, suddenly exclaimed, 'He drops his h's.'" "I shall never forget the manner," says Mr. Willis, "in which Serjeant Parry, the flesh on his forehead moving backwards and forwards, as was usual when he was excited, turned and looked at him and said, 'Good G——! I would rather drop h's with Jessel than aspirate with you.'"

In 1873 Lord Romilly resigned. Sir John Coleridge was Attorney-General, but he courteously waived his claims in favour of the superior equity of his brother law officer, and Sir George Jessel became Master of the Rolls, the first Jew who had ever

held judicial office in England. He had not been many weeks on the bench before it became apparent that a judge had arisen possessed of a unique genius for the work of the bench. Lord Ellenborough used cynically to say that he did not sit there to administer justice. Jessel did. Profoundly versed in the technicalities of the law, he never suffered himself to be enslaved by them, "worshipping," as he said, "the letter and dishonouring the spirit." "There is a mass of real property law," he once remarked frankly to a friend, "which is nonsense. Look at things as they are, and think for yourself." This was the secret of his greatness. He thought for himself. He possessed in an eminent degree, like his distinguished predecessor Sir William Grant, "the genius of common sense," and he always strove to administer substantial justice according to it. There are two things which a judge has to do. He has to make the law wisely, to fashion each stone he adds to fit the architecture of the vast fabric reared by the wisdom of past centuries; but he has also to administer the law wisely—for man was not made for the law, but the law for man; in other words, he has to give satisfaction to suitors. Lord Eldon did the first, but Jessel did both. He never doubted: "I may be wrong, I sometimes am," he said, "but I never doubt." He hardly ever reserved judgment, not even in the most complex and difficult case—witness the Epping Forest case, which lasted twenty-three days. This in itself would be nothing, for ignorance as well as knowledge is often bold. What was peculiar about Jessel's undoubting decisions was, that they were not only so certain and so sound, but so convincing. Suitors, unless they were like the madman who fired a pistol at him, seldom went away without feeling, after the Master of the Rolls' luminous exposition of the case, that right reason, as well as law, were against them. This confidence of suitors in the robust good sense of the Master helped more than anything to popularise the Rolls Court as the resort of litigants. This and his extraordinary despatch. He seemed in dealing with a case, as Lord Davey said, "to understand it almost before it was opened to him," so intuitive was his insight. His mind was a storehouse of case law. Napoleon used to explain the clearness of his mind by saying that the various subjects were arranged in his head as though in a cupboard: "When I want to interrupt one piece of work," he used to say, "I close the door in which it is, and open another. The two pieces of business never get mixed up together,

and never trouble or tire me. When I want to go to sleep I close up all the drawers." Jessel must have had some such cupboard or cabinet in his brain.

Mr. Bryce, in his recent "Studies in Biography," well describes his methods. "When the leading counsel for the plaintiff was opening his case Jessel listened quietly for the first few minutes only, and then began to address questions to the counsel, at first so as to guide his remarks in a particular direction, then so as to stop his course altogether, and turn his speech into a series of answers to the judge's interrogatories. When by a short dialogue of this kind Jessel had possessed himself of the vital facts, he would turn to the leading counsel for the defendant and ask him whether he admitted such and such facts alleged by the plaintiff to be true. If these facts were admitted the judge proceeded to indicate the view he was disposed to take of the law applicable to the facts, and by a few more questions to the counsel on the one side or the other as the case might be, elicited their respective grounds of legal contention. If the facts were not admitted, it of course became necessary to call the witnesses or read the affidavits, processes which the vigorous impatience of the judge considerably shortened, for it was a dangerous thing to read to him any irrelevant or loosely drawn paragraph. But more generally his searching questions and the sort of pressure he applied so cut down the issues of fact that there was little or nothing left in controversy regarding which it was necessary to examine the evidence in detail, since the counsel felt that there was no use in putting before him a contention which they could not sustain under the fire of his criticism. Then Jessel proceeded to deliver his opinion and dispose of the case. The affair was from beginning to end far less of an argument and counter-argument by counsel than an investigation directly conducted by the judge himself, in which the principal functions of the counsel were to answer the judge's questions concisely and exactly, so that the latter might as soon as possible get to the bottom of the matter."

It was not only equity case law that he was familiar with. Whether it was a patent case, or a shipping case, or a divorce case, he seemed equally at home; but he held authority at its true value, *i.e.*, as the illustration only of principles. What was no less surprising than his knowledge of law was his unusual knowledge of matters outside the Profession. It did not matter,

as a President of the Incorporated Law Society (Sir T. Paine) said, "whether it was a question of real property, or charter-parties, or the custom of the Stock Exchange, or brokerage in Mincing-lane, he knew them all as if his life had been spent in the City instead of at Lincoln's Inn." The difficulty, indeed, was to discover what he did not know. But every man has his foible, and Jessel's, it has been said, was believing that he knew how to play whist.

Motion-day at the Rolls was a scene to be remembered. Then it was that his genius shone forth. As counsel after counsel rose to put their problem before him, his rapid and unerring judgment solved the point with easy mastery and unanswerable law and logic, the while his face—the index of his powerful mind—beamed with intelligence and genial good nature, to which a slight obliquity in one eye served only to give a more intellectual cast.

"A young friend of mine," says Mr. Willis, "had a small case in the Rolls Court low down in the day's list, and in his simplicity he thought it might be on in about two or three days. He was sitting quietly in his chambers when the clerk came in. 'Your case will be on, sir, in five minutes, and if you do not make haste it will be decided before you get there.' And actually, when he came into court the judge was calling on the other side and making an order before my friend could speak a word."

On March 4th, 1865, the *Solicitors' Journal* records that the Master of the Rolls, "having exhausted his list of causes, held no court on Tuesday last." He had realised the old *jeu d'esprit*:

A judge sat on the judgment seat,
A goodly judge was he,
He said unto the Registrar
Now call a cause for me.

There is no cause, said Registrar,
And laughed aloud with glee;
A Jessel's wit hath despatched them all,
I can call no cause for thee.

But rapid as he was, Jessel's "speed," as Mr. Bryce well remarks, was never "haste."

Serjeant Robinson relates how once, when Jessel was presiding in the Court of Appeal, a certain pertinacious counsel rose before him.

The counsel in question had evidently prepared a most elaborate statement of his case, and seemed determined that it should

be heard throughout. He poured forth argument after argument into the unwilling ears of the judges, who tried in vain to put an end to him. If ever there was a judge who could put down a persistent and implacable advocate and make him think less of himself, it was Sir George Jessel, but in this instance he was overmatched. The enemy had always some fresh point to open out, and of course it must be listened to before it could be refuted. At length he mentioned one which Sir George said at once he would refuse to hear discussed—it ought to have been taken in the court below.

“But, my Lord, I did take it in the court below, and the judge stopped me.”

Jessel revived. He looked forward over his desk and said earnestly to his persecutor,

“Do you really mean to say, sir, he stopped you?”

“Yes, my Lord, he really stopped me.”

“Did he?” said Jessel; “you would much oblige me by telling me how he did it; the process may be useful to me in future.”

“I have often lamented,” he once said, “that there is not a forensic term for impudence.” Impudence he could put down; but to young and diffident counsel he was extraordinarily kind and considerate. A nervous junior once appeared at the Rolls with his first brief. His leader was absent, and with much trepidation the junior rose to suggest to the court that under the circumstances the case should be postponed until the leader appeared. The Master of the Rolls in his kindest manner asked the junior to state his case. When he had done so the judge re-stated the whole case, putting it in the best light for the parties represented by the junior. Having done this, he turned to the leader on the opposite side, and said, “That is the case you have got to meet; now what have you got to say?”

Sir Horace (now Lord) Davey observed that it was almost a joke amongst the older counsel that “the younger a man was, the better chance he had of being heard at the Rolls.”

“Tired!” said Littledale, J., after a long day in court, in response to a friend. “Tired! Not at all. I like it.” Jessel, M.R., was the same. He often said that he never felt so happy as when sitting on the judicial bench; that during the exercise of his judicial functions all bodily pain, all physical lassitude, were quite forgotten. Law with him fulfilled Aristotle’s definition

of happiness, ἐνέργεια ψυχῆς κατ' ἀρέτην τελείαν. It afforded him, as Lord Justice Lindley not long ago described it, the pleasure of solving a succession of interesting problems. Even when the grasp of death was on him he stuck to his work, and those who had seen him presiding in the Court of Appeal a few days before his death, vigorous and acute as ever, could hardly believe that the light which was never dimmed had been so suddenly extinguished.

A lady once asked Lord Brougham who was the best speaker in the House of Lords. "Lord Stanley is the second, madam," replied Brougham, significantly. Jessel had not such an overweening estimate of himself as this. He reckoned Lord Hardwicke to have been the greatest equity judge in our legal annals; Lord Cairns the second, and himself, perhaps, the third. Of Lord Eldon he had not a high opinion. He dubbed him the "dubitative Chancellor, who might have sat for a personification of the law's delay."

Equity was, as Jessel conceived it, a refined progressive science, and *Besant v. Wood* (40 L. T. Rep. 445; 12 Ch. Div. 605)—in which he reviewed the whole law relating to separation deeds—is a good example of the spirit in which he acted. He recognised that in these as in other cases judicial policy must mould the law in obedience to the change of sentiment on the subject which has come over society. *Emma Silver Mining Company v. Grant* (11 Ch. Div. 918) is another good instance of the adaptation of equity to modern modes of business in establishing the fiduciary relationship of the promoter to the company which he creates. Baron Grant argued his own case, and he argued it, as the writer well remembers, with the greatest plausibility and address; but the Master of the Rolls swept away all the web of sophistry which he had woven with the simple proposition that it is not necessary to be a lawyer to be an honest man. One of his most remarkable performances was in the great *St. Leonards Will Case* (34 L. T. Rep. 369; 1 P. Div. 154) in which he delivered a luminous judgment, entirely oral, extending over seventeen pages of the Law Reports, affirming the proposition that the contents of a lost will, like those of any other lost instrument, may be proved by secondary evidence. *Aynsley v. Glover* (32 L. T. Rep. 345; 18 Eq. 544) is a very instructive and important judgment of his on ancient lights, deciding, as it does, that where the owner of a building having ancient lights enlarges

or adds to the number of windows, he does not thereby preclude himself from obtaining an injunction to restrain an obstruction of the ancient lights. *Honywood v. Honwood* (30 L. T. Rep. 671; 18 Eq. 306) contains a most valuable review of the law of England in regard to timber. *Plimpton v. Malcomson* (34 L. T. Rep. 340; 3 Ch. Div. 531) is a leading case in patent law—with which Jessel was especially conversant—on the subject of the prior publication of an invention. It decided that a copy of an American book containing an account of an invention kept in a private room at the library of the Patent Office is not a communication to the public. Among other decisions of his may be mentioned *Martin v. Gale* (36 L. T. Rep. 357; 4 Ch. Div. 428), that a deed by an infant to secure the repayment of money advanced for necessaries is voidable; *Harrison v. Mexican Railway Company* (32 L. T. Rep. 82; 19 Eq. 358) that if a company's memorandum is silent on the subject there is an implied condition that all the holders of shares are to rank equally without any preference or priority, but the articles may explain the memorandum; *Krehl v. Burwell* (40 L. T. Rep. 236; 7 Ch. Div. 551), granting a mandatory injunction where a man had gone on building after notice of action by the owner of an obstructed right of way; *Pooley v. Driver* (3 Ch. Div. 459), a valuable exposition of the whole law of partnership, deciding, among other points, that *prima facie* a right to share profits, as profits, constitutes, according to English law, a partnership; *Re South Durham Iron Company* (11 Ch. Div. 579), where he held, as he had done often before, that non-registration of a charge by a director under sect. 43 of the Companies Act, 1862, did not avoid the charge, but only exposed the director to a penalty, a view of the section which has recently been fully indorsed by the House of Lords in *Wright v. Horton* (56 L. T. Rep. 782; 12 App. Cas. 371); *Pattison v. Gifford* (18 Eq. 259) on the principle of injunctions *quia timet*; *The Tahiti Cotton Company* (17 Eq. 273) on blank transfers; and *Re National Funds Assurance Company* (39 L. T. Rep. 420; 10 Ch. Div. 118) on misfeasance by directors and the higher rights of a liquidator, as representing creditors, to those of the company itself. But time would fail to tell even a tithe of his contributions to our law; nor was it so much in the decisions themselves that his services to law lay. It was in the spirit in which he approached cases. What more scathing criticism of certain old law could there be than these words of his:

“According to English common law a creditor may accept anything in satisfaction of his debt except a less amount of money. He may take a horse, a canary, or a tomtit if he chooses, and that is accord and satisfaction; but by the most extraordinary peculiarity of the English common law the creditor cannot take 19s. 6d. in the pound. Therefore, although the creditor may take a canary, yet if the debtor did not give him a canary, together with his 19s. 6d., there was no accord or satisfaction. This is one of the mysteries of the English common law.” For such mysteries Jessel had little mercy. He was not like Sir Matthew Hale, content to venerate where he could not understand.

SIR ROBERT PHILLIMORE.

On the same day that Sir George Jessel died another eminent judge, another master builder of our law, was taking farewell of the Bar and quitting the Bench which he had adorned for six-and-twenty years. The retiring judge was Sir Robert Phillimore, the last judge of the old Admiralty Court, and a jurist of world-wide renown.

There rolls the sea where grew the tree.
Oh! earth, what changes thou hast seen;
There where the long street roars hath been
The stillness of the central sea.

So sings the late Laureate; but no less wonderful than the changes of the earth's face have been the changes of the "old order yielding place to new." Few men have witnessed more of such changes than Sir Robert Phillimore, and in many that he saw he bore a leading part.

The old Court of Admiralty, whose jurisdiction he inherited, reaches back to the reign of our English Justinian, Edward I. It was then the Court of the Lord High Admiral of England, and was held on ship board in a summary way *velo levato*. It seems to have been first established in a more permanent fashion by Edward III., for the trial, in accordance with the laws of Oleron and the procedure of the civil law, of all matters relating to merchants and mariners which happened on the high seas. The sittings of the court were originally held within the ebb and flow of the tide, in the time of Henry IV. at a wharf in Southwark, and in the time of Henry VIII. at Horton's Quay, near London Bridge.

In 1597 part of the church of St. Margaret-on-the-Hill was used, as Stow in his survey tells us, for this purpose, and here it was that on March 17th, 1883, Pepys attended the sittings of the court. He enters in his diary for that day: "To St. Margaret's Hill in Southwark, where the Judge of the Admiralty



SIR ROBERT PHILLIMORE.

(From a photograph by the London Stereoscopic Company.)



come and the rest of the Doctors of the Civil Law, and some other commissioners, whose commission of Oyer and Terminer was read, and then the charge given by Dr. Exton (the then Dean of Arches and Judge of the Admiralty Court), which methought was somewhat dull, though he would seem to intend it to be very rhetorical, saying that Justice had two wings, one of which spread itself over the land, and the other over the water, which was this Admiralty Court. I perceive that this court is yet but in its infancy, and their design and consultation was—I could overhear them—how to proceed with the most solemnity and spend time, there being only two businesses to do, which of themselves could not spend much time.”

Readers of Chaucer will doubtless remember the “Serjeant of the law, both ware and wise,” of the “*Canterbury Tales*,” and Chaucer’s sly hit at the bustling bigwig of his time, who, busy as he was, yet

Seemed busier than he was.

Shrewd Mr. Pepys, who was in the Navy Office, and knew more about maritime matters than anybody else, was quite right. The court *was* only in its infancy. Its “two businesses” were soon to multiply, as our commerce and our Empire grew, into scores, and hundreds—the rivulet to become a mighty stream—and this in spite of the jealousy of the common lawyers, who did their best to thwart and circumscribe the jurisdiction of the court. It finally established its local habitation at Doctors’ Commons, under the shadow of St. Paul’s. There, in the old Doctors’ Commons, says a writer in the *Times*, existed, forty or fifty years ago, a subdivision of forensic labour and judicial rewards which is now nearly forgotten. The main stream of legal business flowed, of course, through the Inns of Court, the Circuits, and Westminster Hall. But there were also quiet backwaters, not to be despised by patient anglers, known as the College of Advocates, the Admiralty, Arches, and Prerogative Courts, and the Chancery Courts of the Bishops. The career of an ordinary barrister was then much what it is now. He ate, as he still eats, his dinners in the hall of his Inn. He read in chambers, was called to the Bar, went circuit and sessions, frequented the courts, and perhaps at last sat upon the bench. The alternative career which existed when Sir Robert Phillimore entered upon practice began by a course of study at Oxford or Cambridge, ending with a degree in law. The young civilian

was then capable of being admitted on the fiat of the Archbishop of Canterbury to the College of Advocates at Doctors' Commons, hard by St. Paul's Cathedral. Thereupon, after his year of silence, he was allowed to appear as an advocate in all the courts which administered the civil and canon law; that is to say, the courts having jurisdiction in matters testamentary, matrimonial, maritime, and ecclesiastical. (a) In these courts his right of audience was exclusive, and he was instructed not by solicitors or attorneys, but by a close body of proctors. The doctors and proctors formed in the good old days a happy family party. Readers of "David Copperfield" will remember how when Mr. Spenlow, the proctor, was driving his newly-articled pupil down to Norwood to spend the day, that memorable day when David was for ever enslaved by the curls and blushes of the enchanting Dora, the said Mr. Spenlow descanted on "The Commons" and its advantages.

"I asked Mr. Spenlow"—it is David who is speaking—"what he considered the best sort of professional business? He replied, that a good case of a disputed will, where there was a neat little estate of £30,000 or £40,000, was, perhaps, the best of all. In such a case, he said, not only were there very pretty pickings, in the way of arguments at every stage of the proceedings, and mountains upon mountains of evidence on interrogatory and counter-interrogatory (to say nothing of an appeal lying first to the delegates and then to the Lords); but, the costs being pretty sure to come out of the estate at last, both sides went at it in a lively and spirited manner, and expense was no consideration. Then he launched into a general eulogium on the Commons. What was to be particularly admired (he said) in the Commons was its compactness. It was the most conveniently organised place in the world. It was the complete idea of snugness. It lay in a nutshell. For example, you brought a divorce case, or a restitution case, into the Consistory. Very good. You tried it in the Consistory. You made a quiet little round game of it, among a family group, and you played it out at leisure. Suppose you were not satisfied with the Consistory, what did you do then? Why, you went into the Arches. What was the

(a) To the ordinary lay mind, it is always a mystery why the Admiralty, Probate, and Divorce matters should be merged into one and the same division. The late Mr. Pember, Q.C., once gave an ingenious reason: "It was in compliment," he said, "to Venus, who rose from the sea."

Arches? The same court, in the same room, with the same Bar, and the same practitioners, but another judge, for there the Consistory judge could plead any court day as an advocate. Well, you played your round game out again. Still you were not satisfied. Very good. What did you do then? Why, you went to the delegates. Who were the delegates? Why, the ecclesiastical delegates were the advocates without any business, who had looked on at the round game when it was playing in both courts, and had seen the cards shuffled, and cut, and played, and had talked to all the players about it, and now came fresh, as judges, to settle the matter to the satisfaction of everybody! Discontented people might talk of corruption in the Commons, closeness in the Commons, and the necessity of reforming the Commons, said Mr. Spenlow, solemnly, in conclusion, but when the price of wheat per bushel had been highest, the Commons had been busiest, and a man might lay his hand on his heart, and say this to the whole world, 'Touch the Commons and down comes the country.' "

Beware of prophesying. The family party was broken up and the round game spoilt by a series of Acts, beginning with the Probate Act of 1857 and ending with the Judicature Acts, and the country still lives and thrives.

The College, eulogised so highly by Mr. Spenlow, was last rebuilt in 1672. It contained a dining hall, a garden, a fine library of civil and canon law, a quadrangle formed by the chambers and residences of the doctors, and a handsome court where the scarlet-robed advocates sat in a raised semicircle, the judge, *primus inter pares*, in the midst of them, while the furred proctors occupied a table below.

It was to this court sitting at Doctors' Commons that Robert Phillimore was admitted as an advocate in the year 1839. Heine remarks somewhere that the most important thing in life is to select your parents wisely, and this Phillimore may be said to have done. His father, Joseph Phillimore, of Shiplake House, Henley-on-Thames, was a distinguished civilian and writer; so was John Phillimore. Ballantine says he made the ablest speech he ever heard at the Bar. Law and letters ran in the blood of the race, and Westminster and Christ Church added fine scholarship to these natural aptitudes. Once admitted an advocate at Doctors' Commons, Robert Phillimore rose rapidly. He had that genius which Buffon describes as the capacity for taking pains,

great legal learning, and a gift of facile oratory to set it off to the greatest advantage. He was soon engaged in all the most important cases in the Admiralty, Probate, and Divorce Courts, and succeeded to the offices one after another of Master of the Faculties, Commissary of the Deans of Chapters of St. Paul's and Westminster, Official to the Archdeacons of Middlesex and London, and Chancellor of the Dioceses of Chichester and Salisbury.

In 1853 he entered Parliament as member for Tavistock, calling himself that comprehensive thing a Liberal-Conservative, whose creed is in the motto :

Be not the first to leave the old, nor last to join the new.

The Duke of Wellington's advice for speaking in the House of Commons was, "Say what you have to say, don't quote Latin, and sit down." Phillimore followed this good rule. He spoke on subjects which he understood, and only when he had something to say, and as a result he won the ear of the House. The most burning question with which he had to do was that of church rates. As a staunch Churchman he roundly declared that there was no legal right in the kingdom more ancient or more certain than that of the Church to levy a rate for maintaining the fabric of the church, and providing for the decent order of the services; but, as a Liberal, he saw that the perpetuation of church rates had become impossible—an anachronism—and he wisely recommended the surrender of them in the interests of the Church and of peace. The speech in which he argued for their abolition is an extremely able one, lucid, temperate, learned—a sort of speech that we might look for in vain in the Parliament of to-day. He helped, too, to amend the law with respect to simony "one of those tares," as he calls it, "which the enemy sowed early in the Church." But, from a legal point of view, the most useful of his reforms was the Act which, with Brougham's help, he passed for the introduction of *viva voce* evidence into the Admiralty Court. The "little Act" worked a total and most wholesome change in the whole procedure.

"Truth," as Charles Reade says in the "Cloister and the Hearth," "will leak out, even in an affidavit," but, as a rule, nothing could be better designed to disguise the truth than what Lord Davey once described as the "flowery affidavit that emanates from Lincoln's Inn." If the Judicature Acts had done nothing else they would have justified themselves by abolishing

trial by affidavit in Chancery in favour of *vivâ voce* evidence. Yet, among all these professional and political avocations, Phillimore found time to edit Burns' "Ecclesiastical Law," and to write two monumental works of his own—his "International Law" and his "Ecclesiastical Law," to say nothing of his *Life of Lord Lyttleton*, and his translation of Lessing's "Laocoon." Verily there were giants in those days. In 1855 Phillimore became Judge of the Cinque Ports and Queen's Counsel, then Advocate-General in Admiralty and Queen's Advocate, an office which took precedence of that of Attorney-General. The same year he was knighted, and we have Lord Westbury writing to him playfully:

"My dear Sir Robert,—As I have just had the honour of affixing the Great Seal to the Patent conferring upon you the most ancient, and the greatest distinction of knighthood, I desire to be the first to offer to yourself and Lady Phillimore my sincere congratulations. I think the Queen should have given me authority to dub you personally, to give you the accolade, and admonish you to be faithful, true, and valiant. In one sense, I rejoice to be able to say,

"Twas my blade
That knighthood on thy shoulders laid.

"Whence comes that quotation, most doughty knight? Remember, this is only the first step in the ladder of dignity. Excelsior be the cry, and let the name of Robert Phillimore be added to the Peers of England. Adieu, 'sweet knight,' with my kind regards, Yours sincerely,
WESTBURY."

He goes on to add: "I hope you are by this time perfectly at home in your new office. Do not be too anxious or too zealous at first. Tallyrand's 'point de zèle' is a most useful maxim. Eschew long opinions and much-reasoned opinions—the authorities in office desire little beyond a clear definite rule of action." It is a perilous thing to be the adviser of a Government on points of international law at great crises, but Phillimore amply justified his selection, and it will not soon be forgotten how by the wisdom of his counsels he averted a struggle which, under any circumstances and in any result, must, as the Attorney-General said on his retirement, "have been disastrous to the country."

When Dr. Lushington retired in 1867, everything pointed out Sir Robert Phillimore as his successor, and for twenty-six years he worthily filled the seat of Lushington and of Stowell, adding

fresh honour to it by his learning, his dignity, his patience, and his courtesy, which was no conventional or calculated courtesy, but the effluence of a genuine kindness of heart.

Sir Robert Phillimore married, in 1844, a daughter of Mr. Denison, of Ossington Hall. His town residence was at No. 5, Arlington-street, on the east or non-ministerial side—the house, which had been for so many years the abode of Horace Walpole. It was while sitting in the drawing-room of this very house, not much more than a century ago, one Sunday evening, that I heard, says Walpole, a loud cry of “Stop thief.” A highwayman had attacked a postchaise in Piccadilly within fifty yards of this house. The fellow was pursued, rode over the watchman, almost killed him and escaped.” A highwayman in Piccadilly!

Many well-known ecclesiastical cases came before Sir Robert Phillimore—*Elphinstone v. Purchase*, *Sheppard v. Bennet*, *Boyd v. Philpotts*, the *Colenso* case. We need not dig up these happily dead and buried controversies—whether a Wesleyan minister is or is not entitled to have himself described as “Revd.” on a tombstone (*Keet v. Smith*, 33 L. T. Rep. 794; 1 P. Div. 73); or a man is to be refused the Sacrament as a “notorious evil liver” because he is not “sound” on the subject of the devil (*Jenkins v. Cook*, 34 L. T. Rep. 1; 1 P. Div. 80); or a clergyman is to be criminally proceeded against for remaining too long on his knees (*Martin v. Mackonochie*, 32 L. T. Rep. 568; L. Rep. 2 Ad. & Ecc. 41). We are entering happily now on an era of broader religious thought, whatever our present sins and shortcomings may be. But, however ill-advised these prosecutions may have been, it must be admitted that the judgment in *Martin v. Mackonochie* is a marvel of research and erudition. It occupies 125 pages of the Law Reports. It defines, by the way, what all do not know—the difference between a “rite” and a “ceremony.” A “rite” consists in services expressed in words; a “ceremony” in gestures or acts preceding, accompanying, or following the utterance of those words. A very important question of marriage law came before Sir R. Phillimore in *Sottomayer v. De Barros* (L. Rep. 3 P. Div. 1), in which the Court of Appeal ultimately decided that the law of the domicile governs the capacity to enter into the contract of marriage as it does the capacity to enter into any other contract. *Baker v. Baker* (42 L. T. Rep. 542; 5 P. Div. 142) is noticeable, too, deciding that the lunacy of a husband or wife is not a bar to a suit by the committee for the dissolution of the

lunatic's marriage. But it is in his Admiralty decisions that the Judge's most solid and lasting contributions to English law will be found, as in *The Halley* (17 L. T. Rep. 329; L. Rep. 2 Ad. & Ecc. 3), in which he discusses the obligation *ex delicto* of Roman law, in relation to collisions at sea between a British and foreign ship, and the applicability of the *lex fori* or the *lex loci*; or *The City of Mecca* (44 L. T. Rep. 750; 5 P. Div. 28), that the Admiralty has jurisdiction to entertain an action *in rem* to enforce a judgment obtained against a ship in a Tribunal of Commerce abroad; or the well-known *Parlement Belge* (42 L. T. Rep. 273; 5 P. Div. 197), on the immunity from arrest of a mail steamer belonging to another sovereign state; or *The Macleod* (5 P. Div. 254), that a shipmaster who has been habitually drunk during his employment cannot maintain an action for wages. This sinks him "below the common average of a seaman's morality!" Masters' and seamen's wages, salvage, pilotage, lights, and collisions, bottomry and respondentia, are not perhaps particularly exhilarating subjects, but they are of vital importance to our wide extended empire. These laws, so dull in detail, are the safeguards of our maritime supremacy; they watch unceasingly over our ships, in whatever part of the globe they may be found:

Aside the stormy Hebrides
Or sultry Hindustan;
Where'er in mart or on the main,
With peaceful wings unfurl'd,
They help to wind the silken chain
Of commerce round the world.

To have moulded those laws wisely, to have administered them firmly and well, as Sir Robert Phillimore did, is no mean praise. But he did more. As a jurist, as a builder of that international law (a) which may be called the conscience of Christendom, he rendered services not only to his country but to humanity at large. He brought us one step nearer to the time when the nations shall be at peace, "lapped in universal law":

When the war drum throbs no longer, and the battle flags are furled
In the Parliament of man, the federation of the world.

(a) "It is a matter for rejoicing," he wrote, "that it—International law—has escaped the Procrustean treatment of positive legislation, and has been allowed to grow to its fair proportions under the influence of that science which works out of conscience, reason, and experience, the great problems of law and civil justice": (International Law, vol. 4, p. 11).

LORD JUSTICE MELLISH.

MEN, it has been said, are born Platonists or Aristotelians, endowed with the synthetic or the analytic intellect, poets or philosophers. The same *fundamentum divisionis*, as the logicians would say, is found among lawyers. They are born advocates or born judges. "I think," said Frederick Pollock, afterwards Chief Baron, in refusing a judgeship, "I think the functions of an advocate both more agreeable and more honourable," and many think the same; but not all. "To my mind," said Baron Parke, in answering a letter of congratulation on his appointment to the Bench, "the task of finding truth is much more agreeable than that of finding arguments." Mellish had by nature the same judicial temperament.

Mellish's father was rector of Tuddenham, Norfolk, and afterwards Dean of Hereford. Sir George Rickards, writing in the *Law Magazine*, describes "Mellish minor" at Eton as a slight and delicate boy, little seen or heard of in the contests of the cricket field, or on the river—though he was an expert sculler. Nor was he, either, at this early period, the diligent student known in Eton slang as a "sap."

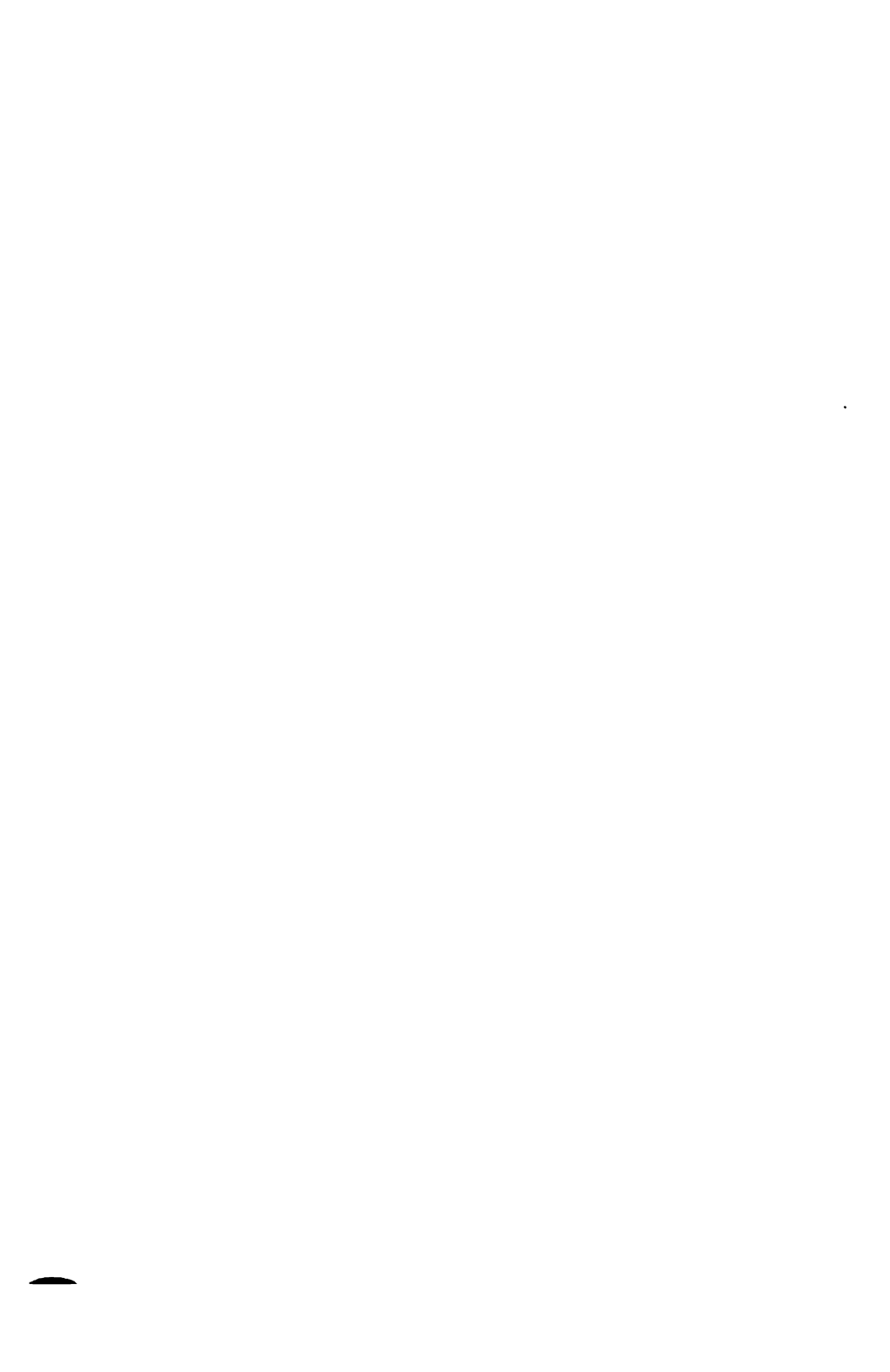
But this is no uncommon thing. When Richard Brinsley Sheridan's mother took young Richard and his brother to their first school she said to the master, "These boys will require all your patience, for two such incorrigible dunces I never knew." Sir Walter Scott was reckoned little better than a dunce at the High School, Edinburgh, and young Charles Darwin was dubbed by his master a "poco curante," a contumelious epithet at which the youthful scientist was as much dismayed as the old lady who was called a parallelopiped.

Where "Mellish minor" did shine was in the mimic parliament of the school debating society. Canning was his godfather, and he may have aspired to emulate his oratorical fame—"the applause of listening senates to command." At Oxford, too, he



LORD JUSTICE MELLISH.

(From a photograph by the London Stereoscopic Company.)



was remembered at the Union as a speaker remarkably terse and forcible. But both at Oxford and Eton alike the estimate of those who knew him best was "that he had great power of mind, yet never achieved quite the amount of distinction which his powers might have commanded." The fact is, he had not found his true vocation.

It is the fashion now to regard with pitying wonder the old system of so-called legal education—the days when the youthful neophyte for the Bar was tumbled into chambers and suffered to browse undisturbed among the papers; but for a man who knew how to make the most of the system, like Campbell, Cottenham, or Mellish, it was probably the best that could possibly be devised. The pupil, if his master in the law was an able lawyer, not only learnt the science of law, but he saw its principles practically applied. Take Mellish's own case. He studied law first in the chambers of Spencer Walpole; then conveyancing and real property in the chambers of Mr. Painter; then special pleading in the chambers of Mr. Unthank, a distinguished member of that cunning tribe; and finally, mercantile law, in the chambers of Mr. (afterwards Mr. Justice) Crompton. This was no bad apprenticeship, and from the first Mellish showed a marvellous precision, ingenuity, and judgment in dealing with legal questions. When Mr. Mellish left Unthank's chambers for Crompton's, Unthank told Crompton that Mellish "might safely be trusted to write any opinion or to draw any set of pleadings that might be required," and when master and pupil met afterwards, as they often did in the legal arena, Unthank always regarded him as his most dangerous opponent.

Eight years more he spent as a special pleader,

Unwearied to explore
The law's dim labyrinths and rugged lore.

It is odd, by the way, how often the term special pleading is misapplied. Popular novelists and public orators write and speak of it as if it were some peculiarly iniquitous kind of advocacy. They think it means haranguing a jury. "I saw," says Macaulay, "the other day a sentence to this effect, 'It may be doubted whether Erskine or Curran were the greater pleader.' The person who expressed himself thus would have stared if he had been told that Littledale was a far greater pleader than either."

With Mellish, as with Parke and Patteson, and many others,

this education in special pleading was an admirable preparation and introduction to the Bar. When he was called his reputation had already preceded him, and he rapidly got into large mercantile and general practice on the Northern Circuit.

So unique was his reputation as a giver of opinions, that an opinion signed by him was, says Mr. Bryce, held equal in weight to a judgment of the Court of Exchequer Chamber. Equally high was his reputation as an advocate. "I remember," says Mr. Bryce, "to have once heard him (Mellish) and Cairns argue before the House of Lords a case relating to a vessel called the *Alexandra*—it was a case arising out of an attempt of the Confederates during the American War of Secession to get out of a British port a cruiser they had ordered. Cairns spoke first with all his usual power, and seemed to have left nothing to be added. But when Mellish followed on the same side, he set his points in so strong a light, and placed his contention on so solid a basis, that even Cairns' speech was forgotten, and it seemed impossible that an answer could be found to Mellish's arguments. One felt as if the voice of pure reason were speaking through his lips." "He was a great lawyer," said Lord Russell of Killowen, "and without any exception the most lucid arguer in banc I have ever heard."

"Mr. Mellish," says Lord Selborne, "as an advocate was distinguished above all other men whom I remember at the Bar by the candour of his arguments and by the decision with which he threw aside everything which did not seem to him relevant to his case and deserving of serious consideration by the court which he was addressing. In forming his opinions it was his habit to go direct to what he considered the real point, and nothing could induce him to wander from it in his speeches, neither the instructions of attorneys, nor the urgency of clients, nor the example of leaders, nor speculation on the infirmity of judges, nor desire to hide the nakedness of a bad case.

There are men to whom rhetorical artifice comes as naturally as the contempt of it did to him, whose gift it is to lead forlorn hopes at the Bar, to despair of nothing, and to argue in court with a high hand and apparently great confidence points which they had just before condemned in consultation as untenable, who can squeeze out tears on an emergency to move the jury, like Scarlett, or melodramatically ask, like Erskine, whether they are in an English court of justice. These were things which Mellish

could not do. He was not adapted by nature for the rough-and-tumble of *Nisi Prius*. "You don't lie, sir, as if you believed it," said a shopkeeper in dismissing an *employé*. Mellish was one who, like the unfortunate *employé*, could not do violence to his convictions. He was not a Sir Hudibras, to "confute, change sides, and still confute." If he thought a point certainly untenable he would not argue it. He took law very seriously; not as chiefly affording material for pleasant jesting, and could no more have argued that a deed under seal was not an estoppel *inter partes* than the late Dr. Pusey could have argued against the doctrine of the apostolic succession.

He had already more than once refused a judgeship when in 1870 a vacancy occurred in the Chancery Court of Appeal, at Lincoln's Inn, by the death of Lord Justice Giffard. Mellish belonged to the Common Law Bar, but his mastery of the principles of jurisprudence, and the judicial qualities of his intellect, qualified him to sit in any court, and in a happy moment he was chosen as the colleague of Lord Justice James in the Court of Appeal (a)—that court which "prefigured," as Sir Frederick Pollock lately said, "and prepared the union of law and equity by the happy conjunction of the Lords Justices James and Mellish, as harmonious in judgment and wisdom as they were diverse in appearance"—the nucleus of that Court of Appeal which the late Lord Justice Bowen described as the pivot of our present judicial system.

Great minds, it is often said jocosely, think alike; but in very truth it is striking to observe how before these two great minds of James and Mellish, so large, so sane, so highly trained, what was accidental and transitory in each of the two rival systems which they respectively personified, melted away, while the principles which were of permanent value emerged with increased force and clearness. "His only fault on the judicial bench," says Lord Justice James—"a fault of manner—was an intense eagerness to convince counsel who was addressing him that his arguments were fallacious, and he never to the last could be brought to realise the fact that an effort to convince counsel

(a) Mr. Bryce says that when Mr. Gladstone, being Prime Minister and having to select a Lord Justice of Appeal, was told that Mellish was the fittest man for the post, he asked: "Can that be the boy who was my fag at Eton?" He had never heard of Mellish during the intervening forty years.

whose duty it was not to be convinced was necessarily useless." "I never can understand," said Vaughan-Williams, L.J. in a recent case, "why counsel will always try to convince their opponents. They are paid not to be convinced." But if Mellish was too eager to convince, his interpellations were always directed to getting at the real substance of the case.

Mellish was of weak health and frail physique. From twenty years of age his constitutional malady, the gout, had fastened itself upon him, and down to the close of life it continued to afflict him, sapping his strength, subjecting him to the severest trial of temper and spirits, though never affecting the clearness and vigour of his brain. This martyrdom he bore with admirable fortitude, never remitting his work except under absolute necessity, but persisting in his arduous duties in the midst of suffering which would have laid most men prostrate. "I have seen him," said one of the judges of the court before which he appeared as counsel, "arguing a difficult case before us while he was absolutely writhing with pain."

But, indeed, pain not unfrequently stimulates the faculties. Did not Hood write many of his most humorous things while he was writhing with pain? But then Hood had, as he said, to be a "lively Hood" for a livelihood.

Not the least admirable thing about him was the way in which he endured this incessant pain. His temper never gave way, "and the only time when I can recollect his expressing his feelings," says his friend Lord Blackburn, "was when he told me he was going to Malvern to try the effect of the water cure, though he had been warned by eminent medical advisers that it was very dangerous, and more likely to kill than to cure him. 'But,' said he, 'life on these terms is not worth keeping.' It did, however, give him some relief. The constant struggle with pain gave him an habitual restraint, or, I should say, made him self-contained rather than reserved, but he was always amiable. I admired and loved him very much."

He died at his residence, No. 33, Lowndes-square, in the early part of 1877. His best epitaph is written in the golden words, instinct with the deepest feeling, which his colleague, Lord Justice James, spoke from the bench after his death. "We have to deplore," he said, "the loss of a very dear colleague, Lord Justice Mellish. We had hoped against hope that he would rally as he has so often rallied; but the last long and painful attack

has been too much for his shattered frame. What he was at the Bar and on the bench is known to the Profession and the suitors, and will be long remembered; but to no man was his judicial character so well known as to me, who for so many years had the inestimable advantage and privilege of sitting by his side in the old Court of Appeal, and working with him during all that time with unreserved intimacy and confidence. During that time I had seen him by my side writhing under the painful disease by which he had been racked from his early youth, and subduing pain to which any other man would have succumbed by his strong will and his resolute determination to do his duty. And yet he has continued to apply his powerful and clear intellect and the unrivalled stores of his legal learning to ascertain the truth, to maintain the law, and to do right and justice to all manner of men. That was the single-minded object of his judicial life, which was as free from vanity and caprice as it was from prejudice, passion, or partiality. With it all there was that marvellous sweetness of temper which was never disturbed or altered. Day by day I learned to look upon him more and more with admiration, which was only equalled by the love with which he inspired me, and by the regret with which I now pay this tribute to a very great and a very good judge."

Mellish's special characteristic is his clear strong judgment and power of luminous exposition. He had a marvellous faculty of extracting the pith of a case and putting it in the fewest possible words. All his judgments are marked, too, by singular independence of thought. They are never a mere echo of others.

Nevill's case (23 L. T. Rep. 577; L. Rep. 6 Ch. 47) explains an apparent anomaly in the law of principal and agent. "The reason," says the Lord Justice, "why a simple release of the principal debtor discharges the surety is that it would be a fraud on the principal debtor to profess to release him and then to sue the surety, who in turn would sue him; but where the bargain is that the creditor is to retain his remedy against the surety there is no fraud on the principal debtor."

His definition of "minerals" in *Heat v. Gill*, the china clay case (26 L. T. Rep. 502; L. Rep. 7 Ch. 712) has always been since recognised as the most comprehensive and accurate given. The result of all the authorities, he there says, is that a reservation of minerals includes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless

there is something in the context or in the nature of the transaction to induce the court to give it a more limited meaning. We know well enough what a burning topic the religious education of children is in these days. In *Hawksworth v. Hawksworth* (25 L. T. Rep. 115; L. Rep. 6 Ch. 537), Mellish, L.J. lays down the very salutary rule of the court. The rule of law which regulates the religion in which children of early years should be educated is that, unless the interest of the child interferes so as to make it the duty of the court to make some exception, the child is to be educated in the religion of its father—*religio sequitur patrem*. In other words, children are not to be fought for by proselytising relatives.

A great many important questions of bankruptcy and company law came before the Lords Justices. *Ex parte Maude* (23 L. T. Rep. 749; L. Rep. 6 Ch. 51) is one of them, as to the true principle on which surplus assets of a company are to be distributed. It has quite recently been followed in *Re Wakefield Rolling Stock Company* (67 L. T. Rep. 83); *Re Patent File Company* (L. Rep. 6 Ch. 83) decides a point of some commercial importance, viz., that a trading company can raise money by an equitable mortgage by deposit of deeds with its bankers for instance: *Rance's case* (23 L. T. Rep. 828; L. Rep. 6 Ch. 104) deals with the difficult matter of dividend declaring; it lays down that, if directors declare a dividend or bonus without proper investigation or professional assistance, and it is afterwards called in question, the burden lies on them to show that it was fairly paid out of profits. *Ex parte Chalmers* (L. Rep. 8 Ch. 289) explains what are the rights of a seller of goods when the purchaser becomes insolvent before the contract for sale has been completely performed. The result of the authorities is, that in such a case the seller, notwithstanding he may have agreed to allow credit for the goods, is not bound to deliver any more goods under the contract unless the price of the goods not yet delivered is tendered to him.

Crook v. Hill (24 L. T. Rep. 488; L. Rep. 6 Ch. 311) is another often-cited case on the meaning of the word "children" in a will. Substantially it is this, that although there is a very strong presumption that the word children means only legitimate children, yet the word children may denote a class including illegitimate as well as legitimate children, provided you find in the will a context raising what is described as a "necessary

implication"; that is to say, a plain and clear inference, leaving no reasonable doubt that the illegitimate children are intended to be included. *Occleston v. Fullalove* (29 L. T. Rep. 785; L. Rep. 9 Ch. 171) is another important decision on gifts to future illegitimate children.

If at the end of seven years a person has not been heard of, the presumption of law is that he is dead. This is comprehensible. The odd thing is, that there is no presumption as to when during the seven years he died. This is *Re Lewes' Trusts* (25 L. T. Rep. 77; L. Rep. 6 Ch. 356).

Lord Bramwell thought railway companies very badly used by juries. He described a railway company as *caput lupinum*; but Mellish's remarks in *Lee v. Lancashire and Yorkshire Railway Company* (25 L. T. Rep. 77; L. Rep. 6 Ch. 536) threw a light on the subject: "When I was on the Northern Circuit," said the learned judge, "I was myself engaged in several of those actions. It was at one time a common practice with some railway companies to have a medical man who was their agent and servant, and whenever an accident took place he used to go and give advice and assistance to the persons injured, carrying receipts in his pocket, and he would induce them to sign receipts in full of all demands upon being paid some trifling sums. I can say from my own experience that in every case of that kind on the Northern Circuit the jury found a verdict against the company." This is even shabbier conduct than we might expect from that soulless thing, a corporation.

LORD JUSTICE LUSH.

THE fusion of the two branches of the legal profession is one of those questions of which trying to get a true view is, as Ruskin expresses it, like "trotting round a polygon"; but there is one assertion we may safely venture, and that is, that every barrister would be the better for a year or two spent in a solicitor's office. No browsing among briefs can make up for that experience which is derived from personal contact with the actualities of the law, the object lessons of the Central Office. It is to the legal student what walking the hospitals is to the medical student. It is a notorious and a significant fact that a large number of our most eminent judges and lawyers have sprung from the ranks of the attorneys or solicitors. Lord Thurlow was occupying a stool in an attorney's office in Ely-place what time he and the poet Cowper spent their time in "giggling and making giggle." Lord St. Leonards' father, the barber, had, we know, to put the future Chancellor as pupil to an attorney because, as he said, "I tried Ned in my own profession, but, unfortunately, he had no genius for it, and it was as a solicitor that he laid the foundations of his fame with his 'Vendors and Purchasers.'" Lord Truro, as a solicitor, saw counsel bungle their cases and felt that he could do better. Lord Russell of Killowen showed his mettle first as an Irish attorney. It was not an accident that these men rose to the highest eminence from solicitors' offices. They owed in a great measure their success to what they learned there.

Lord Justice Lush was another notable instance. He began at the lowest rung of the professional ladder, and he climbed step by step to the summit. There are men whom

Ambition tempts to rise,
Then hurls the wretch from high
To bitter scorn a sacrifice,
And grinning infamy.

Lush shunned this kind of vaulting ambition. Like Nature, he

did nothing "per saltum." When he left the attorney's office he left it for the safe obscurity of the special pleader, and there he laboured for several years—

Mastering the lawless science of the law,
That codeless myriad of precedent,
That wilderness of single instances,
Thro' which a few, by wit or fortune led,
May beat a pathway out to wealth and fame.

Nor did he quit special pleading for the changes and chances of the Bar before he had established a solid connection. But in truth his success was never in jeopardy after the publication of his "Practice." In those days the publication of a law book was something of an event in the Profession. Perhaps it was that in those halcyon times everyone was too busy to be writing books. Now law books are legion, and nobody heeds either them or that unlucky wight, the bookmaker. But Lush's "Practice" is a book which, at any time, must have obtained recognition. Some idea of the work put into this book may be gathered from the fact that the Table of Cases contains references to no less than 9600 cases. It tracks the course of an action at law through all its devious windings, pleas, and declarations, demurrers, interrogatories, replications, and all the thorny intricacies of the old system with elaborate minuteness. The book soon became as indispensable to the Common Law barrister as Daniel to the Chancery barrister, or as the Annual Practice is to both to-day. Practice may be a shifting quicksand upon which to build your temple of fame, but to the average lawyer practice is of paramount importance. Law is a glorious uncertainty—an inscrutable mystery known to neither layman nor lawyer, be he solicitor, counsel, or judge. The practitioner has to act, and a safe guide is indispensable. It is so now. It was so even more in the old days, when a slip meant perdition. No wonder, then, that Lush became a busy junior, and then a still busier leader, quiet and unassuming as he always was.

When Mr. Lush was created a Queen's Counsel a nice little point of etiquette arose. For some unexplained reason it was not until some days after his appointment that the learned gentleman appeared in the silk gown which is characteristic of that rank. In this interval, still in his stuff gown and not formally called within the Bar, he came one morning into the Court of Common Pleas, where Cresswell, Williams, Crowder, and

Willes, J.J. were sitting, to argue a case, and took his seat within the Bar, the place appropriated exclusively to Queen's Counsel and Serjeants.

Mr. Justice Cresswell (addressing Mr. M. Chambers, the counsel on the other side) said: "I do not know, Mr. Chambers, whether I can recognise the countenance of the gentleman beside you (Mr. Lush)."

Lush: "I mentioned the difficulty, my Lord, yesterday to the Lord Chief Justice, and he said I might take my seat provisionally within the Bar."

Cresswell: "Was his Lordship then sitting in court?"

Lush: "He was, my Lord."

Cresswell: "Then under the circumstances I will follow the example of the Chief Justice."

Willes still demurred: "I have not yet had the opportunity of inspecting the learned gentleman's patent."

Lush promised that his Lordship should see it in the course of the day, and there the matter ended.

Lord Hernand, the Scotch judge, would say to counsel arguing before him in a dry, technical way: "Declaim, sir! why don't you declaim? Speak to me as if I were a popular assembly." Lush was not one to declaim. He was not a powerful advocate—he never electrified a jury or anyone else. He was never in Parliament—Lord Westbury, indeed, said that as far as he knew Lush had no politics at all—but he was singularly lucid, and always a perfect master of facts. He knew his business, and stuck to his business. *Tenax justitice* was the characteristic motto which he chose when he was made a serjeant. This tenacity, combined with an acknowledged superiority in practice, a profound knowledge of the law, and great fluency of expression, secured his success at the Bar. He figured in all the heavy mercantile and railway cases at Westminster, and in shipping cases at Guildhall. He and Bovill were the leaders on the Home Circuit, but they did not have it all to themselves. Shee was a formidable rival.

Ballantine used to say, so Serjeant Robinson relates, that there were only two men on the Home Circuit who had the slightest sense of religion about them, and that, singularly enough, although they were staunch friends, and sincerely attached to one another, each most devoutly and conscientiously believed that the ultimate destination of the other would be the infernal regions. The two friends thus strongly allied in this

life, and so ruthlessly to be severed in the next, were Lush, who was a strict Baptist, and Shee, who was a strong Papist. Though placed at the religious antipodes, Lush and Shee were destined to be united in fortune as well as friendship. Together they were elevated to the Bench, and when they were entertained at a banquet by their circuit a legal wit, in lieu of the toast "Wine and Women," coupled together the names of Lush and Shee. Lush, whatever his name might suggest, was no toper, but neither was he "constellated" as Charles Lamb would say, "under Aquarius, that watery sign, nor had taken his degree at Mount Ague." He continued to the end of his days the old-fashioned habit of finishing his bottle of port after dinner.

On the bench Lush was the most perfect *Nisi Prius* judge of his time. His briskness, as a writer in the *Law Journal* says, communicated itself to counsel, witnesses, and jurors without ever degenerating into hurry. On the hundred-and-one collateral questions which arise in a trial of any complication he gave his decision rapidly, and was generally right. The ease with which he fell into the trial of criminal cases is often quoted as an example of adaptability. Until he was made a judge Mr. Justice Lush had never, it is said, seen the inside of a criminal court, and yet after a very short time he was as efficient in trying prisoners as he was at *Nisi Prius*. With Lord Chief Justice Cockburn and other dignified occupants of the Bench, a criminal trial was in every sense a great judicial display. With Lush it was rather a business-like administration of justice. He saw the crucial point of the evidence with marvellous quickness, kept the case within its due bounds without any appearance of impatience, summed up shortly and clearly to the jury, and dismissed the prisoner, if there was a conviction, with a few practical words of warning. His son-in-law, the late Mr. Justice Watkin Williams, when asked whether those whom he tried appeared to have any general characteristics, replied: "They are just like other people; in fact, I often think that but for different opportunities and other accidents the prisoner and I might very well be in one another's places." Mr. Justice Lush thought the same, and it made him very considerate and humane to prisoners. In sentencing to death he used to adopt, instead of the usual form at the end of the statutory sentence, "And may God have mercy on your soul," the words, "And may you be led to seek and find salvation." This was the only point at which his religious

opinions can be said to have come to the surface. He knew his business too well to preach in court.

But in truth he was a man of deep religious feeling, and in the habit of preaching at the Baptist Chapel, which he attended, at Regent's Park. *Apropos* of this, a rather amusing incident, real, or at least *ben trovato*, occurred, according to Ballantine. As his preaching showed, the judge was a member of the Baptist community, not in name only, but truly and conscientiously. His intellect and genius belonged to the law, his belief and conscience to his pastor and church. His position, however, required—so he was told—that he should on his appointment to the Bench give some sort of social gathering. He naturally asked the advice of his chief Cockburn, himself an enthusiast in music. Cockburn at once, with wicked joy, suggested a concert, undertook its arrangement, and the opera of "Traviata" delighted his numerous guests. Little did the guileless host suspect the tenor of the profligate piece which he was patronising. "I am not entitled," adds Ballantine, "to disclose the effect of the discovery on a meeting of the serious friends of his persuasion, some of whom had been exposed unconsciously to the terrible pollution of that naughty performance."

When Lord Justice Holker, stricken with a fatal disease, was appointed a Lord Justice of Appeal, he remarked that the Government had done their best "to smooth the pillow of a dying man." A tardy—a too tardy—recognition of his judicial services came to Mr. Justice Lush, when in 1880 he succeeded Holker in the Court of Appeal. His intellect was as clear as ever, and he sat long enough to deliver several remarkable judgments, among them that in *Re Goodman's Trusts* (45 L. T. Rep. 527); but no one could look at the slight, frail figure of the Lord Justice in that memorable old Court of Appeal at Lincoln's Inn without feeling that it foreshadowed the common fate of all. He died with the dying year 1881.

"I remember once," says the late Sir Frederick Pollock, "in the old Court of Error in the Exchequer Chamber at Westminster, sitting behind Campbell when he was at the Bar, and when an unusual number of judges came in to take their seats on the Bench, and all in scarlet robes, as it was a red-letter day. He turned round to me and said: 'I never see this without thinking of the scene in *Othello*, when a parcel of carpenters and scene-shifters are dressed up to come in as the senators of Venice.'"

Highly irreverent this, even for the caustic Campbell! Lush, assuredly, was no carpenter or scene-shifter dressed up in judicial robes, but a genuine senator.

One of the most valuable of his judgments is *Redhead v. Midland Railway Company* (L. Rep. 2 Q. B. 412), a case, as he himself says, of vast importance to both railway companies and passengers, deciding as it does that a railway company is not liable as carrier for an accident to a passenger occasioned by an undiscoverable defect—a latent flaw in the welding of a tyre, for instance. Mr. Justice Blackburn would have enlarged the liability of railway companies, and made them answerable even for a latent defect. *Dearden v. Townsend* (13 L. T. Rep. 323; L. Rep. 1 Q. B. 10) is another important railway decision which delivered us from the tyranny of that common bye-law providing for a passenger delivering up his ticket or paying the fare from the place from which the train started. Such a bye-law, the Court held, applied only to a person having and wilfully refusing to produce or give up his ticket, and not to the case of a person travelling without having paid for and obtained a ticket with no intention to defraud the company. If it did, it would be repugnant to sect. 103 of 8 Vict. c. 20, which makes a fraudulent intention the gist of the offence of travelling without having paid the fare.

Reg. v. Strugnell (L. Rep. 1 Q. B. 93) is important to promoters of amateur theatricals. It decides that a person who hires an unlicensed public room for six nights, and publicly performs stage plays in it, is not liable to be convicted for "hiring and keeping" a place of public resort for the public performance of stage plays without a licence. *Bryant v. Foot* (16 L. T. Rep. 55; L. Rep. 2 Q. B. 161) is a curious case. It raised the question whether a marriage fee of 13s. charged in a certain parish could be supported under a claim of immemorial prescription. If it were so, the unfortunate bridegroom in the time of Richard I. must have had to produce a sum of something like £20—a condition precedent highly deterrent to marriage; even 13s. in this unromantic era would, it is to be feared, be fatal. It would make it more than ever impossible to drag the reluctant bachelor to the altar. In this case Mr. Justice Blackburn commits himself to an opinion which will be slightly enigmatic to the unlearned in the law, viz., that "the doctrine of rankness is confined to moduses." The Englishman's house, we know well, is his castle,

and distress is a sort of private war carried on by the landlord—a survival of those “wild times” of which Lord Justice Bowen lately spoke in *American Must Company v. Hendry* (68 L. T. Rep. 742; 5 B. 331). But the war game must be played now according to rules of law, and one of such rules is that an entry into a house for the purpose of distraining by opening a window which is shut, but not fastened, is unlawful: (*Nash v. Lucas*, 16 L. T. Rep. 610; L. Rep. 2 Q. B. 590).

Our law of larceny is full of anomalies, and *Reg. v. Prince* (32 L. T. Rep. 700; 11 Cox C. C. 193) reveals one, namely, that where money has been obtained from a cashier at a bank on a forged cheque knowingly, it does not amount to the crime of larceny, the legal reason being that a cashier of a bank has a general authority to part with his employer's money in payment of such cheques as he may think genuine. *Reg. v. Holmes* (49 L. T. Rep. 540; 12 Cox C. C. 137) is another noticeable criminal case. It decides that, on a charge of indecent assault or rape, where the defence is consent, and the prosecutrix is asked as to her improper intimacy with other men, and denies it, evidence cannot be given to disprove her denial. The evidence is too remote, so the Court of Crown Cases Reserved held; but surely such evidence goes directly to the issue, and not merely to character.

In *Austin v. Great Western Railway Company* (16 L. T. Rep. 320; L. Rep. 2 Q. B. 442) the plaintiff's mother, carrying in her arms the plaintiff, a child of three years and two months old, took a ticket for herself, but did not take a ticket for the plaintiff. In the course of the journey an accident occurred through the negligence of the railway company, and the plaintiff was injured. At the time the plaintiff's mother took her ticket no question was asked by the company's servants as to the age of the child, and there was no intention on the part of the mother to defraud the company. The child was held entitled to recover. “I think,” said Mr. Justice Lush, “there was a contract to carry mother and child, and that contract operated in favour of each party. The only question is whether the facts negative the existence of any such contract. I think they show there was an undertaking to carry the plaintiff. If the company enter into it under a mistake as to the age of the child, that does not make it less a contract.”

Not long ago there was an action in Ireland (*Walker v. Great*

Northern Railway Company of Ireland, L. Rep. Ir. 28 Q. B. 69) brought by a child who at the date of the accident was *en ventre sa mère*, but was born deformed, or at least damaged in health. A child *en ventre sa mère* is a remarkable being in law, may or might be an executor, may or might be vouched to warranty, have an injunction, and do many wonderful things, but the Court allowed a demurrer. Said Mr. Justice O'Brien: "In law, in reason, in the common language of mankind, in the dispensations of nature, in the bond of physical union and the instinct of duty and solicitude, on which the continuance of the world depends, a woman is the common carrier of her unborn child, and not a railway company." This is quite the best quality of Irish rhetoric, but is it law?

LORD BLACKBURN.

DR. JOHNSON would not allow Scotland to derive any credit from Lord Mansfield, for he was educated in England. "Much," he said to Boswell, "may be done with a Scotchman if he be caught young." Blackburn, like Lord Mansfield, may be said to have been caught young; that is to say, he was sent to school to the famous seat of learning on the banks of "silver streaming" Thames:

Where grateful science still adores
Her holy Henry's shade.

Eton refined the Gaelic barbarism of Selkirkshire, his native county, and Cambridge completed the civilising process. The intelligent foreigner in the person of a certain Baron X. has lately been informing us that most of the young men at Cambridge are *jeunes farceurs* given up to boating, cricket, tandem-driving, and so on, with a sprinkling of serious students whom he reckons at about fifty. Blackburn was certainly no *jeune farceur* either at Cambridge or in after life. He studied hard, and he emerged a high wrangler. It would make, by the way, an interesting thesis whether mathematics or scholarship form the best training for success in the Law. Mathematics seem to have the greater affinity for Law. They discipline the mind, they teach concentration, they form habits of close reasoning, and yet, when we look at the names of the present and recent occupants of the Bench, we find far more distinguished as scholars than as mathematicians. On the one side we have Lord Justice Bowen, and Chief Justice Coleridge, and Lord Chancellor Selborne, and Lords Davey and Macnaghten, and Justices Denman, and Kennedy, and Wright, and Chitty, and Reid, A.G., and, on the other side—trained in mathematics—Justices Romer and Stirling and Lord Justice Rigby—eminent judges, but numerically few.



CLIFFORD'S INN (STRAND).



Blackburn joined the Middle Temple, the working man's Inn, and was called one year after her late Gracious Majesty's accession. He went the Northern Circuit, and attended the Lancashire Sessions, and laboured for a long time in obscurity. Those early years between a man's call and his emerging, with what hopes and fears, toils and triumphs and disappointments are they fraught. How little we know of what passes within :

Each in its hidden sphere of joy and woe,
Our hermit spirits dwell or roam apart.

Blackburn spent his period of probation in that exercise which makes the best lawyers—law reporting. Eight portly volumes of Ellis and Blackburn attest his industry, his accuracy, and his learning, and greatly are Lord Campbell's judgments indebted to him for their merits. Few ever thought that the young Scotchman, who day by day seated himself in a back row of the old Court of Queen's Bench at Westminster—his habit, as Serjeant Ballantine tells us—was to become one of the greatest judicial lights of the nineteenth century. By degrees he acquired some practice in mercantile cases and other business of the best kind, and in arguments in banc—the true test of a lawyer—the judges owned his skill; but he was still a man unknown to fame. No attorney would have chosen him to conduct a cause which required adroit advocacy or claptrap eloquence. He could not brave it or bounce it in the Buzfuz vein. His circuit knew him not.

Great, then, was the surprise when it was announced on Erle's promotion to the Chief Justiceship of the Common Pleas that Mr. Colin Blackburn was the new judge. Campbell, who was then the new Chancellor, enters in his diary, June, 1859: "I have already got into great disgrace by disposing of my judicial patronage on the principle 'detur digniori.' Having occasion for a new judge, to succeed Erle, made Chief Justice of the Common Pleas, I appointed Blackburn, the fittest man in Westminster Hall, although wearing a stuff gown, whereas several Whig Queen's Counsel, M.P.'s, were considering which of them would be the man, not dreaming that they could all be passed over. They got me well abused in the *Times* and other newspapers, but Lyndhurst has defended me gallantly in the House of Lords." "Well abused," indeed! This was the sort of thing. "Everybody has been going about town asking his neighbour, 'Who is Mr. Colin Blackburn?' The very ushers in the courts shake

their heads and tell you they 'never heard of such a party.' . . . 'His legal claims to this appointment stand at a minimum.' . . . 'The only reason which can be assigned for this strange freak of the Chancellor is that the new puisne judge is a Scotchman.' . . . 'A national job is worse than a family job,' and so on." But Lyndhurst silenced the cavillers. "I wish," he said, "to call your Lordships' attention to a recent appointment to the Judicial Bench—the appointment of Mr. Blackburn to a puisne judgeship in the Court of Queen's Bench. I have been asked who is Mr. Blackburn, and a journal who takes us all to task by turns has asked, somewhat indignantly, 'Who is Mr. Blackburn?' Who is Mr. Blackburn? I take leave to answer that he is a very learned person, a very sound lawyer, an admirable arguer of a law case, and eminently fitted for a seat on the Bench. . . ." And the Lord Chancellor in replying said, "I know nothing of Mr. Blackburn except what I know from having seen him practise in the courts over which I presided. I have no private intimacy, and I declare on my word of honour I don't know of what side he is in politics; but I have known him as a sound, good, and able lawyer, one of the ablest in Westminster Hall."

Lord Wensleydale and Lord Cranworth swelled the chorus of praise, Lord Cranworth adding that neither Tenterden nor Willes had a silk gown when they were raised to the Bench. To see modest worth recognised and rewarded in this way to the confusion of blatant ambition is truly refreshing.

No one was more surprised at the appointment than Blackburn himself. When Lord Campbell sent for him and made him the offer, Blackburn thought it was a County Court judgeship which was being offered him, and he had made up his mind to decline.

He soon lived down the detraction of envious rivals, and every year he sat on the Bench raised his reputation higher. It was said jestingly that Chief Justice Cockburn learnt his law from sitting with the learned Blackburn, and not only was he (Blackburn) a most learned judge, but he was a most patient and painstaking one. He had the "hard-headed logic," as Lord Russell of Killowen put it, of his race, and, if he had also something of the Scotchman's dry manner and uncongeniality, it was only as it is with the Scotch, on the surface. He soon became as good at Nisi Prius as in banc, "and there was no judge before whom I," says

Ballantine, "would sooner have practised." There is an anecdote told of him which illustrates what may be called his judicial conscientiousness. He was trying, not long after his elevation to the Bench, an action in which damages were sought for an injury to the plaintiff, which had caused him the loss of an eye. The plaintiff's counsel dwelt forcibly on the seriousness of the injury, as blighting the plaintiff's whole future career. "I have lost the sight of an eye, Mr. X.," said the judge, interposing, "and it has not blighted my career, as you see." The jury were much impressed with the judge's remark, and the damages they awarded were trifling. Blackburn was conscience-stricken. He thought it over, and the next day he inclosed the plaintiff a cheque for £50.

This judicial scrupulousness was not confined to his own administration of justice. It made him jealous for the law in the mouths of others; witness his brush with Mr. Edmond Beales, the learned judge of the Cambridge County Court. This gentleman had, it may be remembered, encouraged a mob to pull down the Hyde Park railings, and for this spirited vindication of the rights of the people he had been rewarded with a County Court judgeship. One of his directions to a jury, in a case of *Taylor v. Great Western Railway*, came before Mr. Justice Blackburn, and Mr. Justice Blackburn did not scruple to observe that if the learned County Court judge really did rule so, and "is in the habit of making such rulings, I own I think the Lord Chancellor should be made aware of it." Mr. Beales naturally did not relish being sent up to the head-master like this for punishment. He received the remarks "with pain and indignation"; but he was much comforted, and his equanimity restored not long afterwards, by an address of confidence from the legal practitioners.

There was a judge once who is reported to have exclaimed, "Really, I cannot have all this noise in court. I have been obliged to decide the last three cases without hearing any of the evidence." Blackburn was not the sort of judge to decide in this way, and it led to an unpleasant fracas on one occasion between him and the High Sheriff of Surrey. The scene was the Assize Court at Guildford, a most inconvenient building; at all events, Mr. Justice Blackburn could not hear the witnesses, and he accordingly ordered a portion of the building to be closed against the public. Mr. Evelyn protested, published a placard declaring the proceeding to be contrary to law, ordered the

building to be opened, and prohibited his officers from helping to keep the public out. For this Mr. Evelyn was fined £500, and Lord Chief Justice Cockburn, the senior judge, had an opportunity, in inflicting the fine, of delivering an extremely impressive address—quite in his best style—in which he characterised Mr. Evelyn's conduct as "a painfully contumacious contempt of the court." It is worth recording—showing how history repeats itself—that Evelyn, in his celebrated Diary, mentions his father being High Sheriff for Surrey and Sussex some 200 years earlier, and his state on the occasion. "He had 116 servants in liveries, everyone liveried in green satin doublets," and he, too, says his son, was "most unjustly and spitefully molested by that jeering Judge Richardson for repreeving the execution of a woman to gratify my Lord of Lindsay, then Admiral; but out of this he emerged with as much honour as trouble." Not so his descendant.

There is a merry tale told of S. T. Coleridge. The philosopher-poet had the careless habits of his tribe, and in particular where his waistcoat and pantaloons should have met, a gap of white linen would disclose itself, of which he was often admonished by his tender spouse. Seated at dinner one day by a lady, his eye caught a glimpse of white at his side, and straightway he tucked away the unseemly apparition. Still it appeared, and still he tucked, until at last the philosopher discovered, as the ladies rose to leave the table, that he had tucked in the greater part of his *parti's* muslin dress. "Odds, blushes, and confusion," as Sir Lucius O'Trigger would say. We are reminded of this story by reading an incident recorded by Serjeant Ballantine of Mr. Justice Blackburn, at the trial of the Wallingford Election Petition. "It was," says the Serjeant, "a ladies' battle, and the warmth of their advocacy was made so apparent upon the first day, that on the second they were divided and placed upon opposite sides of the court. Mr. Justice Blackburn had taken his seat and composed himself for the performance of his duties, when a lady, having arrived late, had to pass him to get to her party. Now, his Lordship's legs being no unimportant portion of his body, her flounces became seriously entangled in her attempted passage, and for the moment the judge was lost sight of by the audience in front, whilst the lady presented the appearance of sitting on his knee. The judge's voice was heard in no musical tones, and, when relieved from his embarrassment, he

declared in emphatic language 'that he had never been in such a position before'; and this I am disposed to believe." Blackburn was not one like our first parent Adam, "fondly overcome with female charm"; rather he resembled that eminent lawyer, of whom Serjeant Robinson tells us, who said that "he was born a bachelor, and in that persuasion he intended to remain." At all events, Mr. Justice Blackburn never married. After seventeen years in the King's Bench he became a Lord of Appeal in Ordinary—that Elysium of the true lawyer. In 1886 he was appointed on the commission to digest the criminal law. The following year, 1887, he resigned—a victim to that sad disease which often attacks the strongest brains.

At the time of his retirement Lord Blackburn was unquestionably esteemed the highest exponent of the principles of our Common Law. It is impossible to do anything like justice to his luminous exposition of those principles in judgments which are spread over a judicial career of close on thirty years, but we may take a few samples.

Pharmaceutical Society v. London and Provincial Supply Association (43 L. T. Rep. 389; 5 App. Cas. 857) was a case in which the Pharmaceutical Society made a strenuous attempt to squash the Stores as vendors of drugs. To do so they had to prove that the association was a "person" within the Pharmacy Act. Of course, a corporation may be a "person," but nobody in common talk, as Lord Blackburn said, "if he were asked who was the richest person in England, would say the London and North-Western Railway Company. The thing is absurd." That metaphysical entity, a corporation, is indeed a puzzling thing, but Lord Blackburn was not for lightening its responsibility. "A corporation," he says, "cannot in one sense commit a crime and cannot be imprisoned; a corporation cannot be hanged or put to death; but a corporation may be fined, and a corporation may pay damages. I totally dissent from what Bramwell, L.J., is reported to have said, that a corporation that incorporated itself for the purpose of publishing a newspaper could not be tried and fined, or an action brought against it for libel, or that a corporation which commits a nuisance could not be convicted of the nuisance." This is an important utterance in these days, when more than half the business of life is carried on by limited companies. *Debenham v. Mellon* (43 L. T. Rep. 673; 6 App. Cas. 24) is another case in which he lays down very lucidly the

position of tradesmen dealing with a married woman. To put it shortly, they have no right to presume from the fact of a wife living with her husband that she has authority to pledge his credit. They must, to be safe, get an actual authority. Of course, the husband may have held the wife out as authorised to pledge his credit, and then the case is different. Notice of revocation of authority must be given.

Orr-Ewing v. Colquhoun (2 App. Cas. 839) is important to riparian proprietors. Lord Blackburn there laid it down that the owner of the banks of a non-navigable river may without any illegality build a milldam across the stream within his own property and divert the water into a mill lade without asking the leave of the proprietors above him, provided he does not obstruct the water from flowing as freely as was its wont, and without asking the leave of those proprietors below him, if he takes care to restore the water to its natural course before it enters their land.

Estoppels, says Lord Bramwell, are odious; but Lord Blackburn takes a juster view. "Sometimes," he says (*Burkinshaw v. Nicolls*, 39 L. T. Rep. 308; 3 App. Cas. 1004, 1026); "there is a degree of odium thrown upon the doctrine of estoppel, because the same word is used occasionally in a very technical sense; but the moment this doctrine is looked at in its true light, it will be found to be a most equitable one, and one without which, in fact, the law of the country could not be satisfactorily administered. When a person makes to another the representation, 'I take upon myself to say such and such things do exist, and you may act upon the basis that they do exist,' and the other man does really act upon that basis, it seems to me it is of the very essence of justice that between those two parties their rights should be regulated, not by the real state of the facts, but by that conventional state of facts which the two parties agree to make the basis of their action."

Other noticeable decisions of his are, that the marriage of a man with the daughter of the half-sister of his deceased wife is null and void (*Reg. v. Inhabitants of Brighton*, 1 B. & S. 447)—to such extravagant lengths is this strange prohibition carried; that a public document means a document which is made for the purpose of the public making use of it (*Sturle v. Freccia*, 43 L. T. Rep. 209; 5 App. Cas. 623); that a statutory power to build a hospital does not give a right to build it so as to be a public

nuisance (*Hampstead Small Pox Hospital case*, 43 L. T. Rep. 225; 6 App. Cas. 193); that a description of a horse as "a clever hack and good hunter" is not an implied warranty of soundness (*Cleobury v. Tattersall*, 3 Sol. J. 715); that though a loss by a woman of the good opinion of her neighbours, *consortium amicorum*, is no special damage sufficient to support an action for slander of chastity, loss of the voluntary hospitality of friends is (*Davies v. Solomon*, 25 L. T. Rep. 799; L. Rep. 7 Q. B. 112)—refined distinctions now rendered happily obsolete by the recent Act (54 & 55 Vict. c. 51); that partridges reared under a hen are the subject of larceny; that the words "it shall be lawful" give a discretion unless intended to effectuate a right (*Julius v. Bishop of Oxford*, 42 L. T. Rep. 546; 5 App. Cas. 214). In the much vexed case of *Angus v. Dalton* (6 App. Cas. 740) he delivered the most elaborate of all the many elaborate judgments given. *Reg. v. Hickin* (11 Cox. C. C. 19), "The Confessional Unmasked," was another *cause célèbre* which came before him; so was *Reg. v. Governor Eyre* (18 L. T. Rep. 511), a case in which party feeling ran very high, one side regarding Gordon as an injured saint, the other as a "pestilent firebrand."

The following remarks in *Orr-Ewing v. Colquhoun* (2 App. Cas. 839, 863) illustrate his good sense: "I am not inclined," he says, "to reject the evidence of practical men as to a fact merely because they give a bad theoretical reason for it and I am not able to furnish the right one. I have been told that some years ago the pilots in the English Channel uniformly asserted that there was a current setting towards the French shore, and, to allow for that supposed current, they always steered to the north of the course which by the chart and compass they should have held. It was ascertained that there was no such current, and some ships were lost because their commanders disregarded the rule of the pilots because their reason for it was wrong. On further investigation it was found that the deflexion of an unadjusted compass from the action of the iron in most ships was such as make it right when the ship's head lay either east or west to steer to the north of the course by chart as indicated by that compass. The pilots were quite right in the fact which they had observed, though quite wrong in their reason." The good old man who was examined by Sir Thomas More thought that the building of Tenterden Steeple was the cause of the Goodwin Sands, but the Goodwin Sands are a fact all the same.

LORD JUSTICE JAMES.

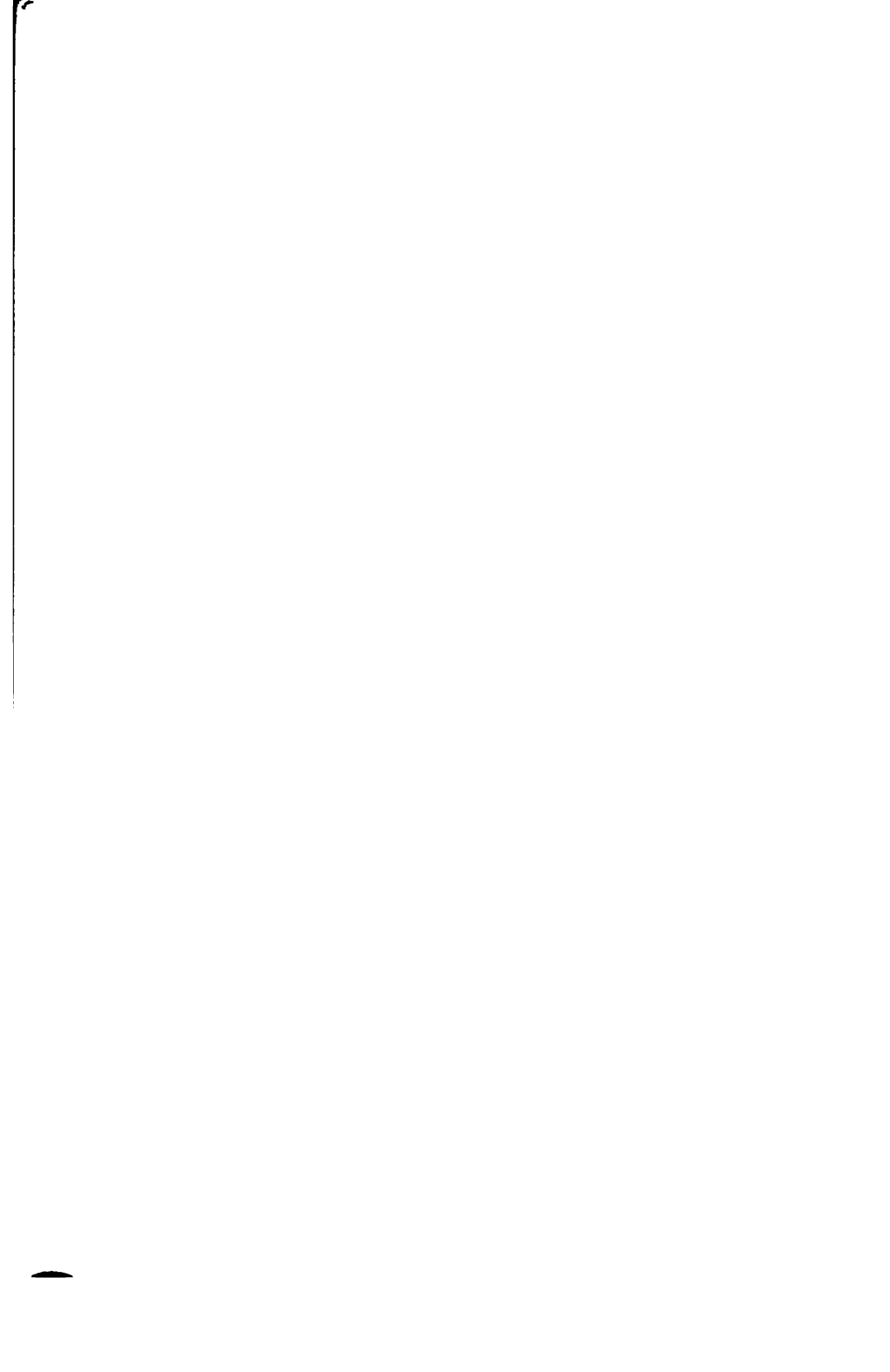
WHEN the future Lord Justice James was a lad of sixteen, he and his cousin, Christopher Thomas, went, on the eve of their departure, one for the University of Glasgow, and the other for a house of business in Bristol, to visit their grandfather. "Well, boys," said the shrewd old Welshman, "one of you will one day be Mayor of Bristol, and the other the Lord Chancellor of England." Seldom has prophecy been more curiously fulfilled. Thomas was three times Mayor of Bristol, and James—William Milbourne James—if he was not Lord Chancellor, was the next thing to it, a Lord Justice of Appeal, with a fame that eclipses that of many Chancellors. We say curiously fulfilled, but, in truth, is not character, as Novalis says, destiny? James had the stuff in him of which success is made. He was born to greatness, and a discriminating eye could discern it. "Boyhood shows the man as morning shows the day."

The University of Glasgow was young James's destination, because his father was a Unitarian, and, in those days of tests, Oxford and Cambridge closed their gates against all but orthodox children of the Church. Well, perhaps for him and for the world, too, that it was so. To his Scotch education James owed, in no small degree, the breadth of view, "the philosophic mind," which made him so distinguished a judge. "He went," says Mr. B. T. Williams, "not to the splendid edifice that is now on Gilmore Hill, but to the famous building in the heart of the old city of Glasgow—in the High-street, and within a short distance of the Salt Market, of the luxuries of which Sir Walter Scott makes Baillie Nicol Jarvie talk in 'Rob Roy.'" A fine mediæval building it was, with its spiral stairs, antique porches, quadrangles, and quaint rooms. It had the beauty of centuries upon it, and the extensive grounds which were attached to it were



LORD JUSTICE JAMES.

(From a photograph by the London Stereoscopic Company.)



crowded with the traditions of many years. But it had more than its picturesqueness to recommend it. Adam Smith, and Reid, Jardine, and Robert Buchanan lectured within its walls.

Learning grew beneath their care a thriving, vigorous plant, and no better discipline for the mind, no finer preparation for an active intellectual career in life, could be conceived than the logic and the scholarship, the metaphysical and the ethical studies pursued under their auspices. Four years James spent at Glasgow, and then he came to London to learn law. He read in the chambers of Fitzroy Kelly, the master of many afterwards eminent pupils, and to

The jests which flashed about the pleader's room,

James, we may be sure, with his rich vein of Falstaffian humour, contributed his full share, but he worked hard, too; like Bacon's good artificer, he did not dread "the smoke and tarnish of the furnace." Able and well-equipped though he was for his work, the solid merits of James were some time in coming to the front. Ill-health—a tendency to weakness of the chest—obliged him to spend two years in Italy, and after he had fairly buckled to at the Bar he remained a stuff gownsmen for twenty-two years, till Lord Truro gave him a silk gown in 1853. He was pitted against brilliant rivals—Rolt and Bethel and Cairns and Roundell Palmer—and he wanted the facile oratory, the showy talkativeness, the "garrulity called eloquence," as Mr. Justice Buller called it, which makes a cheap reputation with so many advocates. His speaking, it has been said, was like that of a man who is choosing among a bundle of sticks for the proved weapon. He always found the right one, but it was not the eloquence of an orator who carries his audience with him. His candour of mind, too, denied him the advocate's faculty of seeing only one side at a time. These things delayed his success, but he was steadily building up a reputation as a lawyer. He carried great weight with Vice-Chancellor Page Wood and with Lords Justices Knight Bruce and Turner. "James," it was said, "has got a judicial mind," and long before he attained it the Bench was looked upon as a certainty for him. He became successively junior equity counsel to the Treasury—a sure step to preferment—counsel to the Woods and Forests, to the Inland Revenue, and the Board of Works, and in 1853 Vice-Chancellor of the Lancaster Palatine Court. Among the *causes célèbres* in which he was

engaged while at the Bar was the Colenso case (*Bishop of Natal v. Gladstone*, 15 L. T. Rep. 465; 3 Eq. 1), *Martin v. Mackonochie* (32 L. T. Rep. 568; L. Rep. 4 Ad. & Ecc. 116), *The Banda and Kirwee Booty case* (L. Rep. 4 Ad. & Ecc. 436), and *Lyon v. Home* (18 L. T. Rep. 541; 6 Eq. 655), the well-known spiritualist case. Mankind, we know from Burns, are an unco' squad. Human nature is notoriously superstitious, notoriously credulous, and we can imagine a rich and foolish and devoted widow being persuaded by a clever medium that she is holding communion with the spirit of her departed husband by table-rapping. It is difficult, but comprehensible. But when the raps elicited from the departed bid his relict adopt the said clever medium as a son, when they go on to tell her to transfer £24,000 in Consols into his name, when they go on further to bid her make a will to the amount of £30,000 in his favour, surely faith will begin to falter here. But it did not with Mrs. Lyon. To James belongs the credit of having successfully unmasked this unparalleled piece of profane and impudent imposture. The following year, 1869, he was appointed to succeed Sir G. Giffard as Vice-Chancellor, and in 1870 he was raised to the Court of Appeal.

Then began the brightest period of his life, when he sat at Lincoln's Inn with Sir George Mellish as his colleague—judges, "than whom," said Lord Justice Bowen, "no greater authorities have in our time sat in courts of law"; judges as united in opinion and in friendship as they were diverse in appearance; James, portly, florid, beaming; Mellish, grave, attenuated, and fleeting. "Pray let us," said Lord Nottingham in the *Duke of Norfolk's case* (3 Cas. Ch. 26, 33), "pray let us so resolve cases here that they may stand with the reason of mankind when they are debated abroad." This is the praise which may be bestowed on the decisions of these two eminent Lords Justices, and more especially on James, and the reason was that he brought to the discharge of his judicial duties, as Lord Cairns said, a no less admirable share of common-sense than of law. "Rich in saving common-sense" he assuredly was.

"When I heard of his death," says Sir Lawrence Peel, "I went over that part of his judicial career of which in my own person I had actual observation (*i.e.*, the Privy Council), and I not only could find no fault with him, but I could not name one superior to him among the many great judges with whom I sat."

He never sought to get rid of a case on some trifling technicality, but, if possible, pronounced on its merits. "What is your proposition of law?" he would say to a counsel who was bungling the opening of his appeal with a confused statement of facts. Given this clue, his highly-trained mind focussed itself at once on the legal principles applicable, and seized all that was material to the issues in the evidence. It is a slight thing, but it shows the accuracy of his mind: he had given his judgment in a case, Lord Justice Bramwell followed, and, in doing so, said, "I think the principle ought to be *extended* to this case"; James leaned towards him and whispered "*applied*." When counsel used the common phrase that the case was within the "spirit" of the Act, he always checked them: "the 'meaning' of the Act, Mr. X."

On one occasion, Mr. Yate Lee appeared to argue a bankruptcy appeal. "Who is your opponent, Mr. Lee?" said the Lord Justice. "I don't think anyone appears on the other side, my Lord," said Mr. Yate Lee. "Then consider that you have three opponents, Mr. Lee," said the Lord Justice, nodding at him, as was his wont, with a genial smile. In quoting his own decisions, he would humorously add, "which is an authority, though I joined in it."

He would often cite, *à propos* of administration actions, Lord Justice Knight Bruce's cynical observation: "The estate will be divided in the usual way among the solicitors." But he was not one to tolerate, if he could help it, the scandals of *Jarndyce v. Jarndyce*, and if we have changed all that, and if the beneficent originating summons now minimises costs, is it not the fruit of his criticism and his labours for the reform of procedure? He was indeed thorough-going in his reforms, and was for abolishing pleadings altogether. He often expressed a very strong opinion that the plaintiffs and defendants always knew a good deal more of the case of each other than they could collect from a study of the pleadings, and had he lived to see the growing complexity of practice as embodied in "The White Book," he would have found more cogent reasons still for his opinion.

His ruling in *Re Ford and Hill* (40 L. T. Rep. 41; 10 Ch. Div. 365, 370) put a salutary check on the introduction of "new-fangled requisitions," as he termed them. "Such a requisition," he said, referring to the one before him, "a requisition in the nature of a searching interrogatory, is dangerous, and ought to

be discouraged as tending to increase the expense and delay in the investigation of titles, which already are almost a disgrace to the law of the country."

His comprehension of a case was rapid and masterly. His memory was marvellous: "If any of us," says his daughter, "wanted a date or a fact in early or modern history, we always asked my father, instead of consulting an encyclopædia, and received an instant reply. He not only took no notes in court, but used, after sitting and thinking for an hour or so, to take up his pen and write off the most elaborate judgment, full of figures and statistics, covering several pages, in his very minute handwriting, without a single erasure, and without any reference to papers, &c." But what was most remarkable in him—what made him the great judge he was—was the soundness, the solidity of his judgment. He saw things as few do—in their due proportion and perspective. Delighting in the law and reverencing it, recognising that it must be, as Burke said, the leading science in every well-ordered commonwealth, he yet saw its limitations—saw it in relation, that is, to religion, to art, to commerce, to the charities of home. He was not one of those who think

The rustic cackle of their bourg the murmur of the world,

or the municipal law of England the end and aim of human existence.

This largeness of view "which saw life steadily—and saw it whole"—was partly proper to himself, partly the result of his wide culture. He was an omnivorous reader, from Jowett's "Plato" to the latest French detective novel, and deeply interested in every question of politics, *belles lettres*, theology, science. He took, for instance, a great interest in all military topics, and followed any campaigns in the most minute details. He was a deep student, too, of Indian history—witness his valuable work on the British in India—and of Irish questions, and wrote many pamphlets on these subjects.

His habits of life were very simple. After his day's work was over at Lincoln's Inn he would walk to the Athenæum, and he might often be seen in the window there conversing with Stanley or Manning. Holding broad views himself on religious subjects, he always took a deep interest in theological questions, and, indeed, wrote a pamphlet on "The Infallibility of the Scrip-

tures." From the Athenæum he drove home. He dined out a great deal, as his society was in great request. When at home he spent his evening in reading and smoking—did not Milton smoke?—and sometimes playing a game of whist or picquet. On Saturdays, when the courts rose early, he nearly always had a commission to attend—the Indian Code Commission, the Abolition of Purchase in the Army Commission, the Judicature Commission—and therefore never had a holiday. His vacations he spent at his small country place in Surrey—Shere, near Dorking.

He loved it, fresh from brawling courts
And dusty purlieus of the law.

Here he luxuriated in leisure, dreaming and smoking in the garden, and delighting in his flowers and his greenhouses, and in the afternoon driving to some fine view or friend's house. His brother-in-law, Lord Romilly, M.R.—they had married two sisters, daughters of Dr. Otter, Bishop of Salisbury—lived within six miles, and among other neighbours were Mr. and Mrs. Grote, Lord Arthur Russell, Mr. Godwin Austen (the geologist), Lady Eastlake, and others. All alike delighted in the judge's great conversational powers and charm of manner. The following epitaph on Lord Westbury was one of his *jeux d'esprit*: "He was an energetic and successful statesman, and during the three years over which his tenure of office extended he abolished the time-honoured institution of the courts of insolvency, the ancient system of conveying land, and the eternity of punishment. So lately as on Tuesday last, by a judicial decision of the Privy Council, he abolished Hell, with costs, and took away from the Orthodox Church party in England their last hopes of everlasting damnation." Procter (Barry Cornwall), Thackeray, and Stanley were also among his intimate friends, and one of his greatest pleasures when in town were the delightful parties to which he was often asked at the house of Mr. Benzon in Kensington Palace Gardens, where Hallé, Joachim, and Piatti delighted their friends with music, and Browning, Leighton, Prinsep, and others, with brilliant talks on literature or art. The Lord Justice had indeed

All that should accompany old age;
As honour, love, obedience, troops of friends.

When he died, full of years and honours, it was no formal

tribute, no conventional panegyric, which was pronounced on him by Lord Justice Bramwell. "I am senior," said the Lord Justice, "of those who were in the habit of sitting with him, and I think expression ought to be given to the great, and, in my judgment, irreparable loss which the public has sustained in his death. He possessed every quality and accomplishment that a judge needed. He had a very great intellect, at once keen and profound. He was a consummate lawyer, thoroughly imbued with legal principles. He was a man of vast experience, not merely in the law, but in those things which make a man what is commonly called a man of the world, fitted to deal with the affairs of the world. He had but one desire when he took his seat upon the Bench—that is, that justice should be done according to right. It was said of him, and truly, that he was rapid in the formation of his opinions, and confident in the expression of them; and so he was, and so a man of his ability had a right to be; but I can say this of him, that a more candid man never lived, nor one more ready to renounce an opinion, though he had given expression to it in the most confident way, if he thought it was wrong. . . . We have lost a valuable friend, and an invaluable associate." May we not add, as Goldsmith says of Reynolds—

And, to tell you my mind,
He has not left a wiser or better behind.

Mr. Tulliver, in "The Mill on the Floss," was of opinion that "the law was made to protect raskills." It was not in Lord Justice James' hands. "The commercial conscience" was a phrase often in his mouth, and if we want a good example of the *liberrima indignatio*, which sometimes characterised his deliverances, we could hardly have a better than in *Re Canadian Oil Works; Hay's case* (33 L. T. Rep. 466; 10 Ch. App. 599), in the fine scorn in which he speaks of the directors in that case, the body of English gentlemen who had "consented and condescended to become on these terms the hired retainers of some unknown adventurers from the other side of the Atlantic." In *New Sombrero Phosphate Company v. Erlanger* (35 L. T. Rep. 309; 5 Ch. Div. 73), he declares and develops the valuable doctrine of the fiduciary relationship of a promoter towards the company he creates, and the duty on his part, if he is selling anything to it, of making full and fair disclosure. This doctrine is to the city

a stumbling-block; to the Stock Exchange, foolishness. But how many company frauds has it not checked or redressed?

The writer remembers a powerful sermon once preached from the University pulpit by the late Professor Jowett. The text was, "Will He find faith on the earth?" He spoke of the religious education controversy. "If He came again," said the preacher, "He would take a child and set him in the midst and say, 'Will you make this innocent child the centre of your religious wranglings, your sectarian bitterness?'" Lord Justice James felt the same. "I, for one," he said in *Hawksworth v. Hawksworth* (25 L. T. Rep. 115; 6 Ch. App. 539, 542) "should be loath to do anything which could operate as the slightest encouragement to persons, whether mothers or not, who obtain access to young children, to begin the task of proselytising them when they are of too tender an age to be disturbed by those religious controversies by which the adult world is so much distracted."

Agar Ellis v. Lascelles (39 L. T. Rep. 380; 10 Ch. Div. 49), a case illustrating strongly the misery of mixed marriages, dealt with the same topic. It laid down not only that a father cannot by any ante-nuptial contract abdicate his parental duty in respect of his children's religious education, but that the court will not sit in appeal from his choice of faith for them, if honestly and conscientiously arrived at, any more than it will as to the particular church his children should attend, the particular sermons they should hear, or the particular religious books to be placed in their hands. "The law has made him the judge, not us." The language of most judgments is colourless. The language of Lord Justice James is always racy and vigorous; yet it is never unjudicial, never intemperate. It may be best described as "impassioned logic."

But we can only note a few of his decisions here and there:— That the settled practice of conveyancers is to be looked at as part of the common law (*Re Ford and Hill*, 40 L. T. Rep. 41; 10 Ch. Div. 365); that an agreement to place shares is not an agreement to take shares (*Gorissen's case*, 28 L. T. Rep. 611; 8 Ch. App. 507); that where any person has to prove the fact of death, he proves it by presumption of law from the lapse of time; but when he has to prove the time of death, he must prove it affirmatively (*Re Lewes's Trusts*, 24 L. T. Rep. 533; 6 Ch. App. 356); that a floating debenture is a charge on the assets of the company

for the time being (*Re Florence Land Company*, 39 L. T. Rep. 589; 10 Ch. Div. 530); that where directors, after proper investigation of the financial position of the company, declare, and the shareholders agree, to a dividend or bonus, the court will not lightly interfere with the payment on the ground that estimates have turned out erroneous; but, if the dividend has been declared without proper investigation or professional assistance, the burden is on the directors to show that the dividend has been fairly paid out of profit (*Rance's case*, 23 L. T. Rep. 828; 6 Ch. App. 104).

But perhaps the most striking of all his judgments is that in *Re Goodman's Trusts* (44 L. T. Rep. 527). The question was whether a child of parents domiciled in Holland, born before wedlock, but legitimated by the law of Holland by the subsequent marriage of the parents, was to be recognised here as legitimate.

"What is the rule," says Lord Justice James, "which the English law adopts and applies to a non-English child? This is a question of international comity and international law. According to that law as recognised, and that comity as practised in all other civilised communities, the status of a person, his legitimacy, or illegitimacy, is to be determined everywhere by the law of the country of his origin—the law under which he was born. It appears to me that it would require a great force of argument derived from legal principles or great weight of authority clear and distinct to justify us in holding that our country stands in this respect aloof in barbarous insularity from the rest of the civilised world. On principle it appears to me that every consideration goes strongly to show that we ought not so to stand. The family relation is at the foundation of all society, and it would appear almost an axiom that the family relation, once duly constituted by the law of any civilised country, should be respected and acknowledged by every other member of the great community of nations. England has been for centuries a country of hospitality and commerce. It has opened its shores to thousands of refugees and religious exiles, fleeing from their enemies and persecutors. It has opened its ports to merchants of the whole world, and has by wise laws induced and encouraged them to settle in our marts. But would it not be shocking if such a man seeking a home in this country with his family of legitimated children, should find that the English hospitality was as bad as the worst form of persecution from which he had escaped, by

destroying his family ties, by declaring that the relation of father and child no longer existed, that the child of his parental affection and fond pride whom he had taught to love, honour, and obey him, for whom he had toiled and saved, was to be thenceforward, in contemplation of the law of his new country, a fatherless bastard." Judgments like these are the very cornerstones of the great edifice of English law.

CHIEF JUSTICE ERLE.

THE night that Burns was born the cottage which sheltered him and his mother was nearly blown down by a storm. "No wonder," said the poet afterwards, "that one ushered into the world amidst such a tempest should be the victim of stormy passions." Erle—the future Chief Justice of the Common Pleas—was ushered into the world amid a mightier tempest, the storm of the great French Revolution :

When France in wrath her giant limbs upreared,
And with an oath that shook earth, sky, and sea,
Stamped her strong foot and said, "I will be free!"

But the lurid star of Erle's nativity exercised no malign influence over his life or nature. His life was gentle, and the elements in him most happily and graciously mixed. All the red star of revolution did was to make Erle a mild but consistent Liberal, a Liberal who sat through one session of Parliament silent like Gibbon, and voted steadily with his party. Gibbon used to explain his silence as a senator by saying that "the bad speakers in the House filled him with terror, the good ones with despair."

Perhaps Erle had the same feeling. He was not gifted with eloquence—indeed, he had a slight impediment in his speech—nor did he, though a distinguished scholar at Winchester and New College, show any particular brilliancy when he first joined the Western Circuit. He attended, it is said, several assizes and sessions without picking up a stray brief. But he had what was better than brilliancy—thoroughness. He was painstaking, he was tenacious, never declamatory, but strikingly argumentative, plain and homely in his style, thinking, like old Fuller, that "the plainest words are the profitablest oratory in weightiest matters."

Self-reverence, self-knowledge, self-control,
These three alone lead life to sovereign power.

And these Erle had. He conquered the impediment in his speech



CHIEF JUSTICE ERLE.

(From a photograph by Maull & Fox.)



by a self-imposed habit of distinct enunciation, and the only trace of the defect remaining in after life was a certain deliberateness of delivery, a "measured emphasis of utterance." He schooled his temper, too, as well as his tongue.

"Pray, Mr. Kenyon, keep your temper," said Lord Mansfield. "Your Lordship," said Mr. Cowper, who sat by, "had better recommend Mr. Kenyon to part with it altogether." Erle parted with his. It is no secret that naturally his feelings were strong, but he for a long course of years kept them under stern restraint, and so effectually that no one can remember any outbreak. He rightly considered that nothing could be more unforensic or more unjudicial than ill-temper. The result of all was that he became a very acute and able advocate; indeed, the late Lord Chief Justice once stated that, in his opinion, the finest advocate of his time was Sir William Erle. Serjeant Davy used to say that the more he went the Western Circuit the more he understood how the wise men came from the East; but in Erle's time this jibe would have fallen flat, for Follett and Crowder and Wilde were among the leaders of the circuit, and among these, able and brilliant as they were, Erle gradually came to the front, though his rise was anything but meteoric.

In one of his earliest cases he appeared for some tradesmen, who had supplied goods—knives and forks, etc.—to a club which called itself the Westminster Reform Club. The club was a failure, and the committee, comprising several Liberal M.P.'s, refused to pay.

"The club, my Lords," said Erle, "was formed for the spread of Liberal principles and——"

"It surely was not necessary," observed Baron Bolland, "for the spread of Liberal principles to get into debt."

"It would have been more liberal to have paid," added Lord Abinger.

"It was necessary, my Lords," said Erle, "that the club should have a house; and, if a house, a dining-room in it; and, if a dining-room, a dinner; and, if a dinner, that they should have knives and forks wherewith to eat it."

"Oh! I don't see that at all, Mr. Erle," said Lord Abinger, rubbing his hands with glee at the imaginary predicament of the Liberal M.P.'s; "I don't see that at all. I can't see the necessity of Reformers having knives and forks wherewith to eat their dinners; the Romans had none."

Erle stood this kind of fire from the Bench remarkably well, and was always ready and apt in reply.

It was sixteen years, however, before he obtained a silk gown from Lord Brougham, and it was ten years more before he was appointed a judge of the Common Pleas. It is significant how entirely he owed his advancement to his professional merits, and not to his political pretensions, that he received his appointment from a Tory Chancellor, Lord Lyndhurst. It was one of those excellent appointments which Campbell jestingly told Lord Lyndhurst at a dinner at Mr. Justice Patteson's would "cover the multitude of his sins."

By the unanimous suffrage of the whole Legal Profession a better judge than Sir William Erle never sat on the Bench—combining in the highest degree learning, diligence, patience, and courtesy. His impartiality and his single-eyed desire for justice inspired in the Bar and in the public a confidence which many judges of more striking and original talents have failed to secure—no small excellence, seeing that the power of the law lies in the respect of the people for it. A writer in one of the quarterlies described Erle, J., as the best of our judges on the Common Law Bench, "bating a little obstinacy." This so-called obstinacy was the one flaw in Erle's judicial character; it generally is, of a strong judge like Erle—it goes along with masculine sense and decision. Such men are not given to nicely balancing opposite views like philosophers or casuists, nor was Chief Justice Erle. He was eminently practical. He never delivered a judgment or charge in which he did not allude to practical experience or rest on practical views. Serjeant Ballantine says that he put too much faith in outside respectability, and was almost as weak as some juries in cases where injuries were alleged to have been inflicted upon women. If he did, it was a failing which leaned to virtue's side. "I was counsel," says the Serjeant, "in the last cause he tried, and his dealing with it illustrated what I have said about his want of knowledge of the ways of the world. It was an action arising out of the sale of a horse for which my client had given 300 guineas. It was a magnificent-looking animal, and had been shown off by a very pretty girl before it was purchased. The horse was a screw, and the whole affair a plant. The Chief Justice was indignant at my defence. He could see nothing to justify the imputations I had made, and so he summed up. The jury, however, with very little hesitation,

found in favour of my client. I met Erle leaving the court. He was greatly vexed at the verdict, and could not understand it. I told him that the parties probably were known to the jury, but I cannot help thinking that he felt his power and influence were waning. His predecessor, Sir John Jervis, would have seen through the whole fraud in a moment."

He had a quiet sense of humour, and much relished a joke. Once a counsel apologised for a sally of wit which set the court laughing. Erle did not have the laughter "instantly suppressed" or the court cleared. On the contrary, he said, "The court is very much obliged to any learned gentleman who beguiles the tedium of a legal argument with a little honest hilarity." A scene once occurred in court which must have been not a little conducive to hilarity, but whether it was hilarity which the Chief Justice shared may be doubted. It was in a case tried at Bodmin, in 1855. There was a deaf jurymen. He said nothing about his infirmity, and it was only when the judge had finished his summing up that it was discovered that the jurymen had not heard a word of the recapitulation of the evidence. The result was that Erle had to repeat the whole of his summing up for the benefit of the exasperating jurymen. Needless to say, he was then discharged. *Aprpos* of juries, some of his opinions given before a Parliamentary Committee on our jury system are worth noting. *Imprimis*, he thought that jurors ought to be paid by the day, on a scale which would at least pay their expenses, and afford some indemnity for loss of time. He also thought that nine or seven jurors should be sworn instead of twelve. Hear him on the "hardships" of jurymen: "When I have heard great complaints by jurors I have said, 'If it is so repulsive to you I will discharge you at once, and tell the sheriff never to allow you to serve again on a jury as long as you live,' but I have never found anyone ready to accept that condition." Would that formula answer now? Alas for the degeneracy of public spirit! we much fear the condition would be promptly closed with. On the proposal for a property qualification for jurors, he remarked epigrammatically: "The bounty of Providence in giving a man sound judgment does not depend on the soundness of the roof over his head."

The Chief Justice was one of those who "do good by stealth and blush to find it fame." "He was," says Ballantine, "a man of great benevolence, and I have heard many anecdotes illus-

trative of his kindness of heart, and one example happened to come within my own knowledge. He was presiding in the Civil Court at Northampton, and was obliged to direct a jury against some poor people who had been scandalously but legally swindled. To them the result was absolute ruin. On the following morning an elderly gentleman on horseback made his appearance in the alley where the sufferers resided. This was Sir William Erle. He gave them some very good advice, and with it a sum of money that replaced them in their old position."

Serjeant Robinson adds his testimony: "When I applied," he says, "to Chief Justice Erle to recommend me to the Chancellor he wrote me a very kind letter, stating that his relations with the Chancellor were so strained, that he had come to the resolution not to make any further applications to him of any kind. He said he was very sorry to refuse me, but he could not submit to the rebuffs he had received from Lord Westbury on more than one occasion. However, in less than a fortnight, I received from him another note, saying that he had thought over my application, and did not think I ought to suffer on account of any private grievances of his own, and that he would, at all events, make an exception in my favour. Anyone acquainted with the Chief Justice would recognise this plea as thoroughly illustrative of his character. The recommendation was given, and I shortly afterwards obtained the coif."

No finer tribute could be paid to any judge than that which was paid to the Chief Justice, on his retirement in 1866, by Sir John Rolt, the then Attorney-General: "My Lord," he said, "we all feel and desire to acknowledge that under your presidency in this court the great judicial duty of reconciling as far as may be positive law with moral justice has been satisfied. The letter of the law which kills, and the mere discretion of the judge which has been well said to be the law of the tyrant, have been alike kept in proper and due respect. Learning, great experience of affairs, wise administration, have been so combined that, with the assistance of the eminent judges associated with you on that Bench, the laws of England have been exhibited in their true aspect as the exponents of the rights and duties of our citizens and the guardians of their liberties. The Court of Common Pleas, under your presidency, my Lord, has obtained the highest confidence of the suitor, the public, and the Profession. Our homage," he went on to say, "is due, and is paid not only to the

dignity of the judge, but the worth of the man, his simplicity and elevation of character, his private and social virtues, his kindness and his courtesy." It was indeed—to use the words of one who was present on the occasion—a touching scene to see the hero of a hundred forensic pitched battles, the third and tested athlete of the legal arena, the judge who had presided over so many a well-fought contest, who had so gently, yet so strictly, kept counsel, witnesses, and public in order for twenty years—who had known so well how to maintain judicial dignity, yet who had ever been ready to enliven the tedium of protracted inquiries and long-drawn disputations with the sallies of a dry and quiet humour, now when he came to bid farewell to his colleagues and to those who had practised before him, as nervous and almost as overcome as if he were a junior holding a maiden brief before a court of quarter sessions.

Cincinnatus laid aside the fasces to till his farm. From and after his retirement Sir William Erle passed his time chiefly in the country, following the life of a country gentleman, fond of his tenantry, his horses, his dogs, and his cattle, and dispensing with a peculiar charm the hospitalities and charities of a Hampshire squire, at Bramshott, near Liphook and Haslemere, where the memorial granite cross, erected by him on the summit of the hill, is a conspicuous landmark. "*Senesco non segnesco*" was his motto, and, like Dyer, he would say

Be full ye courts, be great who will,
 Search for peace with all your skill;
 Open wide the lofty door,
 Seek her on the marble floor.
 In vain you search, she is not there,
 In vain ye search the domes of care.
 Grass and flowers Quiet treads
 On the meads and mountain heads.

He might often be seen in the lanes about his neighbourhood, dressed in a loose country coat, knee breeches, and gaiters, fondling his dogs, and caressing his cart-horses, who on their part seemed quite at home with him. He was not a sportsman—indeed, it is said that he would not allow either birds or beasts on his estate to be killed—but he was a thorough typical English gentleman, with a fine, honest nature and fine, manly tastes and pursuits. All this you could read in his open and genial countenance, so full at once of good sense and good humour, of shrewd-

ness and kindness. In fact, few men were ever more truly beloved than Chief Justice Erle, either in their homes or in general.

He sometimes, however, attended the sittings of the Privy Council. Westbury, says Serjeant Robinson, once remarked to Chief Justice Erle, after the latter's retirement: "I wish, Erle, you would sometimes come in to the Privy Council and relieve me from my onerous duties there, for we can't get on without three, and there is no one else I can apply to."

Erle said he would willingly come, but he was getting a little deaf, and was afraid that might interfere with his power of doing full justice.

"Not at all, my dear fellow," said Westbury. "Of my two usual colleagues, — is as deaf as a post and hears nothing, — is so stupid that he can understand nothing he hears, and yet we three together make an admirable court."

"Human Life," says the Chief Justice in his admirable little treatise on Trade Unions, "is a progress between two sets of physical and moral agencies perpetually striving against each other— one on the side of falsehood, malice, and destruction; the other on the side of truth, kindness, and health; and the law, if wisely made and properly administered, maintains truth and kindness and health." Erle's own life, as well as his law, was all on the side of truth, kindness, and health.

His decisions will be found reported in the later volumes of Adolphus and Ellis, in Ellis and Blackburn, Common Bench Reports, Cox Criminal Reports, and Law Reports Common Pleas, vols. 1 and 2.

It is very old law that adultery does not bar a wife's right to dower. *Needham v. Bremner* (14 L. T. Rep. 437; L. Rep. 1 C. P. 583) is based on the same principle. It decides that a verdict finding a wife guilty of adultery does not constitute a defence to an action against the husband for necessaries supplied to the wife. It does not, like a decree for dissolution, alter the status of the parties. The woman still continues the wife of the defendant. The verdict is binding as between the parties to the suit, but not as against other parties who come to litigate the same question.

Our law has always rigorously enforced the safety of the King's highway to his liege subjects. *Hadley v. Taylor* (13 L. T. Rep. 368; L. Rep. 1 C. P. 53) decides that occupiers of premises, warehousemen, for instance, who leave a hoist hole unfenced, say

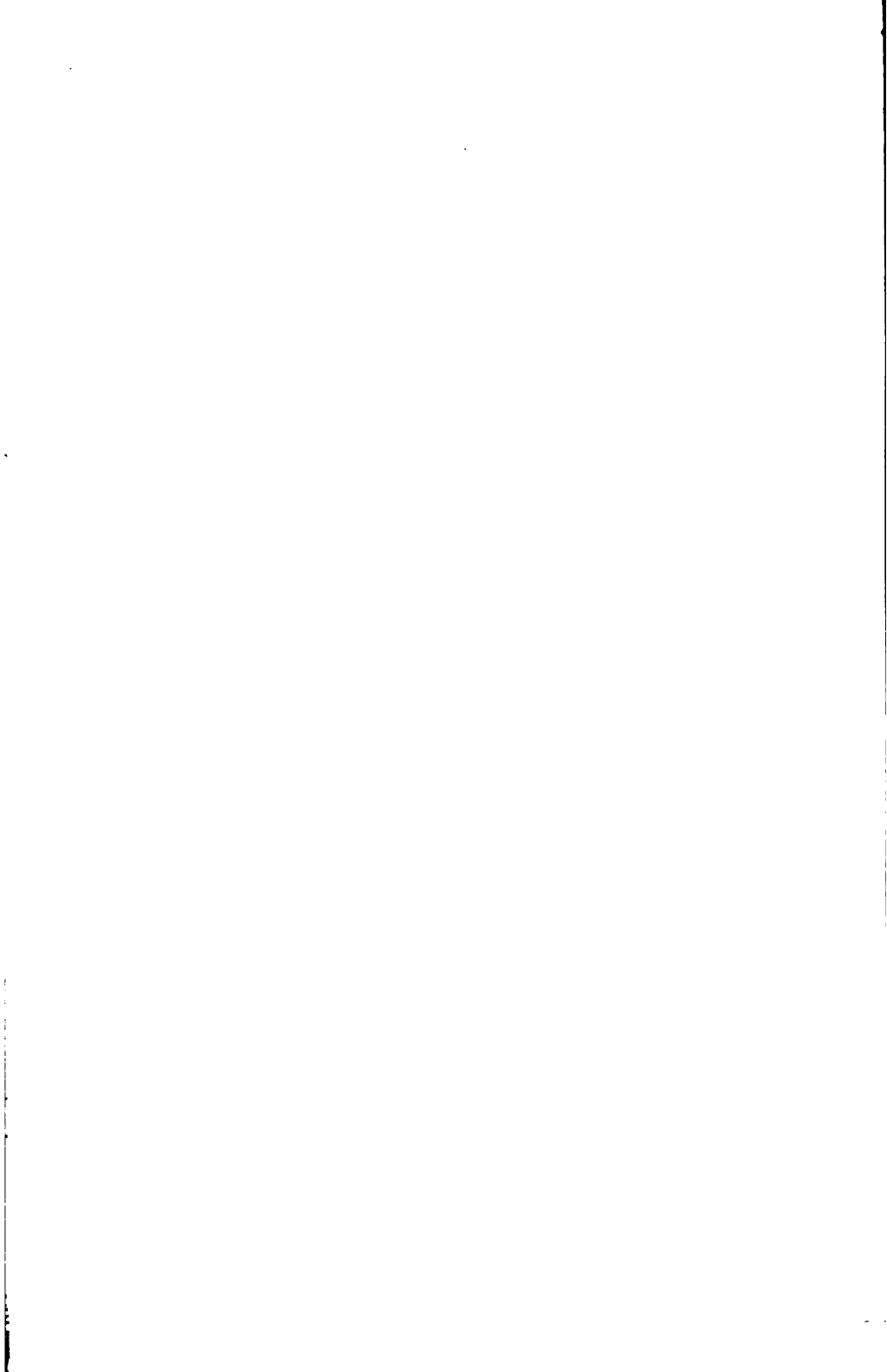
a cellar flap, within a foot of the highway, are liable if a man fall down it. A hole in such close proximity to the highway is a public nuisance, because, though you cannot recover if you wander into danger from the highway, you ought to be able to step a foot off the highway without danger.

The ravages of rats at sea have much exercised the minds of our judges. *Kay v. Wheeler* (16 L. T. Rep. 66; L. Rep. 2 C. P. 302) is one of the earlier cases, and it decided that the shipowner is liable for injury done by these "busy, mischievous vermin" gnawing the goods, though shipped under a bill of lading containing exceptions of "the act of God, the Queen's enemies, fire, and all other dangers and accidents of the sea, rivers, and navigation, of what kind and nature soever." In *Kay v. Wheeler* the shipowner had even kept two cats and a mongoose—dire foe of rats—on board, and had employed a professional rat-killer to clear the ship before she started. *Hamilton v. Pandorf* (57 L. T. Rep. 726; 12 App. Cas. 518) raised quite a different point—that of rats letting in the sea to the cargo.

Innkeepers are rather hardly pressed by the common law of England, but there is such a thing as contributory negligence on the part of the guest which will exonerate the innkeeper from liability, and *Armstead v. Wilde* (17 Ad. & Ell. 261) is an instance. There a traveller for a firm ostentatiously showed a large sum of money in the presence of several persons, and then openly put it in an ill-secured box, which he left in the travellers' room, and the innkeeper was held not responsible for a loss. It is not even necessary, *semble*, that the negligence should be gross. *Ex parte Death* (18 Ad. & Ell. 647) decided an important point of University discipline, viz., that the governing body of a University may lawfully issue a decree that every tradesman with whom a person *in statu pupillari* within the University contracts a debt of £5 shall make the same known to the tutor of such person's college on pain of being discommuned if he omits doing so; and in case of disobedience they may enforce such decree by ordering that no person *in statu pupillari* shall deal with the tradesman for a given period. The law would, indeed, have been deplorably meddlesome if it had interfered with this wholesome provision against undergraduate extravagance in Cambridge. Why does not Oxford follow her sister University's example? Other decisions of Erle's are: That the servant of a horsedealer has an implied authority to bind his master by a warranty (*Howard v.*

Sheward, 15 L. T. Rep. 183); that a landlord cannot break open the outer door of a stable, though not within the curtilage, to levy an ordinary distress for rent (*Brown v. Glenn*, 16 Ad. & Ell. 254); that the solicitor of a vendor receiving the deposit on a sale is not a stakeholder (*Edgell v. Day*, 13 L. T. Rep. 328; L. Rep. 1 C. P. 80; cf. *Ellis v. Gaulton*, 68 L. T. Rep. 144; (1893) 1 Q. B. 353); that it is not competent to a company incorporated in the usual way for the formation and working of a railway to draw, accept, or indorse bills of exchange (*Bateman v. Mid-Wales Railway Company*, L. Rep. 1 C. P. 499); that a pew in a parish church does not entitle the owner to a county vote as a 40s. freeholder (*Hinde v. Chorleton*, 15 L. T. Rep. 472; L. Rep. 2 C. P. 104); and that a ballet divertissement is not an "entertainment of the stage," a legal conclusion which may surprise stage managers (*Wigan v. Strange*, 13 L. T. Rep. 371).

The notorious *Jackson* case stirred society to its depths. It was stigmatised as subversive of marriage and domestic life, and the Press poured forth "cataracts of nonsense," but, in truth, all that the *Jackson* case laid down had already been laid down long before in *Reg. v. Leggatt* (18 Ad. & Ell. 781), one of Erle's decisions, viz., that where a wife is, by her own desire, living apart from her husband, and is under no restraint, the court will not grant a *habeas corpus* on the application of the husband for the purpose of restoring her to his custody. The only difference is that in the time of *Reg. v. Leggatt* the Ecclesiastical Court had still the right to compel a rebellious wife to return to her allegiance. But really we have lately progressed so fast under the influence of the "new woman," that *Jackson's* case, if decided to-day, would hardly startle us. In all probability it would be meekly accepted by the deposed lords of creation without a single murmur.





INSIDE THE TEMPLE CHURCH.

SIR EDWARD VAUGHAN WILLIAMS.

ROME had its Mucian gens, its hereditary race of lawyers. England has its Pollocks, its Chitties, its Vaughan Williamses. "No man," said Lord Eldon, speaking of the first of the Vaughan Williams' line, "ever lived to whom the character of a great common lawyer more properly applied than Serjeant Williams." Mr. Preston, the eminent conveyancer, used to speak of him as "the renowned Serjeant." This renown was mainly based on his edition of Saunders' Reports, published in 1799. The notes to this edition contain an admirably lucid and accurate statement of the Common Law in almost every branch of it, and more particularly as to the rules of pleading. The notes in it on real property, too, obtained a very great reputation among conveyancers as well as common lawyers, so that the book at once became famous.

Mr. Justice Patteson used to relate that, when a student, he was staying at a friend's house in the country, with Chief Justice Dallas, who honoured him by proposing, one rainy day, that they should read a little law together, and, on being asked what it should be, said: "I believe my friend has a 'Saunders' in the house, and I think I should like to read Serjeant Williams' 'Note on Executory Devises.'" Alas! alas! how are we degenerated. What learned judge, we wonder, in his vacations calls for "Executory Devises" to divert the tedium of a wet day, or dines off Coke like Eldon, or takes the Statute of Uses to bed with him? *Propos* of this Note, Serjeant Williams was once at the Hereford Assizes, opening a case before Mr. Justice Lawrence, and, after stating the limitations of a will, said that they created an executory devise, on which Mr. Justice Lawrence said, "Surely, brother, it is a contingent remainder." The learned Serjeant, continuing his address, again suggested that it was an executory devise, and the learned judge again suggested that it

was a contingent remainder. Whereupon Serjeant Williams exclaimed, with some warmth, "Upon my honour, my Lord, it is an executory devise." "Oh!" said the learned judge, "if you say that, brother, I have no doubt that I am wrong."

One of the Serjeant's eccentricities, as a writer in the *Law Magazine* tells us, was that he would never allow that a puisne judge was properly called "My Lord" in banco, and occasionally, when irritated by the interruptions of his argument proceeding from a puisne judge, he was wont to say, "Sir, I will answer your observations after I have replied to my Lord (the Chief Justice)." He was a handsome man, says the same authority, with such a fine complexion that he was commonly called "Bloom Williams." His manners were most agreeable, though he was somewhat hot-headed, full of amusing reminiscences of the old Carmarthen Circuit when the roads were too bad for coaches, and counsel and judges were obliged to ride the circuit; nor wanting, too, a tincture of letters, so often lacking in the composition of the modern lawyer. He would walk up and down in an evening reciting Lycidas and favourite passages from Pope, or reading out to his family papers of Addison's from the *Spectator*. Had he lived, there can be little doubt that the learned Serjeant would have been raised to the Bench, but he died prematurely at the age of fifty-one. He had always been delicate, and he used to say he never got over the effect of over-fatigue in having, when a young man, joined a party of college friends who walked from Oxford to London in a single day.

Sir Edward Vaughan Williams was the second son of this renowned Serjeant—"Patre præclaro, filius præclarior." Glimpses of the boyhood of great men are always interesting, and such a glimpse we have from a schoolfellow of Vaughan Williams' at Westminster. This friend of his youth, writing of him in the *Law Magazine*, describes him as not very studious, but a boy of very uncommon abilities. "He had," he says, "the most insatiable thirst for reading of any boy I ever knew; newspapers, novels, books of all sorts he would read with wonderful rapidity, extracting and never forgetting what amused him or was worth remembering. But his love of reading did not prevent him from taking part in the games and active exercises of the school. He was a good swimmer, and has swum across the Thames and back again with his college cap on his head; and I can fancy him now exhibiting his blistered hands as evidence of the courage and

perseverance with which he had plied the oar in some contest on the river. He had a good voice and a correct ear, and was very fond—was he not a Welshman?—of music. He sang amusing songs, and was constantly humming airs from popular plays and operas, and imitating with great success the principal singers with ridiculous acting." But what his friend notes as his special characteristic was a peculiar quickness and minuteness of observation. It gave promise of the excellences of the special pleader.

He read in the chambers of Patteson, and afterwards of Campbell. The first day he went to Patteson (afterwards the judge), Patteson said, "Your father's books contain everything you could wish me to teach you." "You can conceive," says Vaughan Williams, "how delightful it was to me." In Patteson's, and afterwards in Campbell's, chambers he was initiated into the mysteries of special pleading and the thorny technicalities of law. Campbell was fond of tracing his legal pedigree through Tidd up to Tom Warren. Thus Tom Warren begat Serjeant Runnington, Serjeant Runnington begat Tidd, Tidd begat Campbell, and Campbell, he would add, begat Vaughan Williams. A year after his call, Vaughan Williams published an edition of his father's "Saunders," but the most celebrated edition of that work is the sixth, brought out in 1845, under the joint auspices of Sir William Patteson and Edward Vaughan Williams, just before the latter's elevation to the bench. Williams' Saunders, once revered as the Pleader's Bible, has, in modern days, fallen sadly into neglect. It is still cited, indeed, and still maintains its high authority, but its unfortunate form of notes upon notes appended to reports—a form due to a reverence for authority much lacking now—its "unmethodical" character, to use Lord Campbell's phrase, has prejudiced its popularity. Like Dr. Johnson's Dictionary, it is, to all but the experts who can thread its labyrinths, "verra disconnected," and thus it has become a sort of legal quarry rather than a fair building. Very superior as a work of legal art is the admirable "Law of Executors"—no tribute of filial piety, but his own design—the worth of which has been attested in nine editions. The editor of the last edition—his son, the present Lord Justice Vaughan Williams—bears striking witness to its excellence in his preface. "Day by day," he says, "as the work of this new edition proceeded, I became more and more filled with admiration for the original, and more impressed with my own inability

as editor to supply my father's place." And, not content with these giant labours, the great lawyer edited Burns's "Justice of the Peace," a most laborious work, and wrote the chapter on "Evidence" for "Russell on Crimes."

Vaughan Williams was not one of those judges who are also orators. He was fastidious in the choice of words, and this very fastidiousness prevented him being a master of fluent expression. His delivery was somewhat laboured and embarrassed. An intimate friend of his relates, that long before Vaughan Williams was made a judge, a chief of one of the courts said to a conceited gentleman who was sneering at Williams for his nervous manner, "Hold your tongue, and don't talk nonsense. There is not a judge on the Bench who would not be proud to bow to Williams' law." There was, indeed, but one opinion. "In profound acquaintance with the law of England," said one of his chiefs, "in all its branches, I doubt if any man living could stand before him, and I do not forget Lord Wensleydale." "Williams' mind," said Sir James Willes, "is like a bell—there is no flaw in it." Yet had he withal the modesty that so often goes with great learning. He minimised, perhaps, too much his just reputation. To the Bar he was always considerate and genial, maintaining the dignity of the Bench with the natural ease of a thoroughbred gentleman.

A learned lawyer of the school of Vaughan Williams is generally credited with being a dreary Dryasdust, with a narrow understanding, and with very limited human sympathies. Nothing could be more erroneous in his case.

In private life, says the authority we have already quoted, "Sir Edward Vaughan Williams was, as long as health and spirits served him, simply one of the most delightful companions possible—full of fresh life, joining in the pastimes as in the studies of his children; his memory stored with various knowledge. Pictures, scenery, a ramble through the streets, a night at the play, he enjoyed them all heartily with the keen zest of youth, and rejoiced in the exercise of genuine and really splendid hospitality. In the beautiful country between Dorking and Guildford, which was for so long a time his country home, he was supreme. There was not a nook or corner, scarcely a tree, with which he was not familiar. He was a great reader of books of all kinds except travels, for which he had no taste. His fondness for novels was extraordinary, and he preferred to have an

indifferent one on hand rather than none at all, but it was characteristic of his sensitive nature that he always put a novel down which he saw was going to end badly."

Campbell enters in his diary on Aug. 17th, 1850: "My circuit passed off very pleasantly. I had for my colleague my old pupil Vaughan Williams, whom I made a judge in 1846. I found him not only a good lawyer, but a very agreeable companion. We had a delightful row upon the Thames between Abingdon and Oxford, and nice walks together at every circuit town." And more than once he alludes to the pleasures of Vaughan Williams' companionship.

In the Spring Assizes of 1849, Sir Edward Vaughan Williams went the Western Circuit in company with Lord Chief Justice Denman, and the two judges were entertained very hospitably by the Duke of Wellington at Strathfieldsaye. Vaughan Williams, as Denman says, "Boswellised" the Duke's conversation. His graphic account of the visit, given in Denman's Life, is worth quoting.

"Nothing could be kinder or more hospitable," he says, "than the Duke's reception. There was a large party of the county gentlemen of the first distinction. The lady guests were few, and I cannot say they had aristocratic names: Mrs. and Miss Browne (the Brownes are tenants of a house belonging to the Duke in the neighbourhood, and Mrs. Smith is the wife of the well-known Assheton Smith). There was also a Miss Walmesley, Mrs. Browne's sister. The Duke led the way to dinner; Lord Denman sat at the Duke's right, and I at his left. The dinner was very superb and good, but the waiting bad; the display of plate quite magnificent. The Duke was most attentive and obliging, and I really think I never knew anyone make himself more agreeable.

"Of Macaulay's history he said, 'It is capital. It puts you in the very heart of the society of the time, and makes you live among the people of that day.' Shortly after the Duke said, 'The English have no notion of what espionage there is in every department of the public service on the Continent.' Lord Denman said, 'One consequence is, that as people write their letters, knowing they will be read before they reach their destination, they word them accordingly.' The Duke said, 'Yes, yes; to be sure. I remember, when I commanded the army in Spain, I intercepted a vast deal of correspondence. Among the rest I used to intercept the letters which a man named Bourke, the

Swedish envoy at Madrid, used to send to his court. They used to begin with a regular statement of what the authorities said had taken place or would take place, but at the end he used to add, "mais il y'a des malveillants" who say so and so, and I soon found out that what he wrote at the beginning was false, and what he wished his Government to believe was what the *malveillants* said. I met him many years afterwards in London, and told him what I suspected, and he said, "You were quite right, that was our cypher." He asked Lord Denman if he had been acquainted with Madame De Stael. 'She was,' said the Duke, 'a clever, sensible woman. She told me she thought the old French Republic would have worked well enough if a successful soldier had not sprung up. But I think she was wrong. It was tumbling to pieces before; so many leading men in it had been found out in such corruptions about money.'

"He spoke of Phillpotts, the bishop, and Lord Denman and the Duke agreed in praising his speeches and his great talents for debate. 'But,' said the Duke, 'he is always at war with somebody, which a bishop ought not to be; he is always in hot water; he can't keep out of hot water. You know what Canning wrote in his letter offering Lyndhurst the Seals: he put in a post-script, "Philpotto non obstante."'"

After twenty-two years on the bench, and not yet fallen into the sere and yellow leaf, Vaughan Williams wisely retired to the congenial tranquillity of country life and country scenes—to rest but not to rust.

During the ten years that were left him of life he often attended the sittings of the Privy Council, and rendered valuable assistance in its counsels.

His decisions will be found reported in the long array of Common Bench and Common Bench New Series, in Blackburn, and Ellis, in Ellis, Blackburn, and Ellis, in Cox's Criminal Cases, and in the Law Reports, Privy Council. People who are fond of a country ramble, especially on the Yorkshire moors, should bear in mind *Hounsell v. Smith* (1 L. T. Rep. 440; 7 C. B. N. S. 731). The effect of this decision is, that an owner of land is under no legal obligation to fence an excavation therein, unless it is made so near to a public road or way as to constitute a public nuisance. Therefore, where a person in crossing some waste land on a dark night had missed the road and fallen into a quarry, he could get no redress. Another rather hard case,

or which seems so, is, that a man who has been bitten by a savage dog can maintain no action against the owner unless he can show that such owner kept the dog knowing it to be of a mischievous disposition. This is *Card v. Case* (5 C. B. 622). The *scienter* is the gist of the action. *Apropos* of animals, *Morgan v. Abergavenny* (8 C. B. 768) decides that deer in a park (though an ancient and legal park) may be so tame and reclaimed from their natural wild state as to pass to executors as personal property. To the uninitiated this seems a pretty simple proposition. Only the lawyer will recognise the possibilities of argument contained in it. *Wild v. Harris* (7 C. B. 999) was a breach of promise action, and it is "pretty to observe," as Mr. Pepys would say, the precision of the old pleadings in such a matter. After setting forth the promise, it goes on to aver that "the plaintiff confiding in the said promise of the defendant had always from thenceforth remained, and still was, sole and unmarried, and had been during all the time last aforesaid, until she had notice that the defendant was married as thereinafter mentioned, ready and willing to marry him, the defendant, &c.; that, although a reasonable time had elapsed since the making of the defendant's promise, and before the commencement of the suit, yet the defendant had wholly neglected his promise and had not married the plaintiff, but, on the contrary thereof, the defendant, at the time of making his promise and from thenceforward, had been, and still was, married to a certain woman, whose name was to the plaintiff unknown, and still being the wife of the defendant, and that she, the plaintiff, did not know at the time of the defendant making the said promise to her, nor for long afterwards, that the defendant was married, &c., &c." What was the answer of the defendant to this touching and beautiful pleading? Will it be believed? It was that the lady could not perform her part of the bargain by marrying him, the defendant—the married man. It is satisfactory to find that on this unconscionable plea the perfidious defendant was utterly routed.

Among other decisions of Mr. Justice Vaughan Williams may be noted: *Ambrose v. Kernson* (10 C. B. N. S. 776), that a husband is liable for the necessary expenses of the decent interment of his wife, though she has been living apart from him upon an adequate separate income. *White v. Garden* (10 C. B. 919), that a contract for the sale of goods obtained by fraud on the part of the purchaser, though voidable at the option of the vendor,

cannot be avoided by his election after the goods have passed into the hands of a *bond fide* purchaser; *Wenman v. Ash* (13 C. B. 836), that addressing a letter to a wife containing matter reflecting on her husband is a publication of the libel. As Mr. Justice Maule sarcastically asked, "Is a man's character with his wife worth nothing?" *Ritchie v. Smith* (6 C. B. 462), that an agreement, the object of which is to enable an unlicensed person to sell excisable liquors and so contravene a statute passed for the protection of public morals, cannot be enforced in a court of law; *Hopwood v. Whaley* (6 C. B. 744), that the executor of a lessee for years is, in the absence of assets of the testator, liable *de propriis bonis* to the extent to which he might by the exercise of reasonable diligence have derived profit from the premises; *Singleton v. Eastern Counties Railway Company* (7 C. B. N. S. 287), that where a child of three and a half years strayed on a railway and had its leg cut off by a passing train, the railway company could not be held liable in the absence of evidence to show that the child got there through some neglect of the company. *Cooper v. Slade* (6 E. & B. 447) affirms the rather Jesuitical proposition that, under the Bribery at Elections Act (17 & 18 Vict. c. 192), s. 2, you may promise to pay a voter's travelling expenses, but you must not do so conditionally on his voting for you or for any particular candidate.

Hall v. Wright (E. B. & E. 746) was a case of singular nicety. It was an action for breach of promise to marry, and the defence set up was, that the defendant had become so ill—he had fallen into a consumption—that he could not marry without danger to his life. Both in the Common Pleas and in the Exchequer Chamber the court was almost equally divided. Baron Bramwell, in what Lord Hannen called his usual striking way, asked, "Could he (the defendant) be bound to commit suicide or go through a ceremony which would be a nullity?" But his view did not prevail. Mr. Justice Vaughan Williams, who was on the side of the majority, seems to have struck the true note of distinction in pointing out that such a plea might be a good answer to a claim for specific performance, but was none to a claim for damages. Ill-health may to some ladies of fashion be a positive recommendation.

Sir Peter Teazle: "And what have I done for you, Madam? I have made you a woman of fashion, of fortune, of rank—in short, I have made you my wife."

Lady Teazle: "Well, then, and there is but one thing more you can make me to add to the obligation, and that is——"

Sir Peter: "My widow, I suppose."

Lady Teazle: "He—m, Hem! Then, why will you endeavour to make yourself so disagreeable to me and thwart me in every little elegant expense?"

MR. JUSTICE CROMPTON.

THERE are some men—great men—who have a peculiar power of winning affection, though ambition is generally made of sterner stuff. Charles Lamb was one of these gracious souls; so was Oliver Goldsmith. Crompton was another. “Dear old Charlie Crompton!” was the endearing appellation which his friends bestowed upon him. He, Crompton, is not one of our greatest judges; not a Hale or a Mansfield; not

One of the grand old masters, one of the names sublime,
Whose trampling footsteps echo down the corridors of Time;

but he did good work; he added some solid masonry to the edifice of English law, and he should find a niche there.

His father, Dr. Crompton, was of an old Puritan family, but he had nothing of the Puritanic sourness in his composition. Having come in for a fortune, he gave up medical practice and settled at Eton House, near Liverpool, as a country gentleman, radiating benevolence. So unbounded was his hospitality, that he often stood, it was said, at the gate of his mansion, pressing his passing acquaintances to enter and partake of the refreshment the house afforded. He found occupation, too, besides making good cheer, in physicking his poorer neighbours, and he might any day be seen going his gratuitous rounds on horseback, his youngest daughter, then a young girl, seated behind him on a pillion. But it was to his mother that the future judge owed most—as so many great men do. “Women,” it has been well said, “have produced no masterpieces. They have produced neither Iliad nor Æneid, neither the Venus de Medici nor the Apollo Belvidere; they have invented neither algebra nor the spinning-jenny; but they produce something grander than all these things. It is on their knees is formed what is most excellent in the world—an honest man and an honest woman.” Coleridge, the poet knew her—the mother—intimately, and admired her much. He called her “angelical,” and used to say he “always

expected to see wings start from her shoulders." She was an angel, but a woman too, with a lively interest in politics and in the events of the day. She was present at Horne Tooke's trial, and heard Erskine's great speech on the occasion. When her son was away she kept up a constant correspondence with him on all sorts of topics, and did much to form his mind. He might have said, like the late Samuel Morley, "I am what my mother made me." Perhaps she was a bit of a blue-stocking, but, as Jeffrey said, a woman's stockings may be as blue as she pleases, if only her petticoats are long enough.

Crabb Robinson gives a description of an absurd scene which took place at Dr. Crompton's house one evening.

Fuseli, the painter, was at Liverpool, and he had to divide the attention of the public with a Prussian soldier who had excited a great deal of notice by his enormous powers of eating, and the annoyance was increased by persons persisting in considering the soldier as Fuseli's countryman. Roscoe, whose visitor Fuseli was, had given a hint to the party assembled at Dr. Crompton's that no one should mention the glutton. The admonition unfortunately was not heard by a lady present, who, turning to the great academician and lecturer, said :

"Well, sir, your countryman has been surpassing himself!"

"Madam," growled the irritated painter, "the fellow is no countryman of mine."

"He is a foreigner. Have you not heard what he has been doing? He has eaten a live cat!"

"A live cat!" exclaimed everyone. A lady famous for her blunders went on, "Dear me, Mr. Fuseli, that would be a fine subject for your pencil."

"My pencil, madam?"

"To be sure, sir, as the horrible is your forte."

"You mean the terrible, madam," he replied, with assumed composure, muttering at the same time between his teeth, "if a silly woman can mean anything."

At the date of this scene, 1810, the future judge was a school-boy of thirteen. Crompton was not one of those who see their school days transfigured through a haze of sentiment and declare them the happiest period of their existence. The school days of the judge, says his friend Sir Lawrence Peel, were not happy days, and they pained him in the retrospect. Like Cowper, he was a shy, sensitive, retiring boy, not made for the rough world

of school-boy life, and rough indeed it was in those days. He was not bullied; he did not, like the unfortunate Cowper, learn to know his boy tormentor better by his shoebuckles than any other part of his person, but he felt himself not understood; he was over-sensitive to ridicule, and he shrank from the rough banter and did not expand in the ungenial climate. It left in him in after life an aversion to general society, though his wit and humour so well qualified him to shine in it.

Cowper, in that passionate invective against public schools entitled "Tirocinium," asks why parents do it.

What dream they of, that with so little care
 They risk their hopes, their dearest treasure there?
 They dream of little Charles or William graced
 With wig prolix, down flowing to his waist,
 They see the attentive crowds his talents draw,
 They hear him speak—the oracle of law.

The ambition of little Charles Crompton's parents did not at first soar so high as the "wig prolix." They were content to article him to a solicitor, one Denison; but Denison soon discovered his genius for law, and urged his father to let him go to the Bar, and to the Bar he went. Walter Scott used to tell, with great relish, a story of how the heir-apparent of a considerable family in Scotland, a fatuous, foolish young man, was called to the Bar, and there being some talk in the servants' hall about the profession of an advocate, an old butler exclaimed: "It canna be a very kittle trad, for our young laird is ane!" But those who have tried it will be of opinion that it is a "verra kittle trad," brains or no brains. Crompton was one of the fortunate few, not of the Tommy Traddles tribe. He had not to

Learn to labour and to wait.

A pupil of Littledale, and afterwards of Patteson, "dear old Pat," as he called him, whom he succeeded on the Bench, young Crompton became an adept in the weird art of special pleading, and from the first had always some business. It languished at times, however, and at such seasons of dearth he would laughingly say, half in jest and half in earnest, "I suppose they have found me out." Sir Lawrence Peel, writing in the *Law Magazine*, gives a graphic picture of him in these early days at the Bar. "He might have said with old Selden," he says, "that the proverbial assertion that Lady Common Law must lie alone never wrought with me. So far from condemning the Lady Common

Law to a cabin couch, he gave her one as ample as the great bed of Ware, and crowded it with companions. He was, in truth, an insatiable devourer of books. That he had read a great deal of law during his education for the Bar as a student was necessarily to be inferred from the large stores of legal learning which he possessed even in the first years of his practice. He used to say that he owed his knowledge of law to Williams' Saunders. It was always a mystery to some of his associates in those early days of his forensic life what part of his day he devoted to law reading; whether from the morning or from the night he abstracted those *seu horas* which even Lord Coke deemed sufficient. On entering his room, which for disorder might have competed with the chamber of Dr. Oakhorne in Madame D'Arblay's then popular novel of 'Camilla,' he would be found lolling on the hardest and most shining of all ancient black horse-hair sofas reading some novel, play, newspaper, or magazine. He probably devoted his evenings to severer studies, or, as he was always a bad sleeper, the night may have been in part so consumed. His passion for novels never abated; he read them all, good, bad, or indifferent. When he travelled the circuit as a judge he would occasionally buy a novel at a railway station, read it after dinner, and, rather than sit at Nisi Prius in suspense, finish it rapidly the next morning at breakfast, devouring its interesting pages whilst neglecting his dry toast, which, like the dinners of heroines, remained untasted on his plate." But does not Campbell confess to having sat down in his chambers, on getting there in the morning, to finish the "Fortunes of Nigel," in spite of the fact that a long row of briefs on his table were calling aloud for his attention?

But Crompton was no *dilettante*. He enjoyed sprightly talk, but when sprightly talk ran on too long, "Come," he would say, "let us have done with chattering, and see how Johnny Williams manages this defence." From watching others he learned, himself, his trade of advocacy, and gained the character of a safe and cautious junior who could examine a witness admirably. He became "Tubman" and "Postman" of the Exchequer, Assessor of the Liverpool Court of Passage—a useful preparation for the Bench—Commissioner to inquire into the Procedure of the Court of Chancery, and then, though still a stuff-gownsmen—so high stood his repute as a lawyer—he was, in 1853, chosen by Lord Truro to fill the place in the Court of Queen's Bench vacated by

his old master in the law, Patteson, J., adding another "C.," as a contemporaneous curiosity-hunter observes, to the alliterative Bench of Campbell and Cockburn, and Coleridge and Cresswell, and Crowder and Chelmsford, and Cranworth. Mr. Justice Crompton amply fulfilled on the Bench the promise of the Bar. A good lawyer such as he was must, indeed, always be more in his element as a judge than as an advocate—in the task of finding truth rather than argument. At Nisi Prius or in criminal cases he was not conspicuous, but at trials in banc he may justly be ranked with the best judges of his time.

A contemporary preserves the following amusing incident: "The same train often carries down to the assize town on the commission day the judge and his marshal in one first-class carriage; the Bar, attorneys, and more opulent witnesses in others; while in the second and third class follow the mingled ruck of poorer barristers' clerks, sturdy turnkeys, and manacled felons. It was but the other day that a train of this kind containing Mr. Justice Crompton and a motley retinue such as we have described, bound for the Maidstone Assizes, was shunted on to a siding and detained there for an hour or more to let a special train pass. And what do our readers suppose was the freight of the special train for which the majesty of justice was thus kept waiting? It was filled with gentlemen of the 'fancy' about to break the law by assisting at a prize fight! Her Majesty's representative postponed to the Tipton Slasher, the vindicator of the law delayed in order that the violators of the law may keep their time to a second!"

On one occasion, when he went the Northern Circuit, the judges and the Bar were invited by the Earl of Lonsdale, according to ancient custom, to dine at Lowther Castle, and were magnificently entertained by the Earl at this princely mansion on the way to Appleby. At Appleby there were nothing but a few trifling civil cases and no prisoners, and the judge was presented with the traditional pair of white gloves in honour of a maiden assize. The attendance of the Bar was, however, considerable, being *en route* for Lancaster, and as they were leaving the court a farmer's wife in the crowd was heard to exclaim aloud to a companion, "Eh, bairn, but there's a gey lot of counsellors for sike a bit o' business"—an opinion which met with the entire concurrence of the said counsellors.

In his home circle the judge was delightful—the living soul

of all, full of lively humour, and ready at all times for a game of romps with the young ones.

Mr. O'Brien, in his "Life of Lord Russell," tells how in Russell's very early days at the Bar he was engaged in a case before Mr. Justice Crompton. The plaintiff was a bill discounter and moneylender, and his leading counsel was Mr. Edwin James. After a short time the great advocate threw down his brief ostentatiously before him, and without a word of explicit explanation walked out of court. The case went on, and the time came when the counsel for the moneylender should have replied and put the case finally to the jury. Up stood a junior counsel, when the judge very testily said, "What do you want, sir?" The young counsel said, "I am for the plaintiff, my Lord, and I purpose with your permission to address the jury." The veteran judge became more testy than ever. "Don't you know," said he, "that your leader has left the court?" "Yes, my Lord, I know that Mr. James has retired; but I still think there are some points that should be laid before the jury." Mr. Justice Crompton threw himself back in his chair, and with an air of vexation said, "Oh! go on." And the young counsel went on. He made a clear, emphatic, earnest speech, not disguising the nature of the case or talking any nonsense at all, but putting what could be said in the best possible manner. Before he had uttered many sentences the judge leaned forward again, and, still with vexation in his tone, said, "What is your name?" To which the reply was, "Charles Russell, my Lord." And then the young man's speech continued. By the time it was over Mr. Justice Crompton's wrath had entirely disappeared, and when young Charles Russell sat down the judge said to him very kindly and politely: "Well, Mr. Russell, I thought it was a piece of great impertinence for you to put yourself forward to address the jury when your leader had thrown up the case; but I must say that the ability with which you have spoken, and the skill with which you have made the best points that could be made in a hopeless case, have quite vindicated any presumption there might be in what you did." And then, with a bow which was very cordial, he turned from the counsel and began to sum up the case to the jury.

"Oh, madam!" said one of his old domestics to her mistress, when the judge was away from home, "the house does seem so dull without master." Unfortunately, his health had always

been precarious. He might have said of himself as the old Scotchwoman did, when someone asked how she did, "Weel in pairs, but ower muckle to be weel altogether." On October 23rd, 1865, he was taken suddenly ill—seriously ill—with cancer of the stomach, and died a week afterwards at the age of sixty-eight, young as the ages of our judges go.

Crompton's decisions will be found reported in *Ellis and Ellis*, *Ellis*, *Blackburn*, and *Ellis*, and *Best and Smith*.

One of his decisions (*Fray v. Blackburn*, 3 B. & S. 576) was being cited only the other day by Lord Esher, in *Anderson v. Gorrie*, on the immunity of our judges from actions. It is a good illustration of his clearness, precision, and succinctness of statement. "It is a principle of our law," says Mr. Justice Crompton, "that no action will lie against a judge of one of our Superior Courts for a judicial act, though it be alleged to have been done maliciously and corruptly. The public are deeply interested in this rule, which, indeed, exists for their benefit, and was established in order to secure the independence of the judges, and prevent their being harassed by vexatious actions." Barristers are not so privileged. A barrister, for instance, may be punished for contempt of court, even for language professedly used in the discharge of his functions as an advocate. Witness the barrister who said to the foreman of the jury, "You are a wicked old man, and are quite old enough to know your duty better": (*Ex parte Pater*, 3 B. & S. 299).

An infant is the spoilt child of English law. He cannot be made liable on his contracts (other than for necessaries), and it makes no difference, so *Bartlett v. Wells* (1 B. & S. 836) decides, that the infant has fraudulently represented himself to be of full age. *Waite v. The North-Eastern Railway* (E. B. & E. 719) shows, however, that the disability of infancy, if it has its privileges, has also its disadvantages. In that case an infant of five years old and his grandmother crossed a railway line at a point where they ought not to, with the result that the grandmother was killed and the infant injured, and it was held that the infant was so identified with his grandmother and her contributory negligence that he could not maintain an action. This doctrine of identification is very artificial, and, it will be remembered, in the case of the omnibus and the passenger (*Thorogood v. Bryan*, 8 C. B., 115) has lately been overruled: (*Mills v. Armstrong*; *The Bernina*, 58 L. T. 423; 13 App. Cas. 1).

Dawson v. Duncan (7 E. & B. 229) was, until recently, a decision of the utmost importance. It was there held that the publication of matter defamatory of an individual is not privileged because the libel is contained in a fair report of what passed at a public meeting. There is an immense difference, as is pointed out in "Odgers on Libel," between the injury done by such a slander, and that caused by its extended circulation by the press. Many people believe a thing merely because it is in print. But Demos must be fed, and the Newspaper Libel and Registration Act, 1881, s. 2, now authorises the publication of slander, subject to certain easy conditions. Other noticeable decisions of Mr. Justice Crompton are: That the rule that the evidence of an accomplice requires corroboration, is not a rule of law, but of a practice (*Reg. v. Boyes*, 1 B. & S. 311); that the judgment of a foreign court having jurisdiction over the subject-matter, cannot be questioned here on the ground that the foreign court has mistaken the law of its own country, or has come to an erroneous conclusion on the facts (*Scott v. Pilkington*, 2 B. & S. 11); that a contract to make a set of artificial teeth is a contract for the sale of goods, wares, or merchandise within sect. 17 of the Statute of Frauds, and not work and labour done (*Lee v. Griffin*, 1 B. & S. 272); that the foreshore is *prima facie* extra-parochial (*Reg. v. Musson*, 8 E. B. & E. 900); that the mere act of setting cocks to fight is not an offence within 12 & 13 Vict. c. 92, s. 3, unless in a place specially kept for the purpose (*Morley v. Greenhalgh*, 3 B. & S. 374); as a compensation to the cock, however, he is an "animal" within the protection of the Act, and may not be tortured (*Budge v. Parsons*, 3 B. & S. 315); that to constitute an attempt to commit larceny there must be property in the place where the attempt is made—a thief putting his hand, for instance, into an empty pocket is not an attempt (*Reg. v. Collins*, 9 Cox C. C. 497). In *Reg. v. Brown* (61 L. T. 594: 24 Q. B. Div. 357) the Court for Crown Cases Reserved expressed itself as "not satisfied" with this decision, and it must now be taken as overruled, which, if law is not to be at war with common sense, we cannot regret. *Crane v. The London Dock Company* (5 B. & S. 313) decides that a sale by sample is not entitled to the privileges of a sale in market overt. In this case we have the interesting proposition—or shall we call it sentiment?—affirmed, that Love Lane is not market overt. This is as it ought to be.

CHIEF BARON KELLY.

“ I was placed,” says Planchè, the well-known dramatist, “ at the age of eight, in a boarding-school kept by a Rev. Mr. Farrer, in Lawrence-street, Chelsea. In the room in which I slept were two boys as handsome as they were clever. They amused themselves with writing plays, and enacting the principal parts in them, displaying considerable histrionic ability. My early theatrical proclivities naturally rivetted the bonds of friendship which was speedily formed between us. The youngest was about my own age. He had glossy black hair curling gracefully over his head, and a pair of piercing dark eyes that sparkled with humour and intelligence. They left school before me. The eldest I never saw again, but my especial friend rose to high distinction at the Bar, and filled the important offices of Solicitor and Attorney-General.” The little boy with the curly black hair, dark eyes, and dramatic talent, was the future Lord Chief Baron Kelly.

It has been said that private schools make poor creatures, public schools make sad dogs; but the Chelsea academy did not make a poor creature of Kelly, though he always regretted his want of a public school education. On the contrary, he was throughout life a man of spirit and address, endowed with that courage and unwearied combativeness which is a young lawyer's best qualification in the estimation of most solicitors. He began life as a special pleader, and was all his life famous as a critic of pleadings. Before he was called to the Bar—at the age of twenty-eight—he had already gained so much reputation that the Benchers of his Inn—the Middle Temple—expedited his call in order that he might hold a brief which was awaiting him backed with a fee of 100 guineas.

Mr. Kelly, on becoming a barrister, joined the old Home Circuit, now fused with the Norfolk into the South-Eastern, but left it because he found the work on this busy circuit was pro-

longed into the Vacation. He had an old-fashioned reverence for the long interlude to forensic battle which tradition has imposed on lawyers and clients, and he changed to the Norfolk Circuit for the sake of his vacation. The migration proved a very fortunate one. "The assize was opened," says a writer in the *Times*, "at Norwich. Mr. Kelly arrived at that city in the evening, and went to bed briefless. At one o'clock in the morning his clerk came to awake him with the news that an attorney wished to see him with a brief. It was for the defence of a publican and a bill-sticker, against whom a charge of libel was preferred. They had exhibited bills charging a certain clergyman with being a fit person to be made co-respondent in that divorce court which Sir Fitzroy Kelly was afterwards concerned in founding. The person libelled had engaged all the leading counsel on the circuit, and the attorney, wandering in the town at his wits' end, had been recommended by a friend to try the new junior. On a point of practice Mr. Kelly threw the other side over for a time, but the cause came on at Thetford. Here the leader who had been most feared could not attend, and Mr. Kelly got the publican off scot free, while the bill-sticker escaped with a slight loss of money. Before he left the court the attorneys for the other side threw to him over the table two retainers, and other briefs followed him at his lodgings. From that time till he left the circuit owing to the stress of London work, his reputation on the Norfolk Circuit was unbounded."

He was reputed first rate in the conduct of a case. He had that instinctive tact and good judgment which characterised the late Serjeant Parry. He was especially skilful in concentrating into one focus the scattered pieces of evidence, which had either come out in the course of the trial in favour of his client or prejudicial to his opponent, until he had impressed such facts on the minds of the jury. Like Scarlett, the great verdict winner, he singled out one of the jury—the master mind—and reasoned with him, emphasising his points with rhetorical thumps on the desk—thumps which were more in fashion then than now. He had another characteristic of the great Scarlett. At the most critical point of a case Scarlett would sit composedly paring his nails, a prey to inward anxiety. Kelly had the same coolness and imperturbability; he was never disconcerted. It is a striking testimony to the value which was set on his services that on one occasion the London and North-Western Railway Company and

the Great Western Railway Company left competing retainers of £1000 each at the chambers to secure his services before a parliamentary committee. He became a King's Counsel in the brief space of ten years, standing counsel to the Bank of England and to the East India Company, and was earning at one time an income of £25,000. Baron Bramwell and Mr. Justice Honyman were among his many eminent pupils.

One of the *causes célèbres* in which Kelly was engaged was *Reg. v. Tawell*: it was in this case that he acquired his soubriquet of "Applepip Kelly." The prisoner Tawell, a highly respectable and seeming pious Quaker, was charged with having poisoned his mistress with prussic acid on a hurried visit which he paid her at Slough. Kelly, for the defence, set up the theory that the traces of prussic acid were due to the woman having eaten a number of apples—an ingenious but, as may be imagined, desperate defence. (a)

The case is also interesting as the first in which the telegraph was used to overtake a criminal. Listen to Sir C. Head's graphic description of the incident. "Whatever may have been his (the murderer's) fears, his hopes, his fancies, or his thoughts, there suddenly flashed along the wires of the electric telegraph, which were stretched close beside him, the following words: 'A murder has just been committed at Salthill, and the suspected murderer was seen to take a first-class ticket for London by the train which left Slough at 7.42 p.m. He is in the garb of a Quaker, with a brown great coat on, which reaches nearly down to his feet. He is in the last compartment of the second first-class carriage.' On arriving at the Paddington Station, after mingling for some moments with the crowd, he got into an omnibus, and as it rumbled along, taking up one passenger and putting down another, he probably felt that his identity was every minute becoming confounded and confused by the exchange of fellow passengers for strangers that was constantly taking place. But all the time he was thinking, the cad of the omnibus—a policeman in disguise—knew that he held his victim like a rat in a cage. Without, however, apparently taking the slightest notice of him, he took one sixpence, gave change for a shilling, handed out this lady, stuffed in that one, until, arriving at the

(a) So, at least, it appeared to the writer, until his attention was drawn to a case recently reported from Vienna, in which a number of apple pips did actually cause death.

Bank, the guilty man, stooping as he walked towards the carriage door, descended the steps; paid his fare; crossed over to the Duke of Wellington's statue, where, pausing for a few moments, anxiously to gaze around him, he proceeded to the Jerusalem Coffee House, thence over London Bridge to the Leopard Coffee House in the Borough, and finally to a lodging-house in Scott's-yard, Cannon-street. He had scarcely entered the lodging when the policeman, opening the door, said to him, 'Haven't you just come from Slough?' The monosyllable 'No,' confusedly uttered in reply, substantiated his guilt. The policeman made him his prisoner; he was thrown into gaol; tried, found guilty of wilful murder, and hanged. A few months afterwards," continues Sir G. Head, "we happened to be travelling by rail from Paddington to Slough, in a carriage filled with people, all strangers to one another. Like English travellers, they were all mute. For nearly fifteen miles no one had uttered a single word, until a short-bodied, short-necked, short-nosed, exceedingly respectable-looking man in the corner, fixing his eyes on the apparently fleeting posts and rails of the electric telegraph, significantly nodded to us as he muttered aloud, 'Them's the cords that hung John Tawell!'"

In politics Kelly was one of those "stern, unbending Tories," now as extinct as the dodo, with whom Macaulay once ranked a certain young William Ewart Gladstone.

The House of Commons is, in Lord Campbell's language, "infested" with lawyers, it is strewn with the wrecks of their reputations; but Kelly was one of those who make a success of politics, and the secret of his success was that he did not take up politics professionally, as so many lawyers do. His heart was in the strife. He fought Hythe; he fought Ipswich; he lost, he fought it again, he won; he was unseated, he unseated his opponent. He challenged his chief opponent, Mr. Rigby Mason, to mortal combat. His foot was ever in the stirrup, his lance in rest. To the last he delighted, in his yearly harangues to the Lord Mayor in the Exchequer, to review the field of politics, and fight all his battles o'er again.

One of his pet projects as a representative of the agricultural interest was the repeal of the malt tax. In the golden age of James I., when there was no malt duty in England, and no excise vexations, good, wholesome nut brown ale was sold at 1*l.* per quart at every inn and public-house throughout the country.

No wonder England was "merry England." No wonder the sturdy beggar of the old ballad could sing :

Tho' I go bare,
 Take ye no care,
 I nothing am a cold ;
 I stuff my skin
 So full with in
 Of jolly good ale and old.

Kelly wanted to bring back this "golden prime," and save the ill-used working man from paying £12,000,000 a year out of his earnings to the Exchequer. He gave the House the interesting information that he had himself brewed 144 gallons of excellent beer for 80s.—in other words, at 7d. a gallon. His motion was rejected, but it is memorable as having elicited a rare burst of eloquence from the late John Stuart Mill. To that philosopher it appeared the height of iniquity to abolish the tax and enjoy cheap ale while our National Debt remained unreduced. What has posterity ever done for us? We owe it nothing, it was said. "Not owe anything to posterity, sir!" exclaimed Mill, in righteous indignation. "We owe to it Bacon and Newton, Locke and Bentham—aye, and Shakespeare and Milton and Wordsworth." "I have read," he went on, "of an eminent man—I am almost sure it was Dr. Franklin—who, when he wished to relieve the necessities or assist the occasions of any deserving person by pecuniary help, had a way of his own of doing it, and it was this: He said to them, 'I only lend you this. If you are ever able, I expect you to repay it, but not to me; repay it to some other necessitous person, and do it under the same stipulation, so that the stream of benefit may still flow on as long and as far as human honesty can keep it flowing.'"

But the malt tax was not Kelly's only project. He was a keen law reformer also. He brought in a Bill for the abolition of capital punishment in all but murder cases; he was an ardent advocate of a Court of Criminal Appeal; an ardent advocate, too, of codification. Many were the meetings on this subject held at his house in Piccadilly.

"Sir Fitzroy's appearance was," says Ballantine, "very striking. He had a finely chiselled face and regular features, with an intelligent forehead and lively bright eyes. His manner was somewhat artificial, and his demeanour, always courteous, was of the old school. He was very hospitable, and also went out a great deal into society, where his pleasant manners and varied

information made him always welcome." These things reckon for a good deal in the race of life. But when Kelly was made Solicitor-General, and in 1858 Attorney-General, he had well earned his preferment. He would have attained these honours earlier, but that he was fated to follow the brilliant Thesiger, and, in aquatic metaphor, he got the wash of that distinguished man's career. Thus he was seventy years of age before, on Chief Baron Pollock's retirement, he became Chief Baron of the Exchequer, that venerable court which carries us back to the beginnings of English history. Still, late as he attained the bench, his judicial reputation stands high. The modern lawyer is too apt to run at once to his bookshelves for an authority which has some resemblance—often a merely superficial one—to that in hand. He is helpless without a case. Chief Baron Kelly was distinguished from his younger brethren by his grasp of principle, and his preference for it over decided cases. "During his later years the Chief Baron," says a writer in the *Law Journal*, "seldom professed a previous acquaintance with any case that was cited to him less than forty years old. He would examine a case when cited by the light of the principle involved, and use it as an illustration in his judgment; but his knowledge of law was founded on general rules, and was unconnected in his mind with an action which at such and such a date was brought by A. against B., and decided in a particular way, or with an obscure passage in Comyn's Digest. The Chief Baron's application of law appeared intuitive, so deeply was he imbued with its elements. In his later days it was a common saying that, the difficulty of making him understand the facts once surmounted, the law might be left to take care of itself. It was also a frequent observation that, if the Chief Baron differed from his colleagues, the chances were that he would turn out right. In person, there could hardly have been a better example of that stately dignity of the past which is associated with ruffles and walking swords. It was often said that the Chief Baron was the only judge of his time who came out becomingly from the trying ordeal of walking up the nave of St. Paul's in his full robes and with his trainbearer behind him.

The Chief Baron's distinguished services to his party and to the law led to the expectation that he would receive a peerage and a retiring pension; his growing infirmities, which retarded the business of the court, rendered it very desirable that he

should, but an unfortunate incident gave umbrage to the powers that be. As a Privy Councillor, the Chief Baron had taken part in the decision of the Ridsdale ritual case—vestments then vexed much the souls of many righteous persons—and, in the overflowing confidences of after-dinner conversation, the Chief Baron had divulged the fact that he was dissenting from the judgment, and expressed an opinion that the decision was one of policy rather than law—he was charged with calling it “iniquitous,” but that he emphatically denied—and he added that his confidant—the Rev. Mr. Ellis—might make his opinion public. Lord Cairns—the then Chancellor—was highly scandalised at this breach, as he held it, of Privy Council privilege, and called the Chief Baron’s attention to the Ordinance of 1627 “to be observed in assemblies of Council” that, “when the business is carried according to the most votes, no publication is afterwards to be made by any man how the particular voices and opinions went.” Kelly replied that the Ordinance belonged to the period of the Star Chamber and its indirect crooked ways, and had no application to the Judicial Committee of the Council. Kelly had certainly the best of the argument.

But, apart from Star Chamber ordinances, there is a good deal to be said as a matter of policy for the fiction of unanimity. The Privy Council is the supreme Court of Appeal for our vast empire, and a unanimous judgment inevitably carries more weight.

To the end of his life the Chief Baron was a constant diner out both in London and on circuit, a welcome and genial talker. The great Duke of Wellington was his favourite hero, and he could recount by heart every step in the Duke’s campaigns with a particularity and gravity worthy of Uncle Toby.

Only a short time before his death he was attacked by garot-
ters, and one of his ribs broken, yet such was his indomitable
spirit and strength that he took his seat upon the bench a day or
two afterwards.

But time will rust the brightest blade,
And years will break the toughest bow;
Was never wight so starkly made
But time and years would overthrow.

He died at Brighton on September 17th 1880, and with him ended the long line of Chief Barons that reaches back to the third Henry.

The House of Lords laid it down in *Rylands v. Fletcher* (19 L. T. Rep. 220; L. Rep. 3 H. L. 330), that if a person brings on

his land and keeps there anything likely to do mischief if it escapes, he must keep it at his peril. This may be salutary, but it is a formidable rule, and it is satisfactory to find the principle of ensuring safety qualified by the decision of the Chief Baron and Court of Exchequer in *Nichols v. Marsland* (35 L. T. Rep. 725; L. Rep. 10 Ex. 255), in cases where the escape is due to *vis major* or the act of God, as where a man keeps a tiger and lightning breaks his chain. The particular *vis major* in *Nichols v. Marsland* was a storm of rain of extraordinary violence, which flooded some artificial ornamental lakes of the defendant, whereby they overflowed and swept away a bridge. The wrongful act, as was pointed out by Lord Justice Mellish in *Nichols v. Marsland*, is not bringing or keeping the water on the land, but in allowing it to escape. But suppose a mischievous boy bored a hole, as Baron Bramwell suggested, in a cistern in a London house and the water did mischief to a neighbour, would not the occupier be liable under *Rylands v. Fletcher*?

George v. Skivington (21 L. T. Rep. 495; L. Rep. 5 Ex. 1) is another decision of the Chief Baron which has frequently been cited of late. It was by a husband and wife against a druggist for selling the husband a deleterious hair wash for the wife's use; but the principle recognised is a highly important one in our complex society, that a person who agrees with A. to supply something which he knows is to be used by B., is liable in tort to B. (quite apart from any privity of contract) for a resulting injury, whether it is a hair wash or a false valuation (*Cann v. Wilson*, 39 Ch. Div. 39); or a painter's staging and ropes (*Heaven v. Pender*, 49 L. T. Rep. 357; 11 Q. B. Div. 503). No less important is *Eley v. Positive Security Life Association* (33 L. T. Rep. 743; 1 Ex. Div. 20), deciding that articles of association are a contract by the shareholders *inter se*, and that, therefore, a solicitor or manager being appointed by them will not entitle him to sue the company.

Privilege of palace is a curious survival. It was held to attach to Holyrood in 1820, though there had been no Royal person residing there since the time of the Stuarts. "Such divinity doth hedge a King"! and in *Attorney-General v. Dakin* the same immunity was claimed for Hampton Court, that no *fi. fa.* could be executed in the suites of private apartments there. The Chief Baron held it could not, but in the House of Lords, after much debate, the privilege of this old palace was disallowed

(23 L. T. Rep. 1; 4 H. L. 338). Thus does the spirit of a democratic age insensibly mould the policy of our law.

Other noticeable decisions of the Chief Baron are: That a person who has let a room for lectures is entitled to rescind if he finds they are to be used for the delivery of blasphemous lectures (*Cowan v. Milbourn*, 16 L. T. Rep. 290; L. Rep. 2 Ex. 230); that the taking of a heriot—a tenant's best horse, for instance—by the lord of the manor is not a distress within the Statute of Limitations, 3 & 4 Will. 4, c. 27 (*Lord Zouche v. Dalbiac*, 33 L. T. Rep. 221; L. Rep. 10 Ex. 172); that to say of a gamekeeper that he trapped foxes is not *prima facie* a slander (*Foulger v. Newcomb*, 16 L. T. Rep. 595; L. Rep. 2 Ex. 327); that a general manager of a railway has power to bind the company to pay for medical attendance to a person injured in an accident (*Walker v. Great Western Railway Company*, 16 L. T. Rep. 827; L. Rep. 2 Ex. 228), though a station-master has not (*Cox v. Midland Counties Railway Company*, 13 Jur. 65; 3 Ex. 268); that a wife's insanity is no bar to the investigation of a charge of adultery brought against her (*Mordaunt v. Moncrieff*, 30 L. T. Rep. 649; 2 H. L. Sc. 374). In this well-known case Chief Baron Kelly was called in to advise the House of Lords, and he summed up the reasons *pro* and *con.* with admirable lucidity.

Here is what Society papers call a social problem: A young man promises to marry a young lady when and as soon as his father should die. Before his father dies the "fause lover" declares his intention not to perform his promise. What is the aggrieved fair one to do? What she did in *Frost v. Knight* (23 L. T. Rep. 714; L. Rep. 5 Ex. 322) was to bring an immediate action for breach of promise. Chief Baron Kelly, however, held that the commercial principle of *Hochster v. De La Tour* (2 E. & B. 678) did not apply to a promise of marriage, and that you must wait for the event on which the promise is contingent. This is hard on the lady who is losing her market, and so the Court of Appeal thought, for they reversed the learned Chief Baron (26 L. T. Rep. 77), and held that commercial principles do apply. This is in accordance with *Short v. Stone* (8 Q. B. 358), where it was held that the faithless swain marrying another before the date fixed for completion, so to speak, was a breach. But

At lovers' perjuries they say Jove laughs;
and, perhaps, Chief Barons laugh too.

VICE-CHANCELLOR BACON.

LONGEVITY ON THE BENCH.

THE Judicial Bench has had its Nestors not a few. Lord Lyndhurst is described by Campbell as being "as bright as a bee" at eighty. Campbell himself began his Chancellorship at seventy-nine. Lord Wensleydale was still unvanquished and the legal pillar of the House of Lords at eighty-six. Chief Baron Pollock at eighty-three was—to quote Sir Fitzjames Stephen's words—a "fine lively old man, thin as threadpaper, straight as a ramrod, and full of indomitable vivacity"; but Vice-Chancellor Bacon enjoys the unique distinction of having sat on the Bench administering equity at the ripe age of eighty-nine, and not indifferent equity either. The law of his judgments might sometimes not commend itself to the Court of Appeal, but no one ever questioned his acuteness and sagacity, his lucidity in dealing with facts, or the vigour and raciness of his style. The Vice-Chancellor had none of the narrowness of the traditional lawyer. He was a man of the world with wide interests and sympathies. He had the literary instinct and loved a good phrase. Even twenty years' administration of equity could not dry up his sense of humour or dull the edge of his satiric wit. Probably the literary quality of his judgments was due to his having been in early life an industrious reporter and contributor to the Press: in early life—how far that carries us back! At the date of Bacon's call Lord Eldon was still on the woolsack—he did not retire until Bacon had been ten years at the Bar; his brother Lord Stowell was at the Admiralty, Sir John Leach was Master of the Rolls, and Sir Lancelot Shadwell Vice-Chancellor of England; Roundell Palmer was still at school, and Cairns was learning his alphabet.

EARLY YEARS.

In those days, before the Council of Legal Education and the professional crammer had come into existence, it took longer to be called to the Bar—a course of five years, and Bacon was in his

thirtieth year before he could announce himself as an equity draftsman and conveyancer. His chambers were at 21, Old-square, Lincoln's Inn, whence he afterwards moved to 10, New-square. The same year saw his marriage with a daughter of Mr. William Cook, of Enfield. In his as in other cases a long period of obscurity succeeds to call, but the pages of Mylne and Craig, Simon's Chancery Reports, and Drewry attest his growing practice. When at length he emerges it is as a leader in Vice-Chancellor Stuart's court and a rival of Malins, himself afterwards a Vice-Chancellor. Uneventful as these early laborious years were to Bacon himself, they were filled with important public reforms. They saw, to name only a few changes, the abolition of slavery, the allowance of counsel to prisoners, the first Factory Act, the new Poor Law of 1834 (replacing the old mischievous system of indiscriminate relief), the passing of the Wills Act, the abolition of fines and recoveries, the establishment of County Courts, the reorganisation of the Court of Chancery (for the tide of Chancery business was flowing, and two new Vice-Chancellors had to be created to cope with the work), the abolition of imprisonment for debt and the amelioration of the law of insolvency.

DEBTORS IN THE OLD DAYS.

This subject of insolvency is one with which Vice-Chancellor Bacon as Chief Judge in Bankruptcy was so intimately connected that a glance at its history will not be out of place. The old-fashioned principle was that a man must pay his debts to the uttermost farthing. Bankruptcy existed, it is true—had existed in England in some form from the days of Henry VIII.—but it was a privilege reserved for the trader alone. The private gentleman, the business man, the clerk, the servant, every other class of the community, in fact, could claim no mitigation of their indebtedness by a *cessio bonorum*, and were liable, if they could not pay with their property, to pay with their persons—they might be arrested on mesne process, carried to a sponging-house, and, failing a settlement with their creditors, might rot in the squalid misery of a debtors' gaol for the rest of their natural lives. The pages of Fielding, and Smollett, Thackeray, and Dickens abound in these dismal scenes. The knowledge of this Nemesis doubtless begot with our ancestors a wholesome horror of debt, and so made for a high standard of integrity; but the

practical result of the system was, either that the debtor's friends were squeezed to pay his debts or he became a mere burden to the State—a drone in the social hive instead of a useful citizen. Indebtedness for quite a trifling sum might mean lifelong imprisonment. (a) To mitigate the misery of this state of things a series of Acts were passed, known as the Relief of Insolvent Debtors Act (53 Geo. 3, c. 6; 7 Geo. 4, c. 57; 1 & 2 Vict. c. 110; and 5 & 6 Vict. c. 116), “to protect,” as the preamble to the last Act states, “from all process against the person such persons as have become indebted without any fraud or gross or culpable negligence so as nevertheless their estates may be duly distributed among their creditors.” Readers of *Pickwick* will remember the picture—drawn from the life—of the Commissioners of Insolvent Debtors, constituted under these Acts, sitting in their dingy court in Portugal-street, Lincoln's Inn-fields, and of the consequential Mr. Pell with his stories, imparted to Mr. Weller, sen., of the Chancellor's confidences. The high-water mark of this policy of leniency towards debtors was reached in the Bankruptcy Act of 1869. It favoured the debtor at the expense of the creditors, and it favoured that class of the community which lived by preying upon bankrupt estates at the expense of debtors and creditors alike. It made bankruptcy, in short, an easy and profitable mode of escape from all liabilities. This was the Act which Bacon was appointed to administer. It was a failure because the system was an unsound one and an encouragement to fraud, but the failure was no fault of the Vice-Chancellor any more than of Lord Justice James—a master of bankruptcy law—who also had a large share in its administration.

THE VICE-CHANCELLOR IN COURT.

The best picture of the Vice-Chancellor is given by a writer in the *St. James's Gazette*:

“It was only in the eighties,” he says, “that I began to know my way about the Chancery Division, and I soon found that the most interesting figure in that labyrinth was the old Vice-Chancellor. Wherever lawyers congregated the conversation was sure, sooner or later, to turn to him, and one heard much about his

(a) A humane society (only recently dissolved) existed for liberating these small debtors, as a few centuries earlier sums were given to redeem Christian captives in Barbary.

great age, his deafness, his wonderful mental vigour, the splendid English of his judgments, and the occasional sparkle of his caustic wit. Even his diet formed a subject of gossip, and it was reported that his lunch consisted of a basin of bread and milk and a pipe of tobacco. It was said that he never troubled to take a note of the proceedings before him, for his memory was so wonderful that without assistance it could retain all the material facts of a case. Sometimes he might be seen putting pen to paper, and then it was supposed that he was making rough sketches of counsel or the witnesses. One fine old crusted story about him was to the effect that on the hearing of an appeal from one of his judgments the Lords Justices sent for his notes, which proved to consist of a single sheet of paper on which was drawn a caricature portrait of the appellant, with the words 'This man is a liar' written under it."

SOME AVERSIONS.

The Vice-Chancellor had his aversions. He hated a fool; he hated a bore; and, perhaps above all, he hated barristers with moustaches. "I cannot hear you," he said to one of the tribe whose upper lip bore the accursed thing; "and do you know why I cannot hear you?" "No, my Lord," hesitatingly replied the learned gentleman, feeling sure that the Vice-Chancellor was about to apologise for his deafness, but not daring to anticipate the apology. The answer came in tones that rang through the court. "It is because, sir, you wear an obstacle—an impediment—before your mouth." The old man had a very pretty wit; and it must be confessed that now and then he used it without a strict regard for the feelings of those who appeared before him.

"WHO IS CONDUCTING THIS CASE?"

It was not often that he spoke unkindly, but whenever the irascibility of vigorous old age overcame him for a moment the thing that he said was so neat and pointed that it was not easily forgotten by the friends or enemies of the victim. On one occasion he was being addressed by a very deaf member of the Bar, to whom all the judge's questions or observations were quite inaudible. The solicitor instructing the deaf man endeavoured to mend matters by shouting the judge's words into his ear in a strident voice which could be heard in the corridors, and it is needless to add that the English of the sentences was not im-

proved in the process. His Lordship was much irritated at hearing his observations repeated in this way, and, in the hope of rendering the services of the interpreter unnecessary, he addressed the advocate with the full strength of his lungs; but, though this strength was considerable, the discordant yell of the solicitor continued to follow every observation, and the proceedings began to assume the complexion of a shouting match between the Bench and the "well." At last the patience of the Bench gave way. "Who is conducting this case?" said the Vice-Chancellor, in plaintive tones—"the gentleman whom I cannot hear or the gentleman who cannot hear me?" To make clear to the non-legal reader the wit of the description "the gentleman whom I cannot hear," as applied to the shouting solicitor, one may be pardoned for explaining that in the superior courts solicitors have no right of audience, or, to use the phrase in common use, "cannot be heard."

A SARCASTIC VEIN.

On another occasion, the Vice-Chancellor let fall a sentence which for years was quoted against the unfortunate man who provoked it. A certain member of the junior Bar, a very learned conveyancer, whose work lay chiefly in his own chambers, and who, like most of his mystic brotherhood, was far more at ease in those chambers than in court, was arguing a case, and one of the documents in it was handed up to the judge, who began very deliberately to read it. The learned counsel, seeing how he was employed, opened a whispered conversation with a man beside him. The Vice-Chancellor read as much of the document as he thought material, and, looking up, invited counsel to proceed. Unfortunately he (counsel) did not observe this, and continued his conversation; but not for long, for the judge, elevating his voice to its highest pitch, delivered himself as follows: "Go on, Mr. X. You can talk to that gentleman any day; but you do not often get an opportunity of talking to me."

There was one member of the inner Bar practising before the Vice-Chancellor for whom he was supposed to have no great liking. This gentleman's services were not much in demand; for, though his ability and knowledge of law were undoubted, he was apt to look at a case from an impracticable standpoint, and not to make the most of its best points. It was commonly said of him that he had a twist in his mind. When this gentle-

man was about sixty, someone remarked to the judge that he was clever. "Yes," said the old man slowly and judicially, "he is a very clever young man," and, after a pause, he added: "If he swallowed a nail he would vomit a screw."

A too persistent junior once observed: "In the exercise of my discretion, my Lord, I will read the letter again." "In the exercise of your what, Mr.—?" cried the judge. "I wish that faculty of which you speak would induce you to compress your argument."

THE VICE-CHANCELLOR IN CHAMBERS.

"Nowadays," says the same writer, "all the Chancery judges dispose of their chamber business sitting in their courts, and it was Vice-Chancellor Bacon who originated the practice. When he left his old court in Old-buildings, Lincoln's Inn, and took possession of Chancery Court No. 1 in the new Palace of Justice, he saw no reason why he should drag up to his chambers on the second floor, so he heard the chamber summonses in court. It was very good fun to watch him when sitting as a judge in chambers. Enthroned, not upon the Bench, but in the registrar's chair, the old gentleman, resplendent in summer in an immense double-breasted white waistcoat, and, if he thought there was a draught, a white hat also, would lean back very much at his ease, the expression of his face clearly showing that chamber business was in his opinion a matter of no great importance; and when the speeches were over he would give his decision always very briefly and often in racy and unconventional language. I was before him in chambers one afternoon in Nov., 1886, and two of the applications which he then heard still cling in my memory. One was for the appointment of an official liquidator in a winding-up case. Two persons had been put forward, and there was the usual squabble as to who was the more eligible for the office. Evidence in support of each was read, and short addresses were delivered. Then the Vice-Chancellor pronounced his decision, and he pronounced it in these words: 'When two men ride on horseback one must ride behind. I appoint the petitioner's nominee.' The next application was for the appointment of a guardian to infants. Their paternal grandfather was proposed by the applicants, but, for reasons not very clearly set forth, certain members of the family opposed his appointment, and the learned gentleman who appeared for

them laid their views before the judge at considerable length, and read copious extracts from their evidence. This went on for some time, and at last the old gentleman held up a trembling hand. 'Your objection to the grandfather amounts to this,' said he:

'I do not like thee, Dr. Fell;
The reason why, I cannot tell.

'I cannot give effect to such an objection, and I make the order.'"

HIS RETIREMENT.

"On the morning of the day following, a rumour ran round the courts that the Vice-Chancellor was taking his farewell of the Bench. The news came as a great surprise, for everyone knew that he was well and hearty, and it was generally believed that his hundredth year would find him still administering justice. I tried in vain to get into the body of his court, but, after some delay, I managed to squeeze into the little side gallery. He had made his farewell speech, and the Attorney-General had replied on behalf of the Bar. The old man sat in his chair, the other judges standing round him. Many of them had already bidden him farewell, and the others were filing past him, shaking him by the hand as they went. He responded warmly in every case; but when Lord Justice Lindley approached him his emotion was manifest. His face lighted up, and, taking the Lord Justice's hand in one of his, he placed the other on the top of it and shook it as if he could not bear to let it go."

AND AFTER.

The pleasant dream of retired leisure often leads to disillusionment, but it was not so with Vice-Chancellor Bacon. He confessed to Mr. Millar, one of the leaders of his court, that if he had known how agreeable his leisure was to be he would have resigned his post long before. He had the resources of a cultivated mind—literary and artistic interests; he had his clubs—the Garrick and the Athenæum; and in fine weather he might often be seen taking walking exercise near his London residence in Kensington Gardens-terrace, on the higher or Bayswater side—the side most affected by the elder race of judges. It speaks, by the way, volumes for the healthiness of life in London that Sir James Bacon was born in London, worked in London, took his recreations in London, and there attained to a patriarchal

age. But he had his country house, too, at Compton Beauchamp, Great Faringdon, Berkshire—the dower house of the Craven family. When the Vice-Chancellor first took the house on a twenty-one years' lease he observed that it was ridiculous for a man of his age to contemplate such a term, but the twenty-one years ran out and he long remained a yearly tenant, coming down for some of the vacations to have his old books read to him by his sister, to receive his friends, and to enjoy life quietly.

On Feb. 12th, 1894, the old judge gave an "At Home" at his house in Kensington Gardens-terrace, in commemoration of his having attained his ninety-sixth birthday. He took particular interest in the assemblage of his children, grandchildren, and great-grandchildren round him. His son, the County Court judge of Bloomsbury and Whitechapel, was there of course, and among the guests were Lord Halsbury and many of the judges of the Queen's Bench and Chancery Divisions. Sir James was suffering from a slight cold, but otherwise in the best of health. Among the congratulatory telegrams received was one from Lord Esher excusing his attendance in these words: "I am only allowed to go out for work and not for pleasure." A little more than a year, and the curtain had fallen on a remarkable career—the last of the Vice-Chancellors was gone.

CHARACTERISTICS OF HIS JUDGMENTS.

In estimating Vice-Chancellor Bacon's merits as a judge it must not be lost sight of that he was seventy years of age and past his prime, or the ordinary prime of man, before he was appointed to the Bench. But even at this disadvantage he displayed judicial gifts of a high order. He knew the true value of authorities—as illustrations merely of principles—knew how to use them without being enslaved by them; and preserved that independence of mind which has always characterised our greatest judges. "No one can have more respect than I have," said the Vice-Chancellor, "for the valuable assistance which is afforded to the Profession generally by the precedents contained in Mr. Jarman's and Mr. Davidson's books; but what I have to carry out in this instance is a contract between the parties."

In his dealing with facts, too, there was always to be discerned the *lucidus ordo*; as he stated them each case not only became clear, but assumed the form of an interesting narrative; for he had the indefinable charm of style. "To discover in the

Reports," says a critic, "judgments equalling his in felicitous terseness one must go back to those of Maule, Knight Bruce, and Lord Justice James." They had none of the "sloppy diffuseness" which sometimes finds favour with the Bench. His fault, like that of Macaulay and other men of confident judgment, was too much cocksureness. "This is a perfectly clear case," "This is one of the most transparent cases I ever saw in my life," "There are some things which are reasonably clear, and this is one of them"—phrases like these were not infrequently the prelude to the decision being reversed on appeal. But then even the Court of Appeal is not infallible.

SOME DECISIONS.

Banns of marriage are a very proper precaution to prevent clandestine marriages, but it is a serious thing to unmarry people because of some informality in such banns; and the Marriage Act of 1824, recognising this, provides that a marriage is only to be void where the parties "knowingly and wilfully intermarry without due publication of banns." William Frederick Louis Gompertz and Georgiana Adelaide Harvey were two young people who fell in love with one another—he nineteen, she eighteen—and got secretly married at St. Pancras Church, threw themselves at the feet of the lady's irate guardian, were forgiven, and lived happily together; and nothing more would probably have been heard of the matter had not some waterworks shares—the title to which was being traced—raised a doubt as to the validity of the marriage. The names which the register disclosed were Frederick Gompertz and Adelaide Harvey—not the lady's usual signature. The husband said he did it for "brevity's sake," and that the lady knew nothing about it. It was suspicious, certainly; but ought the court, twenty-four years afterwards and when the wife was dead, to say that there was no valid marriage? Vice-Chancellor Bacon emphatically refused to do so (*Gompertz v. Kensit*, 26 L. T. Rep. 95; L. Rep. 13 Eq. 369)—to annul the marriage and bastardise the issue on such a flimsy ground. By the law of England everything is presumed in favour of marriage.

In *Be Moir; Warner v. Moir* (50 L. T. Rep. 10; 25 Ch. Div. 605) a testator devised a mansion-house, making it a *sine quâ non* that the devisee should use it "as and for his residence and place of abode" for at least six months in the year. What the devisee

did was this: He did not live in the house, but he paid the rates; kept a staff of servants on the place; kept horses in the stables and poultry in the yards; and his son, who was at college near, spent his week-ends there. Would this do, or was there a forfeiture? Vice-Chancellor Bacon thought it would do, all, he thought, the testator meant to say was, "You shall not let the house, and, to insure your not doing so, you shall live there six months in the year. Suppose," he put it, "the devisee had come to town and broken his leg, and been confined in hospital or been ordered to Cannes for the winter for his health?"

It is worthy of observation that at the date of this case a devisee subject to such a condition could not get the opinion of the court without first risking a forfeiture. A year after—in 1883—the useful rule was passed (Order XXV., r. 5) enabling the court to make binding declarations of the right without granting consequential relief.

At the time when Bacon was appointed to the Bench the law under the Companies Act, 1862, was being rapidly made, and Bacon contributed many important decisions. For instance, that a company may mortgage, under "property," future book debts (*Bloomer v. Union Coal Company*, 29 L. T. Rep. 130; L. Rep. 16 Eq. 383), such a mortgage operating in equity as an agreement to assign the debts when they become due; that the solicitor of a liquidator cannot hold the liquidator personally liable for his costs—he looks to the assets only for payment (*Re Trueman's Estate; Hooke v. Piper*, L. Rep. 14 Eq. 278); that the first charge on assets is for the costs of realising them; that a person cannot, by buying shares under an *alias*, escape liability as a contributory (*Re Richardson*, 32 L. T. Rep. 18; L. Rep. 19 Eq. 588).

THE ALEXANDRA PALACE CASE.

But the most notable company case which came before the Vice-Chancellor was *London Financial Association v. Kell* (50 L. T. Rep. 492); 26 Ch. Div. 107). Never was such an array of Queen's Counsel seen as were engaged in this case. They numbered sixteen, and the hearing lasted a month. Fees to counsel were on a corresponding scale. Sir Horace Davey's brief was marked 1000 guineas. Yet the case turned on the shortest point of law imaginable, whether the purchase of the Alexandra Palace at Muswell Hill—that unfortunate palace "built in the eclipse,"

as the Vice-Chancellor said—by the London Financial Association was a transaction within its powers under its memorandum of association or not. The powers of the association were confined—argued the impugners of the transaction—to advancing money on securities, and did not cover a land jobbing and building speculation like the one in question. Of course, if the transaction was *ultra vires*, the directors would be personally liable for misapplying the company's funds; and, as the amount claimed was some £400,000, the claim if successful would have meant ruin to them—hence the phalanx of Q.C.'s. But the attack failed, and no one regretted it. The case remains, however, a danger signal to directors warning them to keep within their powers.

“I remember,” says Mr. Augustine Birrell, “a case coming into the Court of Chancery about a novel written by that veteran and admirable story-teller, Miss Braddon, which she had dubbed ‘Splendid Misery.’ Somebody else called a tale by the same name, and Miss Braddon’s publisher objected. A little research of the kind ‘that turns no student pale’ revealed to the defendant’s counsel that whilst the century was still young a Mr. Surr had published a novel called ‘Splendid Misery.’ The counsel flourished this antiquated fact, for to him it seemed as old as Nineveh, in the face of the judge, who happened to be Sir James Bacon. ‘Oh, dear me—yes!’ languidly remarked that accomplished and aged man: ‘I remember Mr. Surr’s book coming out very well. It had a considerable vogue at the time, though, no doubt, the subsequent publication of the Waverley Novels interfered a good deal with the popularity of books of the kind to which it belonged’!”

VICE-CHANCELLOR KINDERSLEY.

FAMILY AND EARLY YEARS.

THE Kindersley family were, in the eighteenth century, wealthy squires settled near Spalding in Lincolnshire. Here may still be seen the family monuments, and also the Kinderlee Dyke—this was the original spelling of the name—in which much of the fortune of the family was sunk. Kindersley's father—Nathaniel Kindersley—was a civilian in the service of the East India Company in Madras, and at the time when the future judge was born, in 1792—so far back does the event carry us—the trial of Warren Hastings was proceeding; the memorable impeachment had been delivered, but the decision was still far off; it was not pronounced, indeed, until 1795, by which time young Kindersley, like most Anglo-Indian children, had been shipped to England for his health. He received his first education at a private school. The amiable poet Cowper, in his "Tirocinium," written to his friend William Unwin in recommendation of a private education, has given us a picture of what a public school was like in those days—a nursery for sots and dunces; and, if the picture is true, we may congratulate ourselves that neither Kindersley's mind nor morals suffered from being trained "in public with a mob of boys." It certainly did not militate against his academic success. At Cambridge, whither he went in his eighteenth year, he achieved high distinction, was elected a scholar of Trinity in his second year, won the Hooper prize for English declamation, and came out Fourth Wrangler in the Mathematical Tripos.

A SACRIFICE TO CAM.

A characteristic anecdote is recorded of him at this time. He had throughout life a keen appreciation of art—in the case of music it amounted to a passion; but he felt that the charms of

the siren were dangerous to his reading, and, to put the temptation beyond his reach, he locked up his piano and dropped the key into the Cam. No fish, as in Polycrates' case, brought back the treasure—the gods accepted and rewarded the sacrifice; and he became a Fellow of Trinity—an honour which Macaulay prized more highly than having been a Cabinet Minister. Endowed with the mathematical mind and a talent for declamation, the Bar was evidently his predestined career, and he entered for the great race at Lincoln's Inn.

LEGAL EDUCATION IN 1818.

It is a marvellous thing—illustrative of our English methods—that at that time, and for long afterwards, there was no system of legal education whatever for call to the Bar, despite the fact that the technicalities of law and equity were far more formidable than they are to-day—penetrable, indeed, by no light of common sense. The old system of "Readings" and "Moots" had long since broken down, and had been succeeded by what Lord Campbell calls "pupilising"; that is to say, the legal novice was turned loose into the chambers of some busy practitioner and suffered to browse there at will on the papers. It was unsystematic, casual in the extreme, but it had certain merits. An industrious pupil, who knew how to profit by his opportunities, saw how the law worked in practice; he was initiated into the weird art of special pleading, and he picked up with it some knowledge of principles. Lord Campbell was an instance of a good lawyer made in this way; so was Baron Parke and Lord Westbury and Lord Justice Lush. Vice-Chancellor Kindersley was himself another instance.

PROFESSIONAL CHANCES.

The date of his call was Nov., 1818. Lord Eldon was then still on the woolsack; Sir William Grant had just retired from the Rolls, and was being succeeded by Sir Thomas Plumer; and Sir John Leach was the new Vice-Chancellor in his place. Sir Samuel Romilly was the leader of the Chancery Bar, and Sugden, Bethell, Parker, and Shadwell were rising into fame. It was a favourable time to be called. The number of men at the Bar was little more than one-eighth of what it is now, while the volume of Chancery business was rapidly increasing. Litigation,

too, as Master Macdonell has told us in his judicial statistics, was commenced and carried on with much more spirit than now.

In those brave days our fathers
 Stood boldly for their law;
 They sued their writs, they filed their bills,
 They chuckled at a "flaw."
 They blenched not at the fluttering writ,
 Neat pleas and coy replies;
 They faced the attorney's bills of costs—
 They d——d a compromise.

Now law is to the Briton
 More hateful than a foe;
 He quails before the dreaded writ,
 He lets the judgment go.
 And arbitrators bungle,
 And honest law grows cold;
 And actions thrive not as they thrive
 In the brave days of old.

Kindersley took it at the flood—this tide of prosperity—and it led him on to victory. A few months after his call his name appears in the important action of *Ross v. Ross* (1 J. & W. 154; 20 R. R. 263), with Horne, K.C., as his leader, and by the time Keen's Reports are reached (1836-1838) he is figuring in nearly every reported case. The secret of his success was the thoroughness which marked all he did—a quality of supreme value to the lawyer, and especially to the Chancery practitioner immersed in the dry details of administration. "Verify your quotations" was the last word of wisdom which the great Dr. Whewell bequeathed to a friend. It was a rule which Kindersley conscientiously followed. A young friend of his, indeed, complained pathetically of how Kindersley, if a dispute arose on any point, would always make him rise from the table to fetch a book of reference to verify the point in debate.

In 1841, Lord Cottenham being then Chancellor, Lord Melbourne made Kindersley an offer of the Solicitor-Generalship; but he declined the honour, being unwilling to pledge himself to any party in politics; not that he had not his political convictions—he was throughout life a moderate Liberal—but to a scrupulous mind like that of Kindersley it is one thing to sympathise with the principles of a party and another to be prepared to defend party measures through thick and thin. Lord Langdale refused the Great Seal for a similar reason.

A MASTER IN CHANCERY.

Instead of a politician he became a Master in Chancery. The title of "Master in Chancery" has lately been revived, but the office when Kindersley held it was a very different one. It was an office of great antiquity. There were eleven Masters in Chancery besides the Master of the Rolls, who was the chief of them. They were to be "grave and ancient clerks, skilful and long experienced in the practice of the court," and they acted originally as assistants or associates to the Chancellor and sat with him in court by turns, usually two at a time. In later times the practice of the masters sitting in court was discontinued, and their duties were confined to chambers, being partly administrative and ministerial and partly judicial. References were made to them and they reported. Any party to the suit might file exceptions to the report, and the exceptions were allowed or disallowed. This procedure was costly and cumbrous, and the office of Master in Chancery was abolished in 1852 on the recommendation of the Chancery Commissioners. Before this had happened, however, Kindersley had been appointed a Vice-Chancellor. For sixteen laborious years he discharged most efficiently the duties of his great office, dignifying it beyond any of his predecessors by his deep learning, sound judgment, and high standard of rectitude, his only relaxations being such as the vacations afforded to a keen sportsman.

THE RECREATIONS OF LAWYERS.

An interesting chapter might be written on this subject—the recreations of lawyers. Of them the saying is pre-eminently true, *Sua cuique voluptas*. Mr. Justice Buller's idea of happiness was to sit at Nisi Prius all day and play whist all night. Sir George Jessel's predilection for equity by day and whist by night was equally pronounced. Lord Lyndhurst's evening amusement was also whist and—oh! simplicity of true greatness—backgammon. How much nearer does this little glimpse of domesticity bring us to the Nestor of the House of Lords, especially when we are told that he played both games very badly, and did not at all like being beaten. Lord Camden, like Lord North, devoted himself to music as a relaxation from study; and, strange as it may appear, music had charms for the rugged Thurlow. When he came into the drawing-room after dinner he generally put his legs on a sofa and one of his daughters played on the pianoforte some of Handel's music, and, though

he might sometimes appear to be dozing, if she played carelessly or music he did not like, he immediately roused himself and called out, "What are you doing?" Another way which Thurlow had of relieving his *ennui* when ex-Chancellor was getting young lawyers to come to him in the evening to tell him what had been going on in the Court of Chancery. On these occasions he was in the habit of censuring very freely the decisions of his successors. This was, at all events, better taste than that of Chief Justice Jeffreys, who used to keep a mimic to amuse his evenings by aping the judges and great lawyers of the age. How much more innocent than both was the device of good old Sir Matthew Hale, who, "by way of ensuring entertainment at home, would keep a monkey or a parrot." Lord Campbell tells us that his chief amusement on circuit was in wandering about the town *incognito*, like Haroun al Raschid, and observing the manners of the people. Sir Alexander Cockburn's ruling passion was yachting. Sir Frederick Pollock was an expert swordsman; Mr. Justice Willis is an accomplished Alpine climber. Cricket, of course, like Catholic truth, is received *semper, ubique, ab omnibus*. To play it scientifically, to play in county matches, requires more time than the practising lawyer can afford; but to play it in an amateurish way is open to all. The present writer, then a very small boy, used to play at this invigorating pastime with the late Serjeant Parry, and he has a lively recollection of the portly serjeant tripping on one occasion in his fielding and measuring his length on the greensward—"Many a rood he lay." Not so long ago Mr. Justice Grantham broke his leg in the most honourable manner in assisting at a village cricket match. Shooting commands most votaries, perhaps, among the Profession generally; it falls conveniently in the Long Vacation. Angling—the contemplative man's recreation—has special charms for the Chancery barrister, often a recluse. Kindersley was enamoured of both, and was always an ardent sportsman. He used to go salmon fishing in Norway long before that country had become tourist-ridden, and he looked forward with the keenest anticipation to his partridge shooting on the 1st Sept. Yet even here, into these Arcadian pleasures, he was pursued at times by lawyers seeking the aid or protection of the court.

AN ENGLISH CADI.

We read in Eastern lands of the Cadi administering justice under the palm tree, and sigh for the simplicity of such a scene,

but what could be more charmingly primitive than the Vice-Chancellor on these occasions, seated under a hedge, with judicial gravity, his gun and bag laid aside, granting an injunction against some threatened act of oppression or injustice or appointing a receiver—

While words of learned length and thundering sound
Amazed the gazing rustics ranged around.

There is surely, too, something more consonant here with the dignity of Justice than granting, like Sir Lancelot Shadwell, a similar remedy from the *deshabille* of a bathing machine.

SOME PERSONAL TRAITS.

In person the Vice-Chancellor was very tall and slightly built. The full-length painting of him by Richmond—which hangs in the hall of Lincoln's Inn—in his Vice-Chancellor's robes, with its calm, dignified, and gentle expression, is a faithful reflex of the nature of the inner man. In some lines addressed to his children—he was a great child lover—he sketches what a man must be to be "complete"—Christian, gentleman, scholar. The qualities all met in him.

The Vice-Chancellor was deeply religious, and for many years took a Sunday School class at St. John's, Paddington, though in heavy work during the week. Lord Cairns, Lord Hatherley, and Lord Selborne, it may be remembered to the credit of the English Bench, all did the same.

He resigned his seat on the Bench in 1866, and went to live with his eldest son at Clyffe, Dorchester, where he enjoyed many years of retired leisure, dying in 1879.

CHARACTERISTICS OF HIS JUDGMENTS.

Vice-Chancellor Kindersley's judgments are not only distinguished for sound law, but for the precision and felicity of their language, and this will account for the fact that they are so often cited for the establishment of a general principle of law. A striking example is to be found in the case of *New Brunswick Central Railway Company v. Muggeridge* (1 Dr. & Sm. 381), where the Vice-Chancellor lays down the duty of those who issue a prospectus. It has been quoted over and over again with approval. Lord Chelmsford commended it; Lord Hatherley called it a "golden legacy"; and it may be said to have received its legislative apotheosis in sect. 10 of the Companies Act, 1900. "Those," said the Vice-Chancellor, "who issue a prospectus

holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge, the existence of which might in any degree affect the nature or extent or quality of the privileges and advantages which the prospectus holds out as inducements to take shares." Had these words only been taken to heart by promoters, how many company frauds should we not have been spared! *Rice v. Rice* (2 Drew, 73) affords another good instance of the care with which the Vice-Chancellor analysed a proposition, such a proposition as that between persons having only equitable interests—*Qui prior est tempore potior est jure*. "I think," he says, "the meaning is this—that in a contest between persons having only equitable interests, priority of time is the ground of preference last resorted to; that is, that a court of equity will not prefer the one to the other on the mere ground of priority of time unless it finds upon an examination of their relative merits that there is no other sufficient ground of preference between them, or, in other words, that their equities are in all respects equal, and that if one has on other grounds a better equity than the other, priority of time is immaterial." For this purpose the conduct of the parties and all the circumstances must be considered. Accordingly the Vice-Chancellor held that the equity of a vendor with a lien for unpaid purchase money must be postponed to that of an equitable mortgagee of the property without notice. Some may deride these refinements as mere hair-splitting—the casuistry of equity—

νήπιοι οὐδε ἴσασι δικήν μᾶλα εὐ διακρίνειν.

THE COURT OF CHANCERY AND ITS DETRACTORS.

It is remarkable, indeed, what little appreciation the Court of Chancery has received. Scarcely a voice except that of Lord Langdale has been raised on its behalf. Its fate has been to be indiscriminately reviled. Sydney Smith described it as pressing heavily on mankind; Dickens held it up to hatred and contempt in "Bleak House"; Selden blamed its "roguishness"; Lord Bramwell scoffed at its "piety and love of fees." Even Sir Frederick Pollock has doubted whether the "conscientious

endeavour of modern courts of equity to work out perfect justice in an imperfect world have not done more harm than good." Yet, despite these gibes and scoffs, the country owes to the court an incalculable debt, not only for what it has done and is daily doing in the administration of estates, the execution of trusts, the taking of accounts, the guardianship of infants, the rectification of settlements and other deeds, the working out of foreclosure and redemption decrees, the specific performance of contracts—all matters which are the very fabric of social life—but in its steady discountenancing of fraud, its aspiration after a finer justice, ever approximating to an ideal standard.

PLOTTING AGAINST A WARD OF COURT.

Money v. Money (3 Drew, 256), for instance, is an interesting illustration of the length of the court's arm. It was a case of a young lady ward. Proposals of marriage were made for her hand about six months before she came of age, but the master was not satisfied with the terms of the settlement, and refused it. "Never mind," said the lady's mother and the gentleman, who were the arch-plotters, "we will wait till she comes of age, and then we can make a settlement to suit ourselves regardless of the court"; and so they did. But they found themselves checkmated. "The parties," said the Vice-Chancellor, with a touch of sarcasm, "appear to have considered—and it is not an uncommon notion even now—that the moment a ward of the court attains her majority and marries, her property will as a matter of course go according to the settlement which she then chooses to make; but in fact the notion is quite wrong, and the court retains its control."

RECEIVERS AND THE COURT.

One of the most important and useful heads of equity jurisdiction is the appointment of a receiver. It is all very well to adjudicate with the extremest nicety, as the old courts of common law did, on the rights in some particular property, the subject-matter of litigation, but it might very well happen that before the date of adjudication arrived the property had disappeared and the action was fruitless. Equity met—and still meets—this danger by a receiver. The court lays its hand, by its officer, on the property, and says in effect: "Until the rights in this property can be declared it must be taken into the possession of and

under the protection of the court, and anyone meddles with it at his peril." In *Hawkins v. Gathercole* (1 Drew 12, at p. 17), Vice-Chancellor Kindersley emphasises this principle very strongly. "It is quite clear," he says, "that when this court has appointed a receiver, it will not allow the possession of that receiver to be disturbed by anybody, however good his right may be; but the party thinking he has a right paramount to that of the receiver, or rather to that of the person who has got the appointment of the receiver, must, before he can presume to take any steps of his own motion, apply to this court for leave to assert his right against the receiver, otherwise he is guilty of a contempt of court."

LEGATEE WITNESSES.

Under the law before Queen Victoria came to the Throne a will was liable to be avoided if any of the attesting witnesses took an interest under it—a disastrous result. The Wills Act introduced the more rational policy of avoiding the legacy in lieu of the whole will—a rule, again, not without its hardships. In *Gurney v. Gurney* (3 Drew, 208) this point arose. A legatee under a will had attested, not the will itself, but a codicil to it which gave him nothing. Had he forfeited the legacy? The Vice-Chancellor held that he had not, and he went so far as to decide that a residuary legatee of a share of residue does not lose his title by attesting a codicil, though the codicil revokes legacies and therefore indirectly benefits the witness by increasing the residue.

FICTIONS AND NONSENSE.

On July 24th, 1852, the *Law Times* formally records the death of those common law celebrities, John Doe and Richard Roe. Chancery's turn, in the matter of legal fictions, came a few years later. The equity pleader of those days would often be instructed to draw a bill of injunction against an action on a promissory note, for instance, without the suggestion of a single fact; whereupon he would invent out of his own head a set of facts which were so introduced and were so connected with the promissory note as to make it appear that there was a *prima facie* equitable ground why the note should not be enforced; or, if he wanted to found an interrogatory, he would introduce charges in a bill suggesting imagined facts. Even Sir Lancelot Shadwell when at the Bar saw no harm in this—such is the force of pro-

fessional habit; but when the Chancery Improvement Act, 1860, was passed, Vice-Chancellor Kindersley warmly and loyally supported the spirit and principle of the Act, and on counsel trying to argue (in *Marsh v. Keith*, 1 Dr. & Sm. 342) that you might still allege fictions, he promptly popped the extinguisher on him with the words, "The object of the Act was to get rid of this sort of nonsense."

LORD HANNEN.

A JUDICIAL IDEAL.

LORD BACON delighted to give the "portraiture" of a good judge. In his speech, when Lord Keeper, to Justice Hutton, on his being called to be one of the judges of the Common Pleas, he sums up, for example, with his own peculiar pregnancy, the attributes of such a judge: "He was to draw learning out of his books, not out of his brain; he was to mix well the freedom of his own opinion with reverence of the opinion of his fellows; he was to continue the studying of his books, and not to spend upon the old stock; he was to fear no man's face, and yet not turn stoutness into bravery; he was to be truly impartial, and not so as men might see affection through a fine carriage; he was to be a light to jurors to open their eyes, but not a guide to lead them by the nose; he was not to affect an opinion of pregnancy and expedition by an impatient and catching hearing of the counsellors at the Bar; his speech was to be with gravity as one of the sages of the law, and not talkative, nor with impertinent flying out to show learning; he was to carry such a hand over his ministers and clerks that they might rather be in awe of him than presume upon him." It is a noble ideal, and in listening to it we recognise nearly all its lineaments in the judicial character of Lord Hannen.

Lord Coleridge's testimony is very emphatic: "I have known Lord Hannen for fifty years, and if there has been a greater English judge during the last seventy-three years, I have not met him."

EARLY YEARS AND HEIDELBERG.

Lord Hannen's father was a City merchant, with a charming residence—Kingswood—at Dulwich, then a sequestered spot rejoicing in real rurality, and innocent of the Crystal Palace and excursion trains. The chief neighbours were the Grotes—culi-

vated and accomplished people. Here it was that the future judge's youthful years were passed. He early showed promise, and his father used proudly to point to the boy and foretell great things of him. It was at St. Paul's School (then under the shadow of the Cathedral) that he received his education—the school of Milton and Marlborough, of Pepys and Chief Baron Pollock—as one of the 153 fishes for which pious Dean Colet spread his educational net; but, instead of proceeding thence in the usual way to Oxford or Cambridge, he was sent to the University of Heidelberg. There he witnessed the humours of the German student, and, if he did not himself take part in the daily duels, he knew well how to hold his own against odds, as some students had good cause to find out when he interfered on one occasion to protect a young girl from brutal insult. At Heidelberg, too, he imbibed a taste for German literature and German philosophy, especially of the advanced school.

This early experience of the world—seeing men and cities—“the second part of education,” as Lord Bacon calls it—helped not a little to enlarge his mental horizon and make him the great and judicious judge which he became. He realised by his residence abroad—what so few English lawyers ever do—that there were other systems of law outside his own country.

THE CHARMS OF THE LAW.

Already his heart was set upon the Bar as a career, as the following letter to his father shows:

“Munich, Dec. 30th, 1840.—I feel frequently, even amidst the great enjoyments I have now, an impatience to begin this course (viz., studying for the Bar). I long for the time when I shall be fixed in my chambers at the Temple, or elsewhere, with my books about me and one clearly defined purpose as the object of my studies—to make myself a lawyer; besides, I am convinced I shall be one, which conviction gives support to, as well as derives support from, the interest I feel in my legal studies, which is most certainly a fact—however you may feel inclined to think that I ‘*tire une carotte*’ in so saying, as the French have it.”

This is the sort of man one would back for the race. He soon had his wish, and was launched on the “rapids” of the law. The first chambers he read in were those of Samuel Warren, an eccentric barrister, who had just made a hit with his “Ten

Thousand a Year," and was divided in a laughable way between dread lest being known as an author should prejudice him in his profession, and a childish vanity which would not let him keep the secret. A better initiation into the mysteries was that which Hannen got in the chambers of Thomas Chitty, the famous pleader, who was to Hannen's time what Tidd had been to an earlier generation—the legal "trainer" of half the Judicial Bench.

LORD CAMPBELL'S COMPLIMENT.

His first success—as he told his son—was in the case of *Hochster v. De La Tour* (2 E. & B. 678), where he held a brief for Lush. The point of law was simply this: Suppose a man in April hires a courier to travel with him in June, and before June comes refuses to take him, has the courier a *present* right of action? Hannen argued that he had, just as much as a lady would have if a gentleman had promised to marry her at the end of a year, and before the time for performance had arrived married somebody else. At the close of his speech Lord Chief Justice Campbell paid him a marked compliment. "The counsel," he said, "in support of the rule have to answer a very able argument." Ellis, the reporter—Macaulay's bosom friend—was also struck by the argument, and some time afterwards, when Sir Fitzroy Kelly and he (Ellis) were in the great Shrewsbury and Talbot peerage case, being asked by Sir Richard Nicholson, the solicitor for Lord Shrewsbury, to name a third counsel, he named Hannen. From that date Hannen's work quickly increased. He got the reputation of a "strong junior," and a dangerous antagonist. He had the capacity for taking pains which Humboldt called genius. A fortunate accident won him the confidence of the Treasury. He was in the chambers of Welsby, a well-known barrister at Westminster, and junior counsel to the Treasury. Welsby was away on a commission, or ill, when the Treasury sent some important papers requiring dispatch. Hannen, who was on the spot, knew something of the subject, was intrusted with the work, and did it so satisfactorily that other Government business came to him in increasing quantity—all which goes to show that he was a man who knew how to improve an opportunity when it came his way—the vulgar miscall it luck. The importance of the Government connection was that in due time he was appointed Treasury junior, or Attorney-General's devil—a post which has generally proved, as

it did in his case, a stepping-stone to the Bench. Among the most memorable Treasury prosecutions in which he was engaged was that of Franz Müller for the murder of Mr. Briggs, on the North London Line, on July 9th, 1864—one of the most sensational of modern crimes—and that of the Fenians, Allen, Larken, and Gould, the so-called "Manchester martyrs," for murdering Sergeant Brett in a desperate attempt to rescue some Fenian prisoners from the prison van.

THE BENCH.

He had been retained with Serjeant Ballantine for the claimant in the great *Tichborne* case, but before the trial came on he received his apotheosis and became a judge of the Court of Queen's Bench, then splendid with the eloquence of Sir Alexander Cockburn and the learning of Mr. Justice Blackburn. A worthy colleague and a most able puisne Hannen proved himself. "He struck me," says an acute observer who saw him at assizes, as "the calmest, sanest, most patient, and most determined-looking judge that I had up to that time encountered." But a puisne in those days was inevitably overshadowed by his chief—especially such a chief as Cockburn—and it was not until Hannen became Judge Ordinary of the Court of Probate, and three years later (in 1875) President of the then newly-constituted Probate, Divorce, and Admiralty Division, that his judicial gifts found their fitting sphere. The offer of the appointment to the latter post came personally from Mr. Gladstone, then Prime Minister, in a private letter highly complimentary to Sir James Hannen. It is with this presidency of the Divorce Division for sixteen years (1875 to 1891) that his name will always be associated. At the Bar, says one who knew him well, he had been a somewhat frigid and not very fluent speaker, but when he took his seat on the Bench it was as though a change came over his personality. His facility and power of expression seemed to grow with his position, and no judge delivered more finished judgments or with clearer elocution. The most striking thing about him was the great dignity of his manner. He was a very stern and strict ruler of his court, and no man dared to take a liberty with him. "Every good judge," he often said, "must be something of an actor"—must sink his idiosyncrasies of temper and conviction, and impersonate justice alone. And so he played his part. Grave, authoritative, almost austere, intensely decorous

with a Rhadamanthine solemnity, he would suppress the slightest attempt at a demonstration in court or any indications of frivolity on the part of counsel. It was in no conventional sense that he used the phrase, "This court is not a theatre." "No! but neither is it a church," Butt, Q.C., is said once to have whispered in a stage aside.

LEVITY IN COURT.

On this point—the latitude to be allowed in a court of justice—opinions will always differ. There have been—there are—eminent judges who think it would be intolerable if all joking were banished; but, whatever may be the case in the mirth-provoking breach of promise or slander action, there can be no doubt as to the unseemliness of levity in those cases—the saddest of all—where married couples have made shipwreck of their happiness. It jars on us like the mocking laughter of Charles Surface in the screen scene of the *School for Scandal*. The result of Sir James Hannen's régime was that the Divorce Court, which in other hands might easily have become a scandal, became under him a model of all that a court should be. A visitor there acquired a new sense of the truth of the commonplace that justice requires that both sides shall be heard impartially—saw, too, vice in her shape how ugly, not only wrong, but degrading. It is difficult to analyse the qualities which enabled Lord Hannen to produce this effect; but among them may be reckoned a habit of attention alert to appreciate the bearing and materiality of evidence, patience of necessary annoyances, and a severity of good taste which never for a moment tolerated a descent from the highest possible standard of good manners. The silent expression of his face was more eloquent than other judges' speech; a reproachful glance at counsel, a pained look at a rude word to a woman, carried more effect than an angry altercation or petulant outburst.

"TO ATTEND A FUNERAL."

Only once was he known to be hoaxed. It was when a jurymen, dressed in deep mourning and downcast in expression, stood up and claimed exemption from service on that day, as he was deeply interested in the funeral of a gentleman, at which it was his desire to be present. "Oh! certainly," was the courteous reply of the judge, and the sad man went. "My Lord," interposed the clerk, as soon as the ex-jurymen had gone, "do you

know who that man is that you exempted?" "No." "He is an undertaker!"

SOME PERSONAL TRAITS.

There is a foolish story that a lady once wished she might be Lady Hannen, because Sir James must have so many excellent scandals to relate. Assuredly he might, had he been so minded, but such topics were profoundly distasteful to him. It is worthy of note that all the stories of feminine frailty which came before Lord Hannen failed to destroy his reverence for and faith in womanhood. He had early in life married his cousin, Miss Mary Winsland, a helpmate as beautiful as she was sympathetic. Hannen was essentially a man who required, as indeed he repaid, loving affection, and if a woman can be said to contribute to a man's success in life—and who can doubt it?—Lady Hannen, by her devotion to him and their numerous family assuredly did. To the end he felt her loss an irreparable misfortune. Off the Bench, in the domestic circle, all austerity of demeanour dropped from him like his judicial robes. A well-read man, he liked to talk—and he talked well—on science and art and topics of world-wide interest. "The evening we spent," says a medical man, "at the hotel, with Sir James Hannen"—he was then travelling in Norway with his daughter—"was one of the pleasantest of the trip. He was a most interesting personality. The dark, expressive eyes which lighted up his strong, somewhat Napoleonic features were such as to leave an impression on one's memory for a long time. He conversed freely on subjects connected with himself. Among other things he told us that he had been operated on for stone in the bladder by a well-known London surgeon. After the operation he asked the surgeon what his chances of health and life were. The answer was that it entirely depended on himself. 'You are suffering from the uric acid diathesis,' was the dictum of his adviser, 'and if you choose to live as a vegetarian, many years of healthy life may still be in store for you.' Lord Hannen at once accepted the verdict, and sentenced himself to play the part of a vegetarian for the rest of his natural life. He said he began by engaging a cook who excelled in making porridge. This amylaceous dish became from that time forward the staple item of his breakfast. A year had passed since the operation when he told us these things, and he said the result of the vegetarian experiment had been that his

nating judge dropped his pen as if paralysed by the poor man's recital. The action was involuntary—there was nothing histrionic about it. Perhaps not a dozen people noticed how profoundly the great judge was moved.

The other little incident related to Mr. Timothy Healy. He appeared as a witness, and made a long speech full of Celtic exuberance. "Thank you, sir!" said the President with killing sarcasm, as the witness quitted the box; "thank you, you have *not* assisted us."

After the inquiry terminated—it occupied 129 days—Sir James Hannen took a three weeks' yachting trip, in order to read undisturbed the huge volume of evidence before coming to a decision. The result was a report which is a masterpiece of its kind, not only dealing with the issues, but summarising admirably the whole history of the Irish land movement. It is no secret that the President penned a large part of it. In 1891 Hannen was created a Lord of Appeal with a life peerage—one of the most enviable positions which can fall to a mortal's lot; but in his case surely "too little payment for so great a debt" as that which his country owed him, for in truth Lord Hannen had sacrificed his health and life in its service. The Parnell Commission involved a severe strain upon him. During the Behring Sea Arbitration in Paris he was taken seriously ill; and, though he rallied sufficiently to bring the proceedings to a termination honourable and advantageous to his country, his health rapidly sank from that time, and he died on March 29th, 1894.

HIS CONTRIBUTIONS TO THE LAW—TESTAMENTARY CAPACITY.

If there are two matters which more than any other concern ordinary people they are wills and marriages. Lord Hannen left a permanent impress on the law which governs both. Testamentary capacity has had a curious history. The older authorities of King James' time and the two Charles' use vague phrases of this kind about it: The testator "ought to be of judgment to discern and to be of perfect memory"; "there must be an understanding judgment fit to direct an estate"; but testamentary capacity was in the main determined on its merits down to 1848. In that year Lord Brougham introduced a novel doctrine. The mind is one and indivisible; if it is disordered in any one part the court cannot take upon itself to determine the extent of the

derangement—it must be treated as unsound generally. In laying down this artificial rule or “external standard,” Lord Brougham was unduly dogmatising with imperfect knowledge about the mystery of mind—“man’s glassy essence”—and his view was vigorously criticised and combated by Sir Alexander Cockburn in *Banks v. Goodfellow* (22 L. T. Rep. 813; L. Rep. 5 Q. B. 549); but it was reserved for Sir James Hannen in *Broughton v. Knight* (28 L. T. Rep. 562; L. Rep. 3 P. & D. 64) to lay down with admirable clearness the rationale of the whole question of testamentary capacity. “You will expect from me,” he said to the jury, “a definition, or at any rate an explanation, of the legal meaning of the words, ‘sound mind,’ and I will endeavour to give one. They do not mean a perfectly balanced mind. If they did, which of us would be competent to make a will? Such a mind would be free from all influence of prejudice, passion, and pride; but the law does not say that a man is incapacitated from making a will if he proposes to make a disposition of his property moved by capricious, frivolous, mean, or even bad, motives. We do not sit here to correct injustice in that respect. Our duty is limited to this—to take care that that, and that only, which is the true expression of a man’s mind shall have effect given to it as his will.” But here, again, when we talk about “true mind,” we are met with the question, What is the amount and quantity of intellect which is requisite to constitute testamentary capacity? and that, as Sir James goes on to say—and with strong emphasis—is a question of degree to be solved in each case by the jury.

THE CONTRACT OF MARRIAGE.

It is the same with marriage. Marriage—Christian marriage—is a consensual contract—an agreement between a man and a woman to live together and love one another as husband and wife to the exclusion of all others; but to make it binding the parties must understand what they are pledging themselves to—the nature of the duties and responsibilities which the contract creates; and whether they have done so—appreciated the contract—is in each case a question of fact. One of the most remarkable cases in which Sir James Hannen laid this down was *Durham v. Durham* (10 P. Div. 80). It was a new version of an old story—the Bride of Lammermoor over again, with nearly as tragic a *dénouement*—a beautiful but shy and sensitive Irish girl, deeply attached to one man, forced

by the importunity of worldly relations into a brilliant match with another; marriage, and then, a few months after, melancholia and madness. Was she—that was the question for the court—already mad at the date of the marriage—incompetent, at least, to understand to what she was committing herself? Sir James Hannen, on a minute review of the evidence, said, “No! The madness had developed since marriage,” and he passed some scathing remarks on those “whose devices to bring about a match they thought advantageous had assisted to wreck the happiness of two lives.”

UNDUE INFLUENCE.

There is another subject—undue influence—which his remarks to the jury in *Wingrove v. Wingrove* (11 P. Div. 81) have done much to clear of confusion. “We are all familiar,” he says, “with the use of the word ‘influence.’ We say that one person has an unbounded influence over another; but it is not because one person has unbounded influence over another that therefore when exercised, even though it may be very bad indeed, it is undue influence in the legal sense of the word. To give you some illustrations of what I mean, a young man may be caught in the toils of a harlot, who makes use of her influence to induce him to make a will in her favour to the exclusion of his relatives; yet the law does not attempt to guard against those contingencies. Or a man may be the companion of another and may encourage him in evil courses, and so obtain what is called an undue influence over him, and the consequence is a will made in his favour. But that again, shocking as it is—perhaps even worse than the other—will not amount to undue influence. To make undue influence in the eye of the law, there must be—to sum it up in a word—coercion. The coercion may be of different kinds; it may be in the grossest form, such as actual confinement or violence, or a person in the last days or hours of life may have become so weak and feeble that a very little pressure will be sufficient to bring about the desired result, and it may even be that the mere talking to him at that stage of illness and pressing something upon him may so fatigue the brain that the sick person may be induced for quietness’ sake to do anything. This would equally be coercion, though not actual violence.”

REVOKING A WILL.

An ingenious person conversant with law and life might usefully write a little book on Popular Legal Fallacies by way of

supplement to Charles Lamb's "Popular Fallacies." One of these fallacies *à propos* of wills is that destroying a will revives an earlier will revoked. Another is that the making of a new will revokes an old one—the truth being that a will can only be revoked in one of the ways pointed out by sect. 20 of the Wills Act. The testator in *Cheese v. Lovejoy* (37 L. T. Rep. 294; 2 P. Div. 161, 251) may be cited as a warning. He drew his pen through the lines of various parts of his will, wrote on the back of it "This is revoked," and threw it among a heap of waste papers in his sitting-room. A servant took it up and put it on a table in the kitchen. It remained lying about the kitchen till the testator's death seven or eight years afterwards, and was then found uninjured, and Sir James Hannen held that it was not revoked; for, whatever the testator intended, the will had not actually been injured. Symbolical destruction will not do. All the destroying in the world, as Lord Justice James put it, will not revoke a will; nor all the intention in the world without destroying. There must be both.

SIR JAMES FITZJAMES STEPHEN.

ENGLISHMEN are seldom philosophers. Of them it may be said, in Cicero's words, "*totum illud displicet philosophari.*" Their genius is practical, not speculative. To this rule Mr. Justice Stephen was an illustrious exception. He loved divine philosophy, not so much metaphysics or transcendental mysticism—these, indeed, he cared little for—he was not built that way; but he was bent on getting at the reason of things, and refused to feed himself on the husks of conventionalities and social shams:

He faced the spectres of the mind,
And laid them

—to his own satisfaction, at all events; and with the inquiring mind he had also the courage of his convictions, and a Johnsonian sturdiness in expressing and maintaining them. His dialectical ingenuity is amusingly illustrated in a little anecdote told of him when a small boy. His mother was holding up his father to him as an example of unselfishness. "Did you ever know your father," she said, "do a thing because it was pleasant?" "Yes, once," said the adroit Fitzjames, "when he married you!" It was a household where duty was supreme; where an atmosphere of Puritan gravity, not to say austerity, reigned; where balls and theatres and such-like vanities were forbidden fruit—dangerous temptations. These surroundings helped to foster his constitutional shyness and beget a maturity of mind which unfitted him for the enjoyment of a public school life.

THE LESSON OF A PUBLIC SCHOOL.

"At Eton," he says, "I was like a sensible grown-up woman among a crowd of rough boys. I still think with shame and self-contempt of my boyish weakness, which, however, did not continue in later years. The process taught me for life the lesson that to be weak was to be wretched; that the state of nature is a state of war, and *væ victis* the great law of Nature. Many years

afterwards I met Robert Lowe (Lord Sherbrooke) at dinner. He was speaking of Winchester, and said, with much animation, that he had learnt one great lesson there—namely, that a man can count on nothing in this world except what lies between his hat and his boots. I learnt the same lesson at Eton, but, alas! by conjugating, not *pulso*, but *vapulo*."

The cause partly of this was that he had no taste for sports and pastimes, and alike at Eton and Cambridge indifferent to those athletic pursuits which make up mainly the lives of school-boys and undergraduates; he was too preoccupied with the world of ideas. If he took a gun he was rather inclined to complain of grouse as an interruption to his thoughts. Yet, had he so chosen, his fine physique might have given him a high place among the heroes of the cricket field or the river. A prize-fighter once said to the burly Whewell, "What a man was lost when they made you a parson!" In the same spirit Fitzjames' brother tells us that one Ritson—the landlord of the Wastdale Head—who had wrestled with Christopher North, lamented in after years that Fitzjames had never entered the ring. His only taste in the direction of athletics was his love of walking; a thirty-three mile walk was with him a common performance. In this contempt or indifference to sports he and his cousin, Tom Macaulay—who was always being held up to him as an example—were very much alike. Nor did he recommend himself particularly to the school authorities by scholarship.

"LONGS AND SHORTS" AT ETON.

The way to glory at Eton was then by the admired art of Latin versification, the manufacture of "longs and shorts," and at this Fitzjames did not shine. The warning addressed to him by a master is delicious. "Stephen Major," said this worthy, "if you do not take more pains, how can you expect to write good longs and shorts? If you do not write good longs and shorts, how can you ever be a man of taste? If you are not a man of taste, how can you ever hope to be of use in the world?" The syllogism failed, however, to appeal to Stephen; he never, either at Eton or Cambridge, became a finished classical scholar or a competent mathematician. More important to his psychological development was his finding among his father's books a copy of the State Trials. There he read the trial of Williams for publishing Paine's "Age of Reason," and it made an indelible

impression on him, and gave a permanent direction to his thoughts:—so potent may the smallest seed become when it falls in congenial soil. Henceforward freedom of thought and criminal law were the two ideas which dominated his mind and engrossed his interest.

THE BAR AND MARRIAGE.

The Church and the Bar were the two careers between which he had to choose, and, after a somewhat pedantic process of logical self-examination, he came to the conclusion that he was better adapted to the Bar than the Church, and he was duly called on Jan. 26th, 1854. A year afterwards he married Mary Cunningham, daughter of the vicar of Harrow and sister of Sir Allan Cunningham, the biographer of Lord Bowen. Love was to him a "blessed revelation"—an awakening like that of the fairy palace in Tennyson's "Sleeping Beauty." It changed him, he says, from a rather heavy, torpid youth into the happiest of men. But marriage with its blessings brings responsibilities, as Burns says:

"Those moving things ca'ed weans and wife
Wad touch the verra heart o' stanes."

And the Bar is not a career calculated to lessen the anxiety of the outlook. There never was a longer hill than that which barristers have to climb.

THE STAFF OF JOURNALISM.

Fitzjames—as so many young barristers do—varied the monotony of the slow ascent and also eked out his professional earnings by journalism and periodical literature. He wrote regularly for the *Saturday Review* (then in its palmiest days), for the *Cornhill Magazine*, and for the *Pall Mall Gazette*; as Sir Courtenay Ilbert puts it, he was the *Pall Mall Gazette*. His industry was enormous, but he followed Sir Walter Scott's advice—he used literature as a staff, not as a crutch; made law the substantive, literature the adjective; sticking steadily to his profession, going the Oxford Circuit, and achieving such steps towards advancement as are implied in the Recordership of Newark and a revising barristership. His general plan when in town was to write before breakfast, and then look in at the office of the *Pall Mall Gazette*, Northumberland-street, Strand, in the course of his walk to chambers. There he talked matters over with Mr. Greenwood, the editor, and occasionally wrote an

article on the spot: the fountain was always full. What he could not manage was the light and amusing article. As Sir Walter Scott said in contrasting himself with Miss Austen: "The big bow-wow strain I can do myself like any now going, but the exquisite touch which renders ordinary commonplace things and characters interesting from the truth of the description and the sentiment is denied to me." Fitzjames could also do the big bow-wow strain, but had not the touch of the belle-lettrist.

Mr. Justice Wills, an elder contemporary of his circuit, describes him at this time as self-centred and rather too logical for the tricks of the trade—tricks which, he adds, are learnt only by a long and persistent handling of ordinary business. He did not understand what would go down; his massive intellect was wanting in pliability. He could not change front in the presence of the enemy. The result was that at the Bar, as at Cambridge, he was still distanced by men greatly his inferiors in general force of mind, but better provided with the talent for bringing their gifts to market.

AUTHORSHIP—A VIEW OF THE CRIMINAL LAW.

Possessed with ideas and aims above those of the ordinary crowd, Fitzjames had the feeling that the great bulk of a barrister's work is poor stuff. Barristering was a good vigorous trade which braced the moral and intellectual muscles; but he wished for more—longed to write something worth reading, and the desire took shape in his "View of the Criminal Law." One of the many good points he makes in the "View" is the contrast between the English and the French system of criminal procedure. We in England are much too fond of girding at what we think the unfairness of French criminal methods. The truth is, we do not understand the French point of view. The English and French systems rest on different theories. Our English system is "litigious," the French "inquisitorial"; in other words, the theory of French law is that the whole process of detecting crime is part of the functions of Government. In France there is a hierarchy of officials who upon hearing of a crime investigate the circumstances in every possible way, and examine everyone who is able, or supposed to be able, to throw any light upon it. The trial is merely the final stage of the investigation at which the various authorities bring out the final result of all their previous proceedings. The theory of English law, on the contrary, is "litigious"—the trial is a proceeding in which the prosecutor

endeavours to prove that the prisoner has rendered himself liable to a certain punishment, and does so by producing evidence before a judge who is taken to be and is an impartial umpire. He has no previous knowledge of the fact; he has had nothing to do with any investigations, and his whole duty is to see that the game is played fairly between the litigants according to certain established rules. Now, which of these two systems is the true one? What says Fitzjames Stephen himself—the author, the expert, the Englishman? “The inquisitorial theory is beyond all question the true one. A trial ought obviously to be a public inquiry into a matter of public interest.” He holds, however, that the introduction into England of the Continental machinery for the detection of crime is altogether out of the question.

“BOILING DOWN” THE LAW.

Maine’s genius—his power to transfigure one of the driest subjects by the beautiful applications to it of history and philosophy—had always charmed him, though he could not help being haunted, like Lord Bowen, with the feeling that Maine’s speculations might be only a dream. His own ambition was practical, not speculative—to “boil down,” as he expressed it, English law into a few broad, general, common-sense principles. “The administration of justice is really the best thing,” he says, “which is going on in the nation.” “God,” as his brother puts it, “seemed to him more palpably present in a court of justice than in a monastery.” What better service, then, could he render to the administration of justice than to simplify and rationalise the form of the law? He got his chance when he became legal member of the Council for India in 1867. Macaulay’s penal code was there to serve him as a model, and he addressed himself vigorously to the task of supplementing and adding to it. It was a herculean labour, but Fitzjames was a Hercules. Problems which to the ordinary mind are repulsive from their complexity and technicality possessed for him a singular fascination. The jungle of administrative law was to him, as Sir Courtenay Ilbert has said, a paradise free from the drawbacks of repose.

CODIFICATION IN INDIA.

His chief work in India consisted of the Indian Law of Evidence Act (March, 1872), the Contract Act (April, 1872), the Native Marriages Act (March 19th, 1872), and the

Criminal Procedure Act (April 16th, 1873). How effectually he did the "boiling down" is illustrated in his "Digest of the English Law of Evidence." "Taylor on Evidence" contains 1800 pages and 9000 cases; Roscoe's "Nisi Prius," 1500 pages and 11,000 cases. Stephen's book puts the whole subject in the modest compass of 200 pages and also some 500 cases. "If it be asked," says Sir Fitzjames Stephen, "how the system of the penal code and the code of criminal procedure works in practice I can only say that it enables a handful of unsympathetic foreigners to rule justly about two hundred million (now some three hundred million) persons of many races, languages, and creeds, and, in many parts of the country, bold, sturdy, and warlike." This fact, he goes on to say—the establishment of a new system of law which regulates the most important part of the daily life of the people—constitutes in itself a moral conquest which renders it possible. It exercises an influence over the minds of the people in many ways comparable to that of a new religion. "Our law is the Gospel of the English, and, what is more, a compulsory Gospel admitting of no dissent or disobedience." The saying in Eastern Bengal is that every little herd boy whose attire consists of a bit of string and a walnut-shell carries a red gingham umbella under one arm and the penal code under the other.

This was the thought which his experience of Indian life and government brought home to him. It is an idea which hardly impresses us in England so much as it ought to do. We in England are so much accustomed to an incorruptible and unimpeachable administration of justice that we take the blessing of it as a matter of course. It is only, as Sir John Scott said, those who have lived amid native misrule—venal justice and corrupt officialism—who can adequately appreciate what an enormous power for good is involved in the steady and impartial administration of justice in British hands in a country like India, Egypt, or Nigeria.

RETURN FROM INDIA.

To step down from the dignified position he had occupied in India into the arena of the Bar, to begin practice over again and find himself being snubbed at the Old Bailey for some supposed irregularity by a judge who betrayed not the slightest consciousness that the man he was snubbing had just composed a code of

evidence for an empire—all this was trying enough. He found a more congenial sphere as Reader on Criminal Law to the Council of Legal Education. The writer of this sketch was then a student at the Middle Temple, and he well remembers the impression produced on him at the lectures by the powerful frame and massive head of the lecturer, with its clustering leonine locks, and the deep, rich, resonant voice declaiming on "benefit of clergy" or the technical niceties of homicide in English law. It gave a sense of power—of "potential energy," as his brother calls it. Form, face, and voice were the faithful index of a mind of singular vigour.

Codification was then in the air, and in July, 1878, the Government applied to Fitzjames Stephen to prepare a draft criminal code. In answer Stephen frankly said that he would be unable to undertake a laborious duty which would make practice at the Bar impossible for a time without some assurance of a judgeship. Thereupon the Chancellor—Cairns—wrote a letter which, though an actual promise could not be given, virtually amounted to a promise. The draft code was prepared, and a Bill embodying it was referred to a committee consisting of Lord Blackburn, Lord Justice Lush, and Mr. Justice Barry, but, owing to that mysterious thing Governmental "exigencies," the measure never reached the legislative port—it is still, in nautical language, a derelict; but Stephen's endeavours after codification, though they suffered shipwreck, were not lost—they inspired other and more successful attempts. The Bills of Exchange Act, the Partnership Act, and the Sale of Goods Act, are distinctly "attributable," says Sir Frederick Pollock, "to his example." Stephen, at all events, got his reward.

THE BENCH.

"I am out of all my troubles," he wrote. "Cleasby has unexpectedly resigned, and I am to succeed him." He felt, he afterwards said, "like a man who has got into a comfortable carriage on a turnpike road after scrambling over pathless mountain ranges." He made his first appearance at the Central Criminal Court in 1879. Thenceforth for the next twelve years his life was the uneventful one of a Common Law judge, but his judicial duties were not enough to employ the inexhaustible energies of his mind, and in his "History of the Criminal Law of England," published in 1885, he gave us what Sir Courtenay

Ilbert has called "the most solid and permanent contribution to the English legal literature of the century."

SOME JUDICIAL TRAITS.

Two anecdotes of him while on the Bench help to show the man. In a slander case which came before him slanderer and slandered were employed in Billingsgate, and the counsel for the defence made a joke of sensibility to strong language in that region. Henry Dickens, who was for the plaintiff, and then a young barrister, was in despair, seeing judge and jury being carried away by the humour of the situation, and tried to bring out the serious injury inflicted on his client. Mr. Justice Stephen, his sense of fairness aroused, was sobered in a moment, and summed up in favour of the plaintiff, and when a verdict was returned accordingly he sent this note to the plaintiff's counsel: "Dear Dickens,—I am very grateful to you for preventing me from doing a great act of injustice." The other anecdote is told by Mr. Justice Wills. When Fitzjames was on the Bench, and he—Wills—had been himself disappointed of reaching the same position under annoying circumstances, he had to appear in a patent case before his friend. Fitzjames came down to look at a model, and Wills said: "Your Lordship will see," &c. "He got hold of the hand next his own, gave me a squeeze which I shall not forget in a hurry, and whispered: 'If you ever call me "My Lordship" again I shall say something!'" That handgrip, indeed, as Mr. Justice Wills remarked, was eminently characteristic. It was like the squeeze of a vice, and often conveyed the intimation of a feeling which shrank from verbal expression. When Mr. Montagu Williams had been weakened by severe illness the judge courteously came down from the Bench to sit beside him and spare his voice.

Like every judge, he had his foibles. He did not like, for instance, a witness pausing and watching his hand while he was taking notes of evidence. "I will send you to prison," he would say, facetiously, to the witness. His innocence of matters of common knowledge—sometimes affected by judges, but not by him—was often amusing. "What is an understudy?" he asked naively in a theatrical case; and at another sought to be enlightened as to the authorship of "East Lynne." Imagine the shock to a Liverpool audience when, as a judge, he inquired in all simplicity of heart: "What is the Grand National?"

On March 17th, 1890, during the assizes at Exeter, he had an attack of illness, and was ordered three months' rest. When he resumed his judicial duties it began to be noticed that his mind was losing its power; it was an effort to him to collect his thoughts and conduct a case clearly. Comments appeared in the Press; they came to his notice; he consulted Sir Andrew Clarke; that eminent physician advised resignation, and he took leave of the Bench and Bar on April 7th, 1891, in a manly and touching speech—"I am not going to make a tragedy of the occasion," he said. "God bless you all and everyone!" were his final words, uttered with the profoundest sincerity. He survived his retirement a little more than three years.

CREMATION AND THE LAW.

It is as the author of the Commentaries rather than as a judge that Mr. Justice Blackstone is remembered, and it is as a code-maker and a historian rather than a judge that Sir Fitzjames Stephen will go down to posterity; but a number of interesting cases came before him for decision. *Reg. v. Price* (12 Q. B. Div. 247) is one of them, raising the question of the right to cremate a dead body. Price, the defendant, had in his house a child five months old, of which he was said to be the father. The child died, and Price did not register its death. The coroner thereupon gave him notice that unless he sent a medical certificate of the child's death he—the coroner—would hold an inquest on the body. Price then took the body of the child to a field of his own, put it in a ten-gallon cask of petroleum, and set the petroleum on fire. To dispose of a body so as to prevent a coroner holding a proper inquest on it is undeniably a misdemeanour; but is it a misdemeanour merely to burn a dead body instead of burying it? Mr. Justice Stephen in an elaborate judgment traces the history of the subject; the burning of bodies practised by the Romans and Hindoos; the views of the Canonists; the idea of Christian burial—noting, by the way, Lucan's epigrammatic disposal of the subject:

*Taberne cadavera solvat
An rogus haud refert,*

and comes finally to the conclusion that burning a corpse is, by the law of England, no misdemeanour unless it is so done as to amount to a public nuisance.

Burning a dead body may jar on some people's religious sentiment, but that does not make it a crime. "It may be," he concludes in summing up to the jury, "that it would be well for Parliament to regulate or to forbid the burning of bodies, but the great leading rule of criminal law is that nothing is a crime unless it is plainly forbidden by law," and he could find no prohibition on this point in the law of England.

SOME OTHER DECISIONS.

Cundy v. Le Cocq (51 L. T. Rep. 265; 13 Q. B. Div. 207) deals with the question of publicans serving drunken persons. This may be said to be the key of the whole drink question, because if nobody is, as Mr. Pepys was at Cambridge, "scandalously overserved with drink," no one will have a chance of indulging to excess. In *Cundy v. Le Cocq* the question was whether it is any defence that the publican honestly believed that the customer had not had too much. The court held that it was not—the prohibition was absolute. Any other construction would offer a great temptation to the publican to sell liquor without regard to the sobriety of customers. Only how shall we reconcile with this admirable strictness of the law the fact that so many persons are observed to come reeling out of public-houses?

In *London School Board v. Duggan* (13 Q. B. Div. 176) a girl of twelve, the daughter of a labourer in poor circumstances and the eldest of several children, was earning 3s. a week and her food as a nursery-maid, and gave the 3s. to her mother for the support of the family. The father was summoned for not sending her to school, but Mr. Justice Stephen would have none of it. There was a "reasonable excuse," he held. "She has been discharging the honourable duty of helping her parents . . . and there is nothing I should read with greater reluctance in any Act of Parliament than that a child was bound to postpone the direct necessity of her family to the advantage of getting a little more elementary education for herself."

What is a "place of dramatic entertainment" within sect. 2 of 3 & 4 Will. 4, c. 15? Our law is extremely cautious—and wisely so—about giving definitions, for definition-giving is, as George Eliot says of prophesying, the most gratuitous form of error; but Mr. Justice Stephen had no difficulty in determining that the board-room of Guy's Hospital is not a place of dramatic

entertainment because *Our Boys* is got up for the entertainment, free of charge, of the nurses, attendants, and surgeons.

LARCENY AT COMMON LAW.

Sir Thomas More puzzled the wisecracs of Bruges by propounding to them the question, "Utrum averia in witherammia sint irreplegibilia"; but what was this to the simple point—so it looked—which arose in *Reg. v. Ashwell* (53 L. T. Rep. 773; 16 Q. B. Div. 190)? The prisoner had asked the prosecutor for the loan of a shilling. The prosecutor gave the prisoner a sovereign, believing it to be a shilling, and the prisoner took the coin under the same belief. Soon afterwards he discovered that the coin was a sovereign, and then and there fraudulently appropriated it to his own use. Was he guilty of larceny at Common Law? Fourteen judges robed in scarlet and ermine sat to hear the case, and seven said it was larceny, and seven said it was not. Mr. Justice Stephen, in a judgment of great weight and learning covering fourteen pages of the Law Reports, sided with those who held it was not larceny; he declined to recognise a constructive "taking," to make what was an innocent act a guilty one by carrying back the *animo furandi*. The true moral of the case, apart from its casuistical refinements (and it is a moral which should make the Englishman's heart swell with pride), is that, whatever he may have done, he can only be dealt with according to law—and how carefully and how patiently administered! But what a time it must have been when a man's life was hanging on the technicalities of our law of larceny!

LORD CHIEF JUSTICE COLERIDGE.

THERE are certain men on the crowded stage of modern life who fill the public eye, whose personality has somehow a peculiar potency of attraction. Lord Coleridge was one of these. Something of this attraction he doubtless owed to the fact that he was the inheritor of a great and honoured name—the son of his father, the great-nephew of the poet—but not all. He had his own individuality—and a very marked one. He was an accomplished man of the world, with a touch of genius and a many-sided culture—polished, courteous, urbane, a graceful orator—such as Lord Chesterfield would have delighted in—a brilliant talker, a scholar, a litterateur, a Churchman.

Ottery St. Mary is a picturesque little village in Devonshire, a few miles from Exeter. Here, at Heath's Court—with its delightful garden close to an ancient church, the residence of his father the blameless Sir John Taylor Coleridge, a judge of the King's Bench and the lifelong friend of Arnold and Keble—the future Chief Justice, John Duke Coleridge, was born on Dec. 3rd, 1820.

EARLY DAYS AT OXFORD.

Eton was his school, and at Eton, like Horace, he had his "plagosus Orbilius" in the person of Dr. Keate; but Keate, like Orbilius, had the art of making scholars, and Coleridge, when he went to the University, carried off the blue ribbon of Oxford distinctions—"the Balliol." His friend, Principal Shairp, has given a poetical sketch of him at this period:

"Fair-haired and tall, slim, but of stately mien,
Another, in the bright bloom of nineteen,
Fresh from the fields of Eton, came.
Whate'er of beautiful or poet sung,
Or statesman uttered, round his memory clung.
Before him shone resplendent heights of fame,

With friends around to bind ; no wit so fine
 To wing the jest, the sparkling tale to tell,
 Yet oftimes listening in St. Mary's shrine
 Profounder mood upon his spirit fell ;
 We heard him then—England has heard him since—
 Uphold the fallen, make the guilty wince,
 And the hushed Senate has confessed his spell."

Those early years at Oxford, when the mind is opening like a flower under the sun of knowledge and of the *genius loci* amid a circle of chosen friends—is there anything quite like them in after life? Young Coleridge threw himself with ardour into the intellectual and spiritual life of the place. A band of youthful friends, Clough and Matthew Arnold, Dean Church and Lord Lingen—they held debate, like Tennyson and Arthur Hallam at the sister University,

On mind and art,
 And labour and the changing mart,
 And all the framework of the land.
 Discussed the books to love and hate,
 Or threaded some Socratic dream.

"We met in one another's rooms," says Coleridge, "we discussed all things human and divine—we thought we stripped things to the very bone—we believed we dragged recondite truths into the light of common day, and subjected them to the scrutiny of what we were pleased to call our minds. We fought to the very stumps of our intellects, and I believe that many of us—I can speak for one—would generally admit that many a fruitful seed of knowledge was sown in those pleasant, if pugnacious, evenings. In the larger arena of the Union, too, he shone conspicuous. Whatever career he had chosen he was marked for pre-eminence. What a bishop he would have made, for instance! What a dignified ecclesiastic! What a college head! But destiny decreed that he should go to the Bar, and family influence led him, naturally, to choose the Western Circuit.

THE WESTERN CIRCUIT AND THE LIGHT WHICH FAILED.

Serjeant Manning used to say that the more he went the Western Circuit the better he understood how it was that the wise men came from the East; but when Coleridge joined the circuit in 1847 it numbered many names then or afterwards illustrious—Cockburn, Crowder, Follett, Karslake, Hobhouse,

A. Hayward, Roxburgh, Thring. Sir William Follett was a friend of Coleridge's father, and gave young Coleridge some useful professional "tips." "Never overstate your case in opening; leave something to the jury to discover—they like it." Second piece of advice: "If there is a weak point in your case, state it yourself; do not leave it to your adversary to do so. It is probable you will state it less to your disadvantage than he will." Coleridge was one who knew how to profit by hints like these. A trifling accident shows his readiness and resource. He was defending a prisoner on trial for his life before a Devonshire jury on a winter afternoon. Suddenly during his address the light in court went out. It was soon restored, but Coleridge saw his way in the brief interval to turn the incident to account. "Gentlemen," he said, resuming his address, "you have all seen how speedily the light in this court was extinguished, and with what ease it has been renewed. It is in your power to extinguish the light of the prisoner's life, but remember, if you do so, it cannot under any circumstances be replaced." The prisoner was acquitted. Coleridge was then an unknown advocate, but he was wont in later years to regard this success as the first stepping-stone to fame. As years went on, and his merits as an advocate became better known, his practice grew rapidly, and "Long John"—his circuit soubriquet—and "Handsome Jack" (Sir John Karlake) were pitted against each other as leaders in every case of consequence; but for some time after his call Coleridge probably made as much by his pen—writing reviews for the *Guardian*, the *Edinburgh*, and the *Quarterly*—as he did by his profession. The Western Circuit did not introduce him to the commercial work which abounded at Guildhall and on the Northern Circuit. With his oratorical talents and connections it is matter for wonder that he did not earlier essay politics.

PARLIAMENT AND UNIVERSITY TESTS.

Perhaps he was deterred by expense—a seat in Parliament was a much more costly luxury then than now—perhaps he was following the advice of an eminent authority that a barrister should not go into Parliament until he has pretensions to the Solicitor-Generalship. At all events he was forty-five, Recorder of Plymouth, a Q.C., and Bencher of his Inn before he entered Parliament as Liberal member for Exeter in 1865.

He at once sprang into prominence as the eloquent advocate

of a measure which touched many time-honoured prejudices—University tests—a measure to enable laymen to take degrees and to become members of the governing body of the University without religious tests, which, to the scandal of the age, they were debarred from doing. “As a Trinity man I shall never forget,” said Lord Macaulay’s nephew, Trevelyan, in the course of the debate, “the shame I felt when a senior wrangler who was universally beloved for his modesty and amiability was driven from the walls of University without either honours or emoluments.” Froude, by the way, when he visited New Zealand, saw the exile at Auckland. The simple issue raised by the Bill was, were the Universities of Oxford and Cambridge, admitted by Coke and Blackstone to be lay corporations from the earliest times, to be national institutions, or were they to be clerical and Church seminaries. Coleridge argued for religious freedom, not as a mere act of justice to the Nonconformists, but on broad grounds of public policy. Nothing, he justly said, tends more to liberalise the feelings and to smooth the acerbities of religious controversy than bringing men of honest and independent minds together and causing them to do justice to the character and motives of their opponents, and then, with the wisdom of the serpent, this defender of the Liberal faith went on to urge that in a democratic age in an aristocratic country we cannot afford to minimise those Conservative influences which ought to be brought to bear on those who have so great an influence in moulding the institutions under which we live. The speech was an admirable one—perhaps the best he ever delivered—and marked him at once as a man of “light and leading.” Dizzy paid him the compliment of an epigram, and dubbed him a “silver-tongued mediocrity.” “Coleridge’s speeches,” said Chief Justice Cockburn, criticising his successor, “want iron and grit.” They had, it is true, the diffuser graces of Cicero, not the fire and condensation of Demosthenes; but they derived a unique charm from the silvery voice—musical as Apollo’s lute—in which they were spoken. This voice was a great gift, and served Coleridge admirably at the Bar, in Parliament, and on the Bench. It was specially valuable at the Bar in dealing with witnesses—in disarming opposition. Counsel, even when they do not browbeat or bully witnesses in the approved Old Bailey style, too often assume a rude and offensive tone towards them—credit them with a “natural taste for perjury.” This is not only bad form, but bad

policy. Coleridge shunned it. He was careful to ingratiate himself with the witness, and, as his reward, generally got from him or her what he wanted. It was the old fable of the man and his cloak—the struggle of the sun and wind. The blustering advocate only made the witness hug his secret closer; under the sun of Coleridge's bland courtesy and silvery tones he unpacked his heart. (a)

CROSS-EXAMINATION OF THE CLAIMANT.

The occasion on which Coleridge's powers in dealing with a witness were most conspicuously displayed was, as everyone knows, the famous Tichborne case. We can see now through that amazing tissue of fraud and imposture, and marvel that sensible men should have been duped by the story; but there was much in it to impress minds not trained to sift and weigh evidence. The fraud had been carefully concocted; there were some curious coincidences. In particular there was the recognition by the mother, Lady Tichborne—a very telling fact. The public was struck with these coincidences, and ignored or overlooked, as it usually does, the evidence that militated against the claimant's theory until it was brought home to them by Sir John Coleridge's destructive cross-examination, with its familiar formula, "Would you be surprised to hear?" "No one," said Lord Esher, "who knows anything of the law will fail to understand that the most masterly cross-examination of our time was that which Sir John Coleridge administered to the claimant. I

(a) There is a story of the two Scotch lawyers—Jeffrey and Cockburn—which well illustrates how to deal and how not to deal with a witness. The witness in the case was an old countryman, and the question was as to the mental capacity of one of the parties. Jeffrey began: "Is the defendant, in your opinion, perfectly sane?" The man gazed at him in bewilderment and made no reply. "Do you think the defendant capable of managing his own affairs?" Still greater bewilderment on the part of the witness. "I ask you," said Jeffrey, speaking with great particularity, "do you consider the man perfectly rational?" The man glowered with amazement, scratched his head, and remained speechless. "Let me tackle him," said Cockburn. Then, adopting his broadest Scotch, "Hae ye your mull wi' ye?" said he. "Ou, ay," answered the witness, and reached out his snuff-box. "Noo, hoo lang hae ye kent John Sampson?" asked Cockburn, gracefully taking a pinch. "Ever since he was that height," came the answer readily enough. "An' dae ye think noo, atween you and me," said the advocate, insinuatingly, "that there's anything intill the creature?" "I wad na lippen (trust) him wi' a calf," was the instant and satisfying rejoinder.

have never doubted that it was that cross-examination, and that alone, which broke down the imposture, that which had the effect no speech could have produced. I venture to think it was the most masterly thing done by any advocate of our time." Lord Russell of Killowen also agreed with Lord Esher that the cross-examination was a *tour de force*. On this point, however, professional opinions were not all at one. Sir Alexander Cockburn publicly declared that "the claimant had beaten Sir John," and there were even wits who said that Coleridge lost his forensic reputation by his unsuccessful cross-examination of the claimant, and retrieved it by his "superb" opening for the defendant. This opening speech was a record performance in speeches, lasting fifteen days.

A CONVENT INTERIOR.

Another case in which he appeared—*Saurin v. Star*—attracted great attention at the time, owing to the glimpses it afforded into the inner life of the convent. The plaintiff, Miss Saurin, was an Irish lady, and she had joined the Hull branch of a religious order known as the Sisters of Mercy. Squabbles arose; the lady superior complained to the ecclesiastical authorities, and Miss Saurin was compelled to leave the convent. Thereupon she brought an action for expulsion and libel. The convent's case was that Miss Saurin had no vocation for the life, would not submit to the strict discipline necessary in religious communities, broke bounds, spoke when she ought to have been silent, and so on. Coleridge appeared for Miss Saurin, and his cue was to ridicule the triviality of the convent rules. Here is a specimen of his cross-examination of a witness, a Mrs. Kennedy, in which, perhaps, he did not get quite the best of it. Mrs. Kennedy was the mistress of the novices, and had stated that, among other peccadilloes, she had once found Miss Saurin in the pantry eating strawberries when she ought to have been attending to a class of poor children or some such duty. The cross-examination proceeded thus:—

Coleridge: "Eating strawberries, really!"

Mrs. Kennedy: "Yes, sir; she was eating strawberries."

Coleridge: "How shocking!"

Mrs. K.: "It was forbidden, sir."

Coleridge: "And did you, Mrs. Kennedy, really consider there was any harm in that?"

Mrs. K.: "No, sir, not in itself, any more than there was any harm in eating an apple; but you know, sir, the mischief that came from that."

In his reply Coleridge rose to a loftier strain. "One flash," says Lord Russell, "I can recall. 'Gentlemen,' he said, 'I cannot help thinking that people who devote themselves to that life imitate too exclusively one part of the life of our Divine Lord and forget the other—they remember and imitate the forty days in the wilderness and the hours in the garden and on the mountain, and they fail to bear in mind the marriage of Cana and the feast of Bethany.'"

THE BENCH AND THE JUDICATURE ACT—LORD COLERIDGE AND THE CABMAN.

At the date of the Tichborne trial Coleridge was Attorney-General. Two years afterwards, in 1873, Bovill, Chief Justice of the Common Pleas, died, and Coleridge succeeded to his place and was made a peer. Seven years after, on Cockburn's death in 1881, he reached the goal of a lawyer's ambition—the Chief Justiceship of England. His transfer from the Common Pleas to the Queen's Bench enabled the Government to complete the scheme of the new judicature system—to merge the Common Pleas and Exchequer Divisions in the Queen's Bench Division of the High Court, and to substitute for the three fine old courts, with their dignity, their strong benches, and their splendid traditions, the dead level of the present one-judge system. Uniformity was secured, but at the price of prestige; courts were multiplied, but at the expense of their authority. Even the magnificent fusion of law and equity which the Judicature Acts inaugurated was seemingly unable to eradicate some inveterate popular prejudices, as the following anecdote illustrates. Lord Coleridge was driving towards his court one morning in his brougham when an accident happened to it at Grosvenor-square. Fearing he would be belated, he called a cab from the street rank and bade the Jehu drive him as rapidly as possible to the Courts of Justice.

"And where be they?"

"What! A London cabby, and don't know where the Law Courts are at old Temple Bar?"

"Oh! the Law Courts, is it? But you said *Courts of Justice*."

LAW, SWEETNESS, AND LIGHT.

As Lord Chief Justice, Lord Coleridge fitted the part to perfection. He was not built so high in legal learning as Lord Coke, but the conditions of modern life require something more in the ideal Chief Justice than learning. "A lawyer without history or literature," said Sir Walter Scott, "is a mere mechanic." Good Sir Samuel Romilly was always urging on his professional brethren the reading of books as a refreshment in work and a refuge in old age. Lord Coleridge was of the same mind. He never forgot in the turmoil of worldly ambitions his love of scholarship and poetry. To the end of his days a happy reference to a line from Horace, George Herbert, Wither, or Wordsworth—and may we not add from S. T. C.‡—was one of the surest ways to his good opinion. He was never so happy as when talking of his favourite books, and of the great men of letters he had known. And he was not only himself a cultivated man, but an apostle of culture: "Allured to brighter worlds and led the way."

He would choose a theme such as "The Classics" or "Eloquence" or the "Value of Literary Societies," and make its discussion delightful and profitable, adding here an apt quotation, and there a reminiscence, till the trite and commonplace took all the gloss and charm of novelty. In presiding in a criminal court he was eminently fair and merciful—and very impressive. In a civil case his manner was as perfect as it could be. Perhaps he was at his best on such ceremonial occasions as receiving the Lord Mayor of London on his election, summing up a society *cause célèbre*, addressing law students, or as treasurer of his Inn entertaining Royalty. On one of these last occasions, when the then Prince of Wales was a guest, the arrangement was "no speeches," yet no sooner had the Benchers withdrawn to the Parliament chamber to finish their festivities than the Prince gave the health of the Lord Chief Justice. Lord Coleridge was equal to the occasion. "Put not your trust in princes," he said, "was a lesson they had all learnt from the psalmist, and the truth of it had been verified that evening," and he went on to make a graceful and felicitous speech, in which he quoted an epigram of Pope on a quondam Prince of Wales:

"Mr. Pope, you do not like kings?"

"Sir, I prefer the lion before his claws are grown."

How well, too, he looked the part of Chief Justice, with his tall and stately figure, smooth, benignant face, winning smile, and beautifully modulated voice.

VISIT TO AMERICA.

In 1883 the Lord Chief Justice went a trip to the United States in company with Lord Bowen, Sir James Hannen, and Sir Charles Russell, on the invitation of the Bar Association of the State of New York. They received a noble welcome from the Bench and Bar of America, were splendidly entertained and *fêted* everywhere. *Propos* of this trip, Lord Coleridge had an amusing story to tell of a dinner given him in Chicago by a once famous lawyer of that city. At the outset there was an ominous pause, and soon it transpired that the pause was due to the viands having been seized by a sheriff's officer put in by a creditor of the host. What if under the law of Illinois—the thought flashed through the Chief Justice's mind during that anxious pause—what if the guests as well as the viands were liable to be taken in execution! Of course the Chief Justice had to submit to the infliction of the interviewer, but as an old hand at the game of cross-examination he was well able to bear his share with a grace. Here is a useful hint for solicitors which he extracted from an American attorney:—

Lord Coleridge: "Pray, Mr. Evarts, how do clients pay their lawyers with you?"

Mr. Evarts: "Well, my lord, they pay a retaining fee, it may be 50 dollars or 50,000."

Lord Coleridge: "Yes! and what does that cover?"

Mr. E.: "Oh! that is simply a retainer. The rest is paid for as the work is done, and according to the work done."

Lord Coleridge: "Yes, Mr. Evarts; and do clients like that?"

Mr. E.: "Not a bit, my lord, not a bit. They generally say: 'I guess, Mr. Evarts, I should like to know how deep down I shall have to go into my breeches pocket to see this business through.'"

Lord Coleridge: "Yes; what do you say then?"

Mr. E.: "Well, my lord, I have invented a formula which I have found answers very well. I say 'sir,' or 'madam,' as the case may be, 'I cannot undertake to say how many judicial errors

I shall be called upon to correct before I obtain for you final justice.' ”

Here is another American reminiscence. The Chicago fire was then recent.

“ I am told, my lord, you think a great deal of what you call your Fire of London. Well, I guess that the conflagration we had in our little village of Chicago made your fire look very small.”

Lord Coleridge blandly replied :

“ Sir, I have every reason to believe that the Great Fire of London was quite as great as the people at that time desired.”

One by one his old friends passed away.

“ Omnes composui. Felices ! Nunc ego resto,”

he writes sadly. The death of Jowett, one of his best and oldest friends, hit him hard. “ He was always,” says Lord Justice Mathew, “ very faithful to those he liked.” He followed them on June 15th, 1894. He might have died with the words of Augustus Cæsar on his lips: “ Have I played my part well ? Plaudite ! ”

LORD COLERIDGE AS A JUDGE.

“ Lord Coleridge,” said Lord Russell, “ was undoubtedly a strong judge ” ; perhaps the epithet should be qualified by adding, “ when he chose to exert himself.” “ I do not think,” Lord Russell goes on, “ he possessed the great synthetical and analytical powers of Sir Alexander Cockburn at his best, nor the vigorous common-sense of Sir William Erle, nor the wide legal erudition of the late Mr. Justice Willes, nor the intimate knowledge of the various branches of commercial law of the late Lord Bramwell, nor the hard-headed logic of Lord Blackburn ; nevertheless, he cannot be said to have lacked any quality essential to a great judge.” Many of his judgments will repay perusal as few modern judgments do.

LEGITIMATE SELFISHNESS.

One of the most characteristic and interesting is that in *Mogul Steamship Company v. McGregor* (59 L. T. Rep. 1 ; 21 Q. B. Div. 544). It goes to the root of our social and commercial system. A number of shipowners trading between China and Europe, with a view to obtaining for themselves a monopoly of

the homeward tea trade, and thereby keeping up the rate of freight, formed themselves into what they euphemistically called a "conference," and offered to such merchants and shippers in China as shipped their tea exclusively in vessels belonging to members of the conference a rebate of 5 per cent. on all freights paid by them. The Mogul Steamship Company—a rival in the trade—was excluded by the ring from all benefits of this association, and, in consequence of such exclusion, sustained damage. Was it an actionable conspiracy to prevent them carrying on their trade? Lord Coleridge said "No," and the House of Lords affirmed his decision. Here are his ethics of the situation: "In the hand-to-hand war of commerce as in the conflict of public life, whether at the Bar or Parliament, in medicine, in engineering (I give examples only), men fight on without much thought of others, except a desire to excel or defeat them. Very lofty souls, like Sir Philip Sidney with his cup of water, will not stoop to take an advantage if they think another wants it more. Our age is not without its Sir Philip Sidneys, but these are counsels of perfection which it would be silly indeed to make the measure of the rough business of the world as pursued by ordinary men of business. The line is in words difficult to draw, but I cannot see that these defendants have in fact passed the line which separates the reasonable and legitimate selfishness of traders from wrong and malice."

THE BOY-EATING CASE.

But there is a limit to legitimate selfishness, and it was reached in *Reg. v. Dudley* (52 L. T. Rep. 107; 14 Q. B. Div. 273). Dudley, Stephens, and Brooks, all able-bodied English seamen, and Parker, an English boy between seventeen and eighteen—the crew of an English yacht—were cast away in an open boat on the high seas 1600 miles from the Cape of Good Hope, with no water and no food except two one-pound tins of turnips. On this and a small turtle which they caught they subsisted for eleven days, and for the next eight days had nothing at all to eat. Their only water was such as they caught in their oilskin caps. Dudley in this desperate situation proposed to Stephens and Brooks that lots should be cast who should be put to death to save the rest, but Brooks refused. Parker meanwhile at the time was lying at the bottom of the boat quite helpless. Dudley and Stephens went to him, and after Dudley had offered a prayer for forgiveness, they put a knife into his throat and killed him then

and there. They lived on the flesh four days, and were then picked up by a vessel. Such a case obviously offered many nice points of casuistry and law with which Lord Coleridge's tastes and training well qualified him to deal. Self-preservation is the first law of nature, but is it also the first law of civil society? Lord Coleridge answered the question unhesitatingly in the negative. Whatever Lord Bacon may have said in the case of two men clinging to a plank, not enough for both, of the right of the one to push the other off, or of the right of a starving man to steal a loaf, the law of England recognises no such justification. It may mitigate the penalty, but it cannot condone the crime. There are times when the citizen must be prepared to face death in the spirit of the Roman officer: "Necesse est ut eam, non ut vivam," and he points out forcibly the practical danger of allowing any such plea—"the tyrant's plea, necessity."

THE LAW OF BLASPHEMY.

As in Parliament Lord Coleridge had vindicated religious equality against the intolerance of tests, so on the Bench he laid down the law of blasphemy in a large and enlightened spirit, moulding it as every great judge moulds the law to the temper of the times in which he lives: (*Reg. v. Ramsay*, 15 Cox C. C. 238; *Reg. v. Bradlaugh*, 15 Cox C. C. 217). In the other cases there may be found many dicta which would make it a blasphemous libel to impugn the truth of Christianity, but they belong to the days when the Nonconformists and Jews were under penal laws and were hardly allowed civil rights. It is not honest errors which the law—properly understood—visits, but the malice of mankind, the wilful intention to insult what others hold sacred. "If that were not so," says the Lord Chief Justice, "we should get into ages and times which, thank God, we do not live in, when people were put to death for opinions and beliefs which now almost all of us believe true."

"INTEREST REIPUBLICÆ UT SIT FINIS LITIIUM."

A cabman while driving was negligently run into by a van. The cabman brought an action for damage to his cab, and recovered judgment (£4 3s.). Afterwards he brought an action for injuries to his person—which had developed themselves later—and was awarded £350 by the jury. Now, it is a well-settled rule of our law that damages resulting from one and the same

cause of action must be assessed and recovered once for all—*nemo debet bis vexari pro eadem causa*. Was this case within the rule? Brett, M.R., and Lord Justice Bowen thought not. The van driver had done one act, and one act only—the driving of the one vehicle negligently against the other; but the collision had inflicted two separate kinds of injury. The Chief Justice could not agree. “To me,” he said, “it seems a subtlety not warranted by law to hold that a man cannot bring two actions if he is injured in his arm and in his leg, but can bring two if, besides his arm and leg being injured, his trousers which contain his leg and his coat sleeve which contains his arm have been torn”: (*Brunsdon v. Humphrey*, 51 L. T. Rep, 529; 14 Q. B. Div. 141, 153). Which was right?

LADIES AND THEIR LUGGAGE.

Here is a warning to ladies—how many there are!—who will leave their luggage in the custody of a porter: (*Hodkinson v. London and North-Western Railway Company*, 14 Q. B. Div. 228). The porter in that case, when told by the lady passenger that she would leave her boxes at the station for a short time and then send for them, replied, in an encouraging tone, “All right, I’ll put them on one side and take care of them.” But it was not all right, for, when the lady returned to claim her boxes, they were missing, and all the consolation the court would give, in dismissing her action against the company, was that the porter might be responsible for the loss.

LORD SELBORNE.

THE quiet country parsonages of England have furnished many illustrious names to the annals of the English Bench. Among them have been some more brilliant, perhaps, but none which will shine with steadier or more enduring lustre than that of Lord Selborne. "There was something in his austere simplicity of manner," as Lord Rosebery said, "which recalled to every onlooker those great lawyers of the Middle Ages who were also great Churchmen." Roundell Palmer Lord Selborne was born on Nov. 27th, 1802, at Mixbury, where his father was rector. The rector, like many other clergymen, had his quiver full; there were eleven children, of whom Lord Selborne was the second.

A MODEL BOY.

"We were, I fear," says Lord Selborne, "more mischievous than we ought to have been." Perhaps they seemed more mischievous than they were in a household regulated with old-fashioned strictness. At all events, one of the worst peccadilloes which he records of himself—*ex uno disce omnia*—was stopping behind to look at a kennelled fox in the inn-yard when the family were posting to the country. Among so many children the youthful Roundell was not missed at first from the post-chaise. Smack went the whip, round went the wheels—till a voice was heard calling out, "Stop, stop, you have left a little boy behind," and the embryo Chancellor was hustled into the family coach amidst a chorus of general objugation. The directions to "Molly" show the home atmosphere. But it is just the best men, the tender-conscienced, the Bunyans, the St. Augustines, the Selbornes that exaggerate the heinousness of their youthful misdoings. Nothing but a model boy would have written of his visits to the British Museum, "I always come away unwillingly, never tired." What volumes it speaks! Sydney Smith tells us



LORD SELBORNE.

(From a photograph by Elliott & Fry.)



that the first spur to his ambition was received from an old gentleman who found him lying under a tree in the playground reading Virgil while the other boys were at cricket. "Clever boy!" he said, patting him on the head; "clever boy! that is the way to conquer the world." In Lord Selborne's case the spur came from his grandmother laying her hand on his head in his tenth year and praying that "I might be a good—I think she also said—a great man." "An odd-looking little boy chewing a pen and making strange faces while his mind was occupied with intense thought"—this is the picture of him at Rugby, where he gained some credit for his verse exercises, and paid the penalty for it by having to do those of others. From Rugby he went to Winchester. The tree of knowledge, as it grew then at that venerable seat of learning, had a rough bark and many thorns; but the *genius loci*—particularly the cathedral and its services—were a powerful influence in the moulding of Palmer's character.

OXFORD AND TRACTARIANISM.

He went to Oxford as a scholar of Trinity at a time when the usually-placid surface of academic life was heaving with the religious excitement of the Tractarian movement. The movement interested him deeply, and the more so that his intimate friend, Frederick Faber, the hymn-writer, was carried away by the strong eddy of Romanism. The wiser Palmer kept his head, thanks to what his brother called an "Evangelical twist" in him and to the poetry of Wordsworth, but throughout his life religious and ecclesiastical questions remained those which moved him the most deeply. Here is a prediction which had a curious fulfilment. In the summer of 1833 he and Tait and two other Oxford men were on a reading party at Seaton in Devonshire, and, like others, were beguiling the intervals of cramming with the usual pleasures of the seaside—picking up shells and lounging on the shore; but they provoked the mighty prophecy from a local bard—and thus it ran:

"What these ingenious youths in time may be
Whose budding powers in embryo we see:
He whom near yonder cliff we see recline,
A mitred prelate may hereafter shine;
That youth who seems exploring Nature's laws,
An ermined judge, may win deserved applause."

"When I was made Chancellor," says Lord Selborne in 1872, "Tait, already Archbishop, reminded me of the verses."

The Church seemed his proper vocation, and had he chosen that career he would undoubtedly have become a learned and blameless bishop; but, at his father's wish, he adopted the Bar, and, with a just estimate of his gifts and powers, he espoused the equity side of the Profession.

THE ARIDITIES OF CONVEYANCING.

It was a *triste* exchange from the "city of the dreaming spires" to Lincoln's Inn—"from the flowers of history, poetry, and philosophy," as he puts it, "to those dry bones of technical systems, and especially to the dull copying-clerk's work and mechanical process of conveyancing;" and dispiriting enough Palmer found it, as others have before and since; but fortunately he had a friend—one H. H. Vaughan—who consoled him by telling him, and truly, that "even in a deed there is a τὸ καλον, and that in time its parts and arrangements would carry a charm." The leading men at the Bar when Roundell Palmer joined it, a few days before Queen Victoria's accession, were Campbell, Pollock, Follett, Rolfe, Sugden, Pemberton Leigh, Knight Bruce, Jacob, James, Wigram, Kindersley, James Parker, Page Wood, and Bethell—a splendid array of talent; but between Chancery and Common Law, Lincoln's Inn and Westminster Hall, there was a great gulf fixed—not of physical separation only, but of principles and procedure. Then, as now, the profits of practice at the Chancery Bar were larger; but then, as now, the Common Law barrister enjoyed more popular fame—the sort of fame summed up in the words, "Digito monstrari et dicier Hic est."

COMMENDATION FROM BARON ALDERSON.

We are not surprised to hear that in Palmer's case, as in that of others, there was the usual sensational incident at starting. He had been briefed in a case of *Knight v. Marjoribanks* to oppose the appointment of a receiver. Two learned leaders had said everything presumably of importance, but had treated the case on the facts; the judicious junior (Palmer) went for the general principle—that the court ought not to interfere with the state of possession before the hearing of a cause without some proof of damage to the property. Baron Alderson privately handed down to Mr. James Freshfield, who was present in court, a few words on a slip of paper commending the part Palmer had

taken in argument, and Freshfield wrote to his father: "From all I can learn, I offer my confident opinion that your son's fortune is in his own power." He was fortunate, too, in gaining the favour of Lord Cottenham, the Chancellor. Palmer was one of the few juniors who were sometimes honoured by invitations to his house, and on at least one occasion—a case of *Rowland v. Morgan* (2 Phill. 764)—"the marked attention," says Lord Selborne, "which he paid to an argument of mine was useful to me with clients"—the clients who in those golden days seem always to have been on the look-out for a promising young barrister. Soon he was doing so well that he was troubled in conscience about still holding his fellowship at Magdalen; but, like Matthew Prior in a similar case, he reflected on the vicissitudes of fortune—that the time might come when he would want it—and resolved to retain the fellowship, but to dedicate the income to the use of the college. In fact, he had in 1846 applied to Lord Lyndhurst for silk—"an audacious thing," he himself calls it, done to keep pace with his rival Rolt, but is not the *μεγαλόψυχος*—according to Aristotle—*ὁ μεγάλων αὐτὸν ἐξιώων, ἀξίος ὄν*. Palmer was certainly one of the leading juniors, and though he did not get silk from Lord Lyndhurst, he did two years afterwards from Lord Cottenham.

AT THE BAR: A SKETCH.

"Those," says a critic, "who remember him at the Bar will recall the tall, slender figure standing immovable, as it were in a pulpit, and uttering in pulpit tones, with no more action than a frequent turning of the head from side to side and an occasional gesture of the arm, intended to draw the attention of the 'dearly-beloved brother' on the Bench, a lengthy discourse, very clearly divided into 'heads,' and concluding with a practical application. He will recall also that seldom, by any chance, were the keen, ferret-like eyes of the speaker directed to the Bench when he was addressing it. While he was pouring forth his carefully-framed arguments, he was investigating out of the corners of his eyes the effect of his discourse on the unrepentant sinners, his opponents within the Bar and in the 'well' of the court, and any sign of surprise or consternation resulted in the particular observation which caused it being diligently pressed and developed." Lord Westbury entertained the highest admiration for his abilities. "If Palmer," he remarked, "could only get rid of

the habit of pursuing a fine train of reasoning on a matter collateral to the main route of his argument he would be perfect."

In private life Roundell Palmer was stiff and reserved in manner, and those who could not see beneath the surface voted him cold and proud. "It was a moot point," says one, "never decided among solicitors, whether Palmer sitting on a sofa in frosty majesty as they entered and waving them to a corner was more unpleasant than Bethell's studied disregard of their presence and existence"; but the truth was that Roundell Palmer was an intensely shy man, and shyness, as is well known, often puts on the defensive armour of reserve as a shield for its sensibility. So far from being cold, Roundell Palmer was a man of strong feeling, and the present writer well remembers the deep emotion with which, at a meeting to start the present Inns of Court Mission, he advocated the cause of the mission and spoke of the debt he owed to many friends in humble life and, not least, to his old clerk. He remembers, too, the delicate deference with which he treated his colleagues when he sat as Chancellor with the Lords Justices at Lincoln's Inn, glancing right and left whenever he had occasion to express an opinion to see if they agreed—a trait not always found in the presiding judge of an Appeal Court. When Benjamin—the great advocate, offended at the behaviour of one of the Law Lords, abruptly closed his book, tied up his papers, and quitted the Bar, it was Lord Selborne who, thinking him ill and worried, wrote him a kind letter to put matters right.

Laura Waldegrave.

A nature like that of Palmer never finds its highest happiness except in domestic life, and just about the time that he was entering Parliament he met at Sir Benjamin Brodie's house at Broom Park, Betchworth, the lady—Laura Waldegrave—who was to be the sunshine of his life. It was not the first time he had seen her. "I had been attracted by her," he says, "when she was almost a child; there was no change in her except the ripeness of womanhood. I looked at her radiant countenance in its simple natural beauty, I remember, as she stood with a prett Venetian ornament of iridescent shells round her hair, with full heart, and I felt how very happy that man would be to whom God might give such a wife." That happiness was to be his. With her for nearly forty years "his life in golden sequenc

ran." Page Wood—Lord Hatherley—was so devoted a husband that he refused the Solicitor-Generalship lest its exacting duties should take him away from the society of his wife. Palmer did not carry it quite so far, but the evenings, except when it was necessary for him to be in his place in the House of Commons, he kept free for his wife; and, the better to enable him to do so, he abandoned the practice which he had until then followed of sitting up late at night over his briefs, and took to early rising instead—for which, he naïvely adds, "I had no natural inclination." In every relation of life, indeed—as husband, father, son, or brother—Lord Selborne was admirable.

A TRACT AND SOME ADVICE FOR PALMER.

While in Penmaenmawr during the Long Vacation of 1858 an incident happened which amused some of his friends. Walking with two of his little girls in their white sun-bonnets down the village street, he was accosted by a benevolent-looking old gentleman. It was Admiral Frederick Vernon Harcourt, whom he had never seen before. The old gentleman held out to him a tract in the Welsh language, saying, "My good man, can you read?" Palmer answered, "Yes, but not Welsh"—"which, I believe," he says, "the tract-distributor understood as little as I did." Report added that the admiral admonished him "not to frequent public-houses." This, however, Palmer alleges is not true. To those who knew Lord Selborne there is something exquisitely humorous in this suggestion. In 1861 Sir William Atherton succeeded to the post of Attorney-General, and Sir Roundell Palmer became Solicitor-General. There was some idea of promoting Palmer, says Mr. Nash in his *Life of Lord Westbury*, to the higher office and leaving Atherton, whose powers were of a more superficial kind, in his former place. It was said that someone remonstrated with the Lord Chancellor—Lord Westbury—on this subject. "Surely you are not going to put Palmer over Atherton's head?" "Certainly not," rejoined Lord Westbury; "I never attempt impossibilities. I did not know that Atherton had a head."

LABORIOUS DAYS.

There is a vulgar ambition, to achieve worldly success; and there is a worthy ambition, to achieve excellence—*αίεν ἀριστεύειν*;

and of this latter kind was Lord Selborne's. It is illustrated in an anecdote narrated of him by Vice-Chancellor Wickens.

Palmer, Wickens, and one or two others were on a reading party at Seaton, near Lyme Regis. One day they amused themselves by jumping over the wooden groins, each trying to take the highest leap. Palmer had never taken interest in athletics, and was out of the running—or, rather, the jumping. Another day the same amusement was resorted to; but, to the surprise of all, Palmer took the highest jump of all. Wickens afterwards heard from the "boots" of the inn that "the gentleman had been up and out at six for some mornings, practising jumping for more than an hour."

So with his briefs. "On all occasions, small and great," says Lord Lindley, "what struck me most was the extraordinary pains he bestowed to master whatever he undertook to do. Juniors were amazed to find at early morning consultations that their leader knew all the contents of a heavy Privy Council brief delivered overnight—involving, perhaps, difficult questions of the old law of Canada—better than they did. He often rose at three in the morning, and sometimes worked two or three days together without going to bed; on one occasion from 2 a.m. on Monday till late on Saturday. "I went to his chambers," says Goldwin Smith, "when he was Attorney-General, on a Wednesday afternoon, and was told by his clerk that I had better not go in as Sir Roundell had not been in bed that week."

Palmer became Attorney-General in Mr. Gladstone's Administration of 1863. Gladstone and he had been friends and contemporaries at Oxford. Both were men of high character, both were scholars, both were ecclesiastically minded, both had literary tastes, both were Liberals. On Mr. Gladstone again acceding to power in 1868 he offered Sir Roundell Palmer the Chancellorship and a peerage.

THE GREAT RENUNCIATION.

The great prize for which all lawyers contend was within his grasp—the bauble dangled before him; but acceptance would have pledged him to the policy of Irish Church disestablishment and he declined the offer—an act of renunciation for conscience sake which won him the respect of all parties in the country—the cynic was wrong, every man has not his price. But virtue was in the end rewarded. Four years later—four busy years, it

the course of which he appeared as counsel for Great Britain at the Geneva Arbitration on the *Alabama* claims—he succeeded Lord Hatherley on the woolsack.

THE PRE-JUDICATURE ACT PERIOD.

His Chancellorship was signalled by that great measure of legal reform, the Judicature Act. Till then, to use Hale's phrase, "what God had joined together"—Common Law and equity—"man had put asunder"—sundered so widely that some, and Lord Eldon among them, believed the separation to be part of the eternal fitness of things. Lord Bowen has well described the state of things. The principles on which the two jurisdictions administered justice were unlike. The remedies they afforded to the suitor were different; their procedure was irreconcilable. They applied diverse rules of right and wrong to the same matters. The Common Law treated as untenable claims and defences which equity allowed, and one side of Westminster Hall gave judgment which the other side restrained a successful party from enforcing. The law had always cherished as its central principle the idea that all questions of fact could best be decided by a jury. Except in cases relating to the possession of land, the relief it gave took, as a rule, the shape of money compensation in the nature rather of debt or damages. The procedure of the Court of Chancery, on the other hand, was little adapted for the determination of controverted issues of fact, and it was constantly compelled to have recourse for that purpose to the assistance of a court of law. The Common Law has no jurisdiction to prevent a threatened injury; could issue no injunctions to hinder it; was incompetent to preserve property intact until the litigation which involved the right to it was decided; had no power of compelling litigants to disclose what documents in their possession threw a light upon the dispute, or to answer interrogatories before the trial. In all such cases the suitor was driven into equity to assist him in the prosecution of a legal claim. The Court of Chancery in its turn sent parties to the law courts wherever a legal right was to be established, when a decision on the construction of an Act of Parliament was to be obtained, a mercantile contract interpreted, a point of commercial law discussed. Suits in Chancery were lost if it turned out at the hearing that the plaintiff instead of filing his bill in equity might have had redress in a law court; just as plaintiffs were nonsuited

at law because they should have rather sued in equity, or because some partnership or trust appeared unexpectedly on the evidence when all was ripe for judgment. Thus the bewildered litigant was driven backwards and forwards, from law to equity, from equity to law. The conflict between the two systems and their respective modes of redress was one which, if it had not been popularly supposed to derive a sanction from the wisdom of our forefathers, might well have been deemed by an impartial observer to be expressly devised for the purpose of producing delay, uncertainty, and untold expense.

FUSION OF LAW AND EQUITY.

To Lord Selborne belongs mainly the credit of ending this anomalous—not to say scandalous—state of things. The division of labour still remains; special subjects are still dealt with by particular branches of the High Court—Chancery, Admiralty, Probate, Commercial, Bankruptcy; but—and this is the essence of the reform—the principles upon which justice is administered in all these branches are now the same. Common Law and Chancery are no longer, in King James's quaint phrase, "crossing and cuffing one another," but co-operand to an end. This union and consolidation of our legal system in one Supreme Court of Judicature was fitly symbolised by the bringing together of the different courts and offices in one splendid edifice—the Royal Courts of Justice—in the year 1882. August was the ceremony of opening. The Queen herself was there with the flower of her realm, and Lord Selborne's address (enshrined in the *Law Reports* for 1882) was worthy of the occasion. *Apropos* of this address there is a story. It was being penned in a committee of the judges, and, with the humility of true greatness, the wearers of the ermine had formulated the phrase, "Conscious as we are of our shortcomings." "Why not," suggested Lord Bowen, "say, 'Conscious as we are of each other's shortcomings'?"

LEGAL EDUCATION.

Fusion of law and equity was not Lord Selborne's only service. He was earnest in the cause of legal education—little less of a scandal than the divided jurisdiction of equity and Common Law. One can imagine the King of Lilliput putting questions to Captain Gulliver as to what was the system of legal education in his country. "Sire," the captain would have

replied, "in our country everyone is presumed to know the law; and the lawyers practise it without having ever learnt it." Till a quarter of a century ago, incredible as it may seem, the only preparation for the Bar—it cannot be called an education—was the process of "pupilising," as Lord Campbell calls it. The legal aspirant went into the chambers of a conveyancer, and afterwards of an equity draftsman or special pleader, to see how business was done. He got what advice he could from his much-occupied senior; he picked up a few more crumbs of elementary knowledge from the pupil-room perhaps, and then he commenced practice, and learnt the business of his profession really and truly, as Lord Selborne said, from practising more than from anything else, and having thus reared a superstructure without foundations, all that could be done afterwards was to underpin it—an operation not more satisfactory or safe in education than in building. This neglect has not only been prejudicial to the practice and administration of the law, but, as Lord Selborne points out, has deprived the country of a most important class—the legists or jurists of the Continent—men who, unembarrassed by the small practical interests of their profession, are enabled to apply themselves exclusively to law as to a science, and to claim by their writings and decisions the reverence of their Profession, not in one country only, but in all countries where such laws are administered; must we not add, alas! in all but in England? Here the jurist, so far from being revered, is a person to be neglected and sneered at as academic. Listen to Lord Melbourne—a typical Philistine—on one of them: "Austin! Oh, a d—d fool! Did you ever read his jurisprudence?" But, if the jurist is still not wanted in England, we have the Council of Legal Education with its scheme of excellent lectures, and we owe the improvement to Lord Selborne's initiative.

RETIREMENT AT BLACKMOOR.

In 1885, though only seventy-three, he resigned office, and spent the remaining ten years of his life in peaceful and happy retirement at Blackmoor, in Hants, his pleasant Tusculan villa. He had always been deeply religious—one of those who, in Keble's words—

"Carry music in their heart,
Through dusky lane and wrangling mart,
Plying their daily task with busier feet
Because their inward souls a secret strain repeat."

His life had always in the vulgar bustle of affairs been elevated and ennobled by an element of ethereal texture—poetry, which found expression in his Book of Praise and his lecture on Wordsworth; and religion and poetry shed their radiance on his declining years. Public affairs, too, continued to possess a keen interest for him, especially where they touched the fortunes of the Church, and he constituted himself the unpaid lawyer of the poor, and spent many precious hours on their behalf. His lighter recreations were whist in an evening and novel-reading. A clever novel he would devour, burning candles to the socket, and waking up with the dawn to go on with it. *Apropos* of this, it was a characteristic trait in him that if he once began a novel, however dull it might be, he must read it to the end. The personal feature, he said, took hold of him, and he could not turn his back on the characters till they were out of the book.

One estimate of him by a master mind is worth recording.

The Selbornes, who were neighbours of Tennyson, were spending the day at Aldworth, and, to please one of the party, Tennyson read to them his "Ode on the Burial of the Duke of Wellington." When he came to the lines

"And as the greatest only are
In his simplicity sublime,"

he paused, and said in a lowered voice to one of Lord Selborne's daughters, pointing to her father: "To that man only in the present time do these lines apply."

He died on May 4th, 1895, full of years and honours.

LORD SELBORNE AS A JUDGE.

Lord Selborne's judgments are among the best that exist. In delivering them it was his habit to review the previous decisions on the subject, carefully analysing each and putting it in its proper place. This critical appreciation of the authorities greatly enhances the value of his judgments to the practitioner as summarising the case law up to date. *Maddison v. Alderson* (49 L. T. Rep. 303; 8 App. Cas. 467) is an example. An old gentleman, possessed of a nice little freehold estate of £137 in Yorkshire, said to his housekeeper: "If you will stop on with me till I die, I will leave you a life estate in my land." The housekeeper did stop on, giving up—so she said—other prospects of establishment in life, and the old gentleman did make a will leaving her a life estate, but unfortunately it was not duly

attested, so the housekeeper had to fall back on an alleged contract. Now, the wisdom of the Legislature has provided in the Statute of Frauds that certain important classes of contract shall be in writing, not resting on the "frail testimony of memory" alone, and a contract for service which may last more than a year is one of such contracts. The contract is not void under the statute; it is only not enforceable. But suppose the contract has been part performed—the service rendered or purchase-money paid; it would be the height of injustice for the court then to refuse relief—it would be making the statute an instrument of fraud. In such cases, therefore, the court enforces the contract, not as such, but by charging the defendant upon the equities arising out of the situation. This, at least, is Lord Selborne's theory of this very puzzling position; but, anyway, it is indispensable to the granting of such relief that the part performance should be "unequivocally referable" to the contract. Was, then, the housekeeper's continuance in service "unequivocally referable" to the promise? The court said No; and, though it sympathised with her disappointment, it could not strain the law in her favour. People, in fact, must learn the importance which the law attaches in certain cases to writing.

UNCONSCIONABLE BARGAINS—MARRIAGE WITH A DECEASED WIFE'S SISTER.

The prodigal is to be found in every age and every clime, and wherever he appears there appears, too, the money-lender, following him like his shadow, ready to pander to his gross extravagances and take his *post obit* bonds. There is hardly any older head of equity in England than that which relieves against "catching" bargains with heirs, reversioners, or expectants in the life of the father. The prodigal need not be an infant. It is the unconscionableness of the bargain which founds the jurisdiction. *Earl of Aylesford v. Morris* (28 L. T. Rep. 541; 4 Ch. App. 484) was a case of this kind. This young nobleman, who had just come of age, was heir to estates worth £20,000 a year, but, having only a present allowance of £500 and extravagant habits, he naturally took to borrowing, and, of course, Mr. Premium had to get the money from a friend, "an unconscionable dog," so that, by taking bills at short dates with large discount and enormous interest, the debtor was kept under a perpetual pressure, which fell upon him as often as his bills

arrived at maturity. This is the sort of thing which, as Lord Selborne said, "blasts the fortunes of families in the bud," and equity casts on the lender the onus of justifying the righteousness of such usury. If he fails to do so the court gives him, like Shylock, "merely justice and his bond"—in other words, his principal and interest at 5 per cent.—and this was what it did in *Aylesford v. Morris*. The equitable principle has now crystallised in statutory form in the Money-lenders Act of 1900.

A widower of mature age went through the ceremony of marriage with his sister-in-law, and, by way of making a provision for her, he transferred shares and stock to trustees. He died, and the lady went on enjoying the benefit of the trust for a great many years until the executor of the husband bethought him of impeaching the settlement as founded on an illegal consideration—an agreement for future cohabitation—and void (*Ayerst v. Jenkins*, 29 L. T. Rep. 126; L. Rep. 16 Eq. 275). There were no creditors, and therefore the executor was in no better position than the husband himself would have been, coming to set aside the deed. Could he—the husband—have done it? It was argued that he could, because it is the duty of the court to discourage, on grounds of public policy, fictitious marriages between persons within the prohibited degrees of consanguinity or affinity, but Lord Selborne declined to recognise any such right of moral censorship. "The policy of the law," he says, "is no doubt opposed to all immorality, and to all unlawful cohabitation, but the equitable doctrines applicable to such cases do not depend upon, and do not vary with, the species or degree of immorality in each particular case. The law matrimonial contents itself with making marriage between persons standing in certain relations to each other absolutely impossible without attaching special penalties to the abuse by those persons of religious or other forms or ceremonies"; in other words, a gift to a sister-in-law is none the less good and irrevocable because the donor has tried to make her his wife. The case illustrates how carefully Lord Selborne kept his judicial judgment from being warped by personal sentiment.





LORD JUSTICE CHITTY.

(From a photograph by Elliott & Fry.)

LORD JUSTICE CHITTY.

WHEN the chapel bell of Lincoln's Inn tolled out on Feb. 15th, 1899, the tidings of the death of that eminent bencher and judge, Lord Justice Chitty, there must have mingled in the mind of many besides the writer, with the deep sense of personal loss, the thought what vast learning, industriously hived up during long years—may we not say, too, inherited?—had vanished with the great lawyer. The feat of the chess player who can play a dozen games simultaneously blindfold by visualising the board, the pieces, and their complicated bearings, is marvellous. So is the art of the *littérateur* who, like Mr. Andrew Lang, can sit down at a moment's notice and produce a sparkling and highly-finished article on any given topic under the sun. Marvellous, too, is the dialectical skill—the improvisatory power—of the practised debater who, at the close of a long and exhausting debate, can seize point after point of the adversary's attack and flash back logic and wit, sarcasm and invective, fusing them into one luminous and coherent whole. But are any of these more wonderful than the faculty of the trained judicial mind which can retain—pigeon-holed in its recesses—literally tens of thousands of cases bearing on the nicest and subtlest points arising out of wills, settlements, mortgages, sales of land, partnerships, *hoc genus omne*? Such a mind was that of Lord Justice Chitty—a storehouse of case law and legal learning. Law ran in his veins, for his father was the Mr. Thomas Chitty, the famous special pleader, the editor of Chitty's Practice, in whose chambers Lord Cairns, Lord O'Hagan, Lord Hannen, Lord Herschell, Mr. Justice Quain, Mr. Justice Wills, Lord Justice Mathew, Lord Justice A. L. Smith, and many more

celebrities received their training. His distinguished son was born in 1828, and was educated at Eton and Oxford.

A PENTATHLETE.

The Bar has reckoned many athletes among its ranks, but never a more notable one than Joseph Chitty. At Eton he was captain of the eleven and wicket-keeper for four seasons. "When Aitken and Blore," says Mr. J. E. Wolverton, "were the bowlers of the Eton eleven, and Weatfield and 'Sam' Deacon were mighty wielders of the bat, 'Joe' Chitty kept wicket, and was admittedly the first amateur wicket-keeper of his day. To see him crouched close behind the wicket, with legs wide apart (there were long-stops in those days, and the wicket-keeper stood close in) and springing with the agility of a cat, now here, now there, was a thing to see and not to forget. Indeed, I remember to have heard that Box, the champion professional wicket-keeper of the day, on seeing Chitty one day in a match on 'Upper Club,' dolefully shook his head, muttering, 'Ah! I can't come up to that.' On another occasion, such was the lightning quickness with which he stumped the batsman that the whole field, including even the umpire, believed the man to have been bowled." At Oxford he played against Cambridge for two years—1848 and 1849—and also achieved a unique reputation as an oarsman. He rowed 2 in the losing boat of 1850, 4 in the winning boat of 1851, and stroke in the winning boat of 1852. He and Meade King, who rowed 7 in the 1852 crew, were regarded as the best stroke and 7 who ever sat in a boat. For twenty-four years—till 1881—he kept up his connection with the race and continued to act as umpire. Nor were these triumphs in the cricket field and on the river purchased at the expense of honours in the schools. He took a first in Greats, won the Vinerian Law Scholarship, and was elected a Fellow of Exeter. With such a record for scholarship and athletics, with a name already famous at the Bar, gifted with untiring industry and genial manners, his prospects seemed exceptionally bright, yet his success at the Bar was far from phenomenal at starting. He won his way slowly by sterling merit.

Nothing can be more uneventful than the life of a busy Chancery practitioner, or more uninteresting to the outside world. It is seldom, very seldom, that the *cause célèbre* comes his way. Petition day and motion day, short causes and

adjourned summonses and further considerations, succeed one another with monotonous regularity. Even the Chancery action, or rather the suit in Chitty's early professional life, was not enlivened as it now is by the oral examination of witnesses, for it was tried on affidavit evidence.

THE INGREDIENTS OF HAPPINESS.

But happiness, as we know from Aristotle, consists in a congenial intellectual occupation combined with a prosperous environment (not merely the cynic's tub), and this Chitty had. He loved the law and the problems it suggested; indeed, his love of it was the source of what may be considered his one judicial defect—he could not refrain from hunting the trail of an interesting "point" if it crossed his path. The environment—the setting—he found in his home in a happy marriage with a daughter of Chief Baron Pollock. For so successful a junior, he was rather long—sixteen years from his call—in taking silk; but when he did, his practice increased by "leaps and bounds."

AT THE ROLLS.

Report said that on motion day at the Rolls forty briefs were once piled up before him. The present writer, then a law student and a frequent attendant at the Rolls—there was no better place to learn law than Jessel's court—well remembers the awestruck tone in which a country solicitor's clerk asked, "Is that the great Mr. Chitty?" He and Horace Davey and Ince between them swept the board, though there were plenty of able men then at the Rolls. Wonderful as was his power of work, it was taxed to the uttermost by such a practice carried on under a judge so rapid as Jessel. "Yet, even in the throng and press and worry of his work as leader at the Rolls, he was never," says Lord Macnaghten, "irritable or impatient. There was always a pleasant word for his junior and a cheery answer for his antagonist. Nothing ever put him out. He had the sweetest temper of any man I ever came across."

"SUA CUIQUE VOLUPTAS."

He was not without his recreations—the *mens sana* is not to be had without them; and the chief of these recreations was lawn tennis. Of this heaven-sent game he was an ardent devotee from its commencement; it was *par excellence* his holiday pastime.

Appropos of this, there is a little story illustrating how myths grow. The day after his appointment to the Bench was announced, he was giving away the prizes at a small tennis meeting in the country, and, alluding to his appointment, he said that he was glad to think that one of the things he would *not* have to give up was lawn tennis. Unfortunately the reporter on the occasion was an amateur, and the next morning there appeared in a daily paper a report in which the new judge was made to say he regretted he would now have to give up lawn tennis, and forthwith leaders appeared in the *Standard* and *Daily Telegraph* commenting on the absurdity of a judge thinking so much of his dignity. *Punch* took it up too, and chaffed the learned judge, in some verses ending—

“Your health, Justice Chitty, athletic, wise, witty :
To turn up your tennis no doubt is a bother ;
But if you don't serve in one court—more's the pity :
At least, you will rule in another.”

It was characteristic of him that he never took the trouble to correct the mistake.

The Greek ideal of education was *γυμναστική, διανοητική, μουσική*. The athletic and the intellectual were certainly not lacking in Chitty, and he completed the cycle of culture with music. He had lost the forefinger of his right hand, and it disabled him for various pursuits—among others for shooting and playing the piano ; but he took up the violin, and was no mean performer in the quartette.

“Chitty's Band” was well known among lawyers ; and, as if all this was not enough—*militavit non sine gloria*—becoming a major in the Inns of Court Volunteers.

GOING CIRCUIT.

When Chitty was raised to the Bench, the Judicature Act had not long been in operation, and the ill-advised policy still continued, not, indeed, of appointing equity lawyers Common Law judges, but of sending the Chancery judges circuit. Poor Mr. Justice Pearson, for instance, who had never addressed a jury or cross-examined a witness, might very well plead *non omni-
possumus omnes* when he found himself sent to try *Nisi Prius* actions at assizes and preside at criminal trials. In his embarrassment, he turned to Lord Bowen for advice as to what circuit he should choose. “Choose the Northern,” said Bowen. “The business on it is the heaviest, but it has, for that very reason, the

strongest Bar." Mr. Justice Pearson took the advice, and had reason to be very grateful for it.

SIR CHARLES RUSSELL'S TRIBUTE.

When Mr. Justice Chitty's turn came to go circuit he, too, chose the Northern and *à propos* of it Lord Macnaghten has given us an interesting reminiscence. He (Lord Macnaghten), then a Chancery Q.C., was standing below the Bar of the House of Commons, waiting the result of a tedious division. To him came up the leader of the Northern Circuit. "I have just returned from circuit," he said. "Your friend Chitty has done his work admirably. It could not have been done better. It was most admirable. I could not have believed that an equity judge could have tried *Nisi Prius* as if he had been brought up to it. And he has such a knowledge of Common Law. And do you know," he added, with a smile, "I got into a slight collision with him one day at Liverpool. It was quite my fault. He behaved with perfect temper and dignity. I was wrong, and he was right. And I tried to tell him so, but then he stopped me at once before I could say what I wanted." "It may seem," adds Lord Macnaghten, "a trivial story, but it was a great pleasure to hear it at the time. And the hearer may be pardoned for doubting to this day whether it was more creditable to the strength and character of the judge or to the generosity of the very great but perhaps somewhat masterful advocate who is now Chief Justice of England" (the late Lord Russell of Killowen).

WIT IN CHANCERY.

Lord Bacon says that judges ought to be rather wise than witty, but it is not to any such honourable self-restraint that the dulness of Chancery is set down—rather to something mephitic in the atmosphere of a Chancery Court, the pervading dreariness of administration suits, trusts, mortgages, settlements, *hoc genus omne*, killing to the sense of humour, and waging "immortal war with wit."

This, like other popular notions about Chancery, is delusive. The truth seems to be that Lady Equity suffers here by contrast with my Lord Common Law. The wit of the Common Law courts—the wit of the typical *Nisi Prius* case—is popular, broad, garish. The lambent wit which irradiates, fitfully it may be, the Chancery Courts is refined, technical, esoteric. When a

learned vice-chancellor, addressing counsel for the plaintiff, observed, "Mr. Gammon, you don't come into court with clean hands," and when counsel promptly replied, "How can I have clean hands, my lord, when I am always handling Coke and Blackstone?"—what avails this little sally to one ignorant of the equitable doctrine of "clean hands"? So when Lord Justice Knight Bruce, on the hearing of an administration suit, playfully remarked, "The estate will be distributed in the usual way among the solicitors," here was essentially a Chancery joke, appealing peculiarly to the Chancery practitioner cognisant of the true order of precedence in legal matters—costs first, then practice, merits last. Lord Westbury's best things belong to Chancery, so do those of Lord Justice Knight Bruce, the prince of judicial wits, Mr. Justice Maule alone excepted.

Mr. Justice Chitty helped materially to uphold the credit of Chancery in this respect. A portion of the ceiling of his court once gave way and fell in front of his desk with a crash. "Fiat justitia ruat cælum" was the ready mirth-provoking comment. On another occasion a bill of sale case was before him. It was being argued with great pertinacity by a certain well-known counsel, Mr. O., learned in the law of "contempt," and the patience of the court was being severely tried, but still Mr. O. persevered. "I will now proceed, my Lord," he said, "to address myself to the furniture." "You have been doing that for some time, Mr. O.," replied the judge, with a smile. It reminds one of Lord Ellenborough's retorts to counsel on another occasion. "My Lord," he said, "I will now, if your Lordship pleases, proceed to my next point." "Sir," said Lord Ellenborough, "we sit here not to court but to endure argument." There is another version of the furniture story. Mr. O., according to this, had a way of looking behind him at the back benches of the court, especially when he was saying unpleasant things to the court, and this peculiarity of his prompted the remark; but this prose version surely spoils the story. It reminds us of Herodotus's account of the man who swam from Sestos to Abydos. He records the feat, and then naïvely adds, "But some say he went in a boat."

POPULARITY.

He was as popular with solicitors as with the Bar. He always looked gently on any slip that was not the result of incompetence or gross negligence. One day an action in his list

suddenly collapsed, and, on the next being called, the learned counsel who had to open it said that the solicitor instructing him was temporarily absent from the court, and he asked that the next case in the paper might be taken. The judge looked serious. "It has never been the practice of this court to wait for solicitors," he said, "but"—and here he smiled—"the registrar will call the next case."

After sixteen years' service as a judge of first instance he was raised—in 1897—to the Court of Appeal. He ought to have been there long before, could vacancies be created for deserving judges. As it was, he lived only two years to adorn his new sphere. How much he was loved and respected, how deeply his loss was deplored, was made evident at the memorial service held at Lincoln's Inn, when Inigo Jones's usually quiet chapel was filled to overflowing with the most eminent members of the Bench and Bar.

Epitaphs are, for the most, dull and pompous platitudes—not over veracious; but that on the memorial tablet to Lord Justice Chitty in Eton College, written by Dr. Hornby, is worth quoting—it sums up so well his character and varied accomplishments.

AN EPITAPH: JOSEPHUS GUILIELMUS CHITTY.

Ex judicibus provocationum causâ constitutis.
 Et ex secretis Regiæ Majestatis consiliis,
 Animi constantiâ, integritate vitæ
 Prope ex pueritia insignis.
 Sive litterarum studiis incumberet,
 Sive ludis campestribus aut aquaticis interesset,
 In omni fere certamine primas tulit :
 Nec minus in quotidiano vitæ usu
 Quæcunque justa sunt, quæcunque sancta,
 Quæcunque amabilia,
 Exemplo et moribus illustrans.
 Strenuâ quâdam neque ingrâtâ auctoritate
 Ut nemo fere alius æqualibus suadebat :
 Postea in negotiis forensibus
 Multa cum laude versatus :
 Dein crescente fama et existimatione
 Judex, doctus, sagax, indefessus,
 De republicâ civis optime meruit :
 Privatos suos sibi magis magisque
 Summa necessitudine devinxit.

CHITTY AS A JUDGE.

One who knew him well, speaking of his legal acquirements, said, "He knew law. Many of us have, as it were, a banker's balance of knowledge at our libraries if we are given time to go and draw upon it; but Chitty's knowledge was ready money." This is a quality of high value in a judge, obliged as he is to dispose rapidly, both in court and chambers, of a number of applications. But Chitty had more than this readiness of legal knowledge; he had a sound judgment—the sagacity which sees the reason of the rule through the technicalities which have overgrown it.

THE SETTLED LAND ACTS.

Perhaps the best illustration is to be found in his administration of the Settled Land Acts, the principal of which, the Settled Land Act, 1882, came into operation almost coincidentally with Chitty's elevation to the Bench. This Act embodied the greatest and most revolutionary change in the whole history of our law of settlement and real property. A period of agricultural depression, as Lord Macnaghten said in the *Aylesbury* case, which showed no sign of abatement, had given rise to a popular outcry against settlements, and the problem was how to relieve settled land from the mischief which strict settlements undoubtedly did in some cases produce without doing away with them altogether. The paramount object of the Legislature was the well-being of the settled land; it regarded—it regards—the welfare of all connected with it—the interests of the tenantry as well as those of the persons entitled under the settlement. A sale of heirlooms, for instance, may seriously disturb those interests. A remainderman, who would have been absolute owner of heirlooms if there had been no sale, may find the heirlooms sold and the purchase money applied in paying off incumbrances or making improvements on the settled land without any special reservation in his favour. Still, the Act authorises the sale, but it intrusts the power of sanctioning the sale to the court alone as being likely to take a broader and more independent view than the trustees of the settlement. It is a delicate jurisdiction this selling of historic family pictures, plate, and diamonds, blue or otherwise, for the good of all concerned; and no judge did more to interpret the policy of the Act in a wise and liberal spirit than Mr. Justice Chitty. Profoundly versed in the law of real pro-

perty settlements, yet in sympathy with necessary changes, he was eminently qualified to aid in grafting the new system on the old. *Earl of Radnor's Trusts* (63 L. T. Rep. 191; 45 Ch. Div. 402), *Duke of Marlborough's Settlement* (54 L. T. Rep. 914; 30 Ch. Div. 127), *Re Lord Gerard's Settled Estate* (69 L. T. Rep. 393; (1893) 3 Ch. 252), and *Re Gaskell's Settled Estates* (70 L. T. Rep. 554; (1894) 1 Ch. 485) are but a few of the cases which witness to the good sense with which he exercised his judicial discretion.

THE PREHISTORIC BOAT.

The lord of the manor of Brigg in Lincolnshire demised land to a gas company for ninety-nine years to erect a gasometer, with a reservation to the lessor of all mines and minerals. When the company came to excavate for the foundations of its works, it came upon an ancient, prehistoric ship or boat embedded deep in the clay, a few yards from the river Ancholme, 45ft. long, and hollowed out of a large oak tree. This interesting "find" the lessor naturally wanted to have, and the company as naturally wanted to keep. Here were some nice points as the lawyer sees. Was the relic a mineral? It was not petrified or fossilised, but it might come within the wide definition of *Heat v. Gill*, "anything to be got from under the earth for profit"; or was it a sort of subterranean fixture—*plantatum solo solo cedens*—or was it a chattel? The company argued that it was like a "dotard" or fallen tree, or, in the alternative, that it was "spoil" from the works, and as such they might keep it or dispose of it; but Mr. Justice Chitty, in a judgment which leaves nothing to be desired, awarded it to the lessor. The boat was, in his view, an abandoned chattel in the land of the lessor none the less his that he knew nothing about it, and it did not pass by the demise, a lease being only a contract for the possession of and profits of the land and giving no implied licence to dispose of such an antiquarian treasure trove.

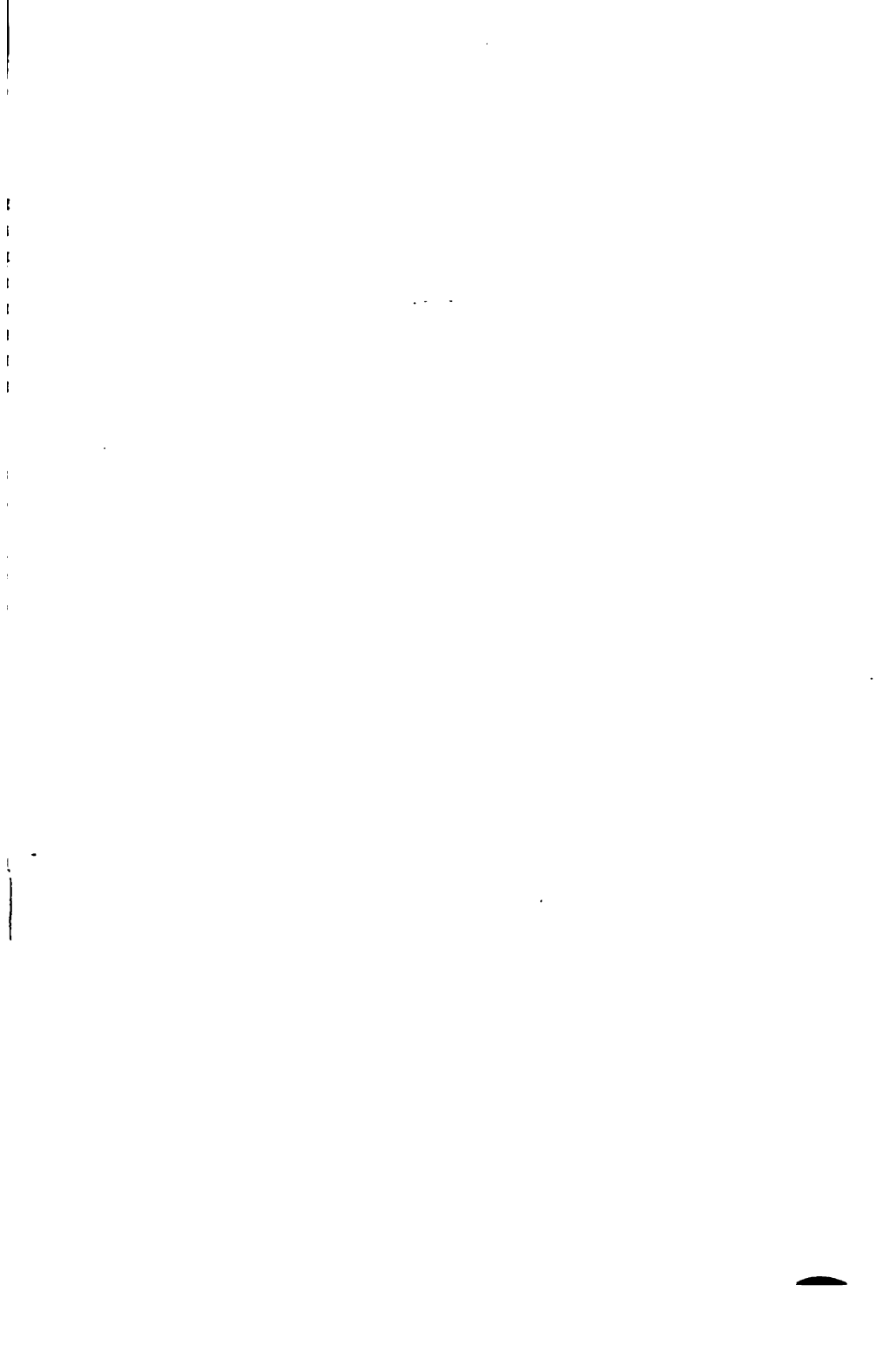
THE RIVAL ROUNDABOUTS.

Kant's criterion of social conduct was, "Ask yourself what would be the result if everybody did the same thing." The defendant in *Lambton v. Mellish* (71 L. T. Rep. 385; (1894) 3 Ch. 163) would fain have ignored this salutary rule of conduct. He kept his steam roundabout going night and day with organ accompaniment, and never asked himself the Kantian question

what would be the effect if a rival steam roundabout and organ were kept going in the same way night and day. The effect, in fact, on the plaintiff, hemmed in between the two, was, as might be expected, "maddening." Mr. Justice Chitty's exposition of the law was quite in harmony with the formula of the German philosopher—that is to say, where acts collectively constitute a nuisance each contributor is liable, though what he does, taken alone, would not amount to a nuisance. Two rights may make a wrong.

MARRIED WOMEN AND THE ANTICIPATION FETTER.

No doubt a time will come when the restraint on anticipation by a married woman will survive only as a curious relic of the subjection of women in a barbarous age, like the ducking stool or the gossip's bridle; but at present it still has its uses, not only in preventing irresistible Mr. Mantalinis from squandering their wives' fortunes, but also in saving married women from themselves—from their own extravagance. "What they do," said Mr. Justice Chitty, "is, they involve themselves in difficulties and then make piteous affidavits (*Re Pollard's Settlement*, 75 L. T. Rep. 116; (1896) 1 Ch. 901) asking the court to remove the fetter under the power in the Conveyancing Act." The particular married woman who elicited this remark from the learned judge must be admitted to have been a disgrace "even to her own sex," as Serjeant Arabin would have said, for, not contented with twice getting help from the court, she had gone on to borrow £500 from a money-lender, and got her stepfather, an old clergyman, to go surety; but, in spite of "piteous affidavits" and an execution at the rectory, Mr. Justice Chitty stood properly firm. The "benefit of the married woman," which is the foundation of the jurisdiction, is a phrase of large meaning; but married women had better take notice that the court does not regard it as being for their "benefit" to relieve them against the consequences of their own or their husband's extravagance.





LORD ESHER, M.R.

LORD ESHER.

WATERLOO had only been fought a few weeks: the allies were still in Paris when William Baliol Brett was ushered into the world at Ranelagh, Chelsea, the site of those gardens so famous in fashionable annals. Doubtless it was this early association with "silver streaming" Thames which helped to give him his aquatic tastes, and Westminster School added a further stimulus. Boating was then a favourite recreation of the Westminster scholars, and Serle's boating-house on the Surrey side of the water, where now St. Thomas' Hospital fronts the river with its splendid pile of buildings, a regular resort of theirs. It was as an oarsman that Brett first won renown.

AN OLD BLUE.

The annual boat-race between Oxford and Cambridge was first instituted while he was at Cambridge (Caius College) in 1839. It was rowed in "tubs," the course being from Westminster to Putney, and "Beauty" Brett—that was his sobriquet—rowed 7 in the winning eight. Fifty years later, as Master of the Rolls, he presided, hale and hearty, at the dinner to the crews, and told the story how there was a "bump supper" to celebrate the headship of his college boat on the river, and how, as he turned into the street to communicate the triumphs of his boat to the passers-by, the first man on whom he bestowed the fervour of his congratulations happened unfortunately to be the proctor. He at once pointed out to that dignitary the extraordinary nature of the occasion, and emphasised the fact that the proctor was the last person he had wished to meet. The proctor was human, and he was softened. "I think we need say no more about it, Mr. Brett," he said. But Brett's ambition was not confined to fame as an oarsman. As he candidly told the Bar

in his valedictory address, he had made up his mind from the beginning that he would be a judge, and a judge he became.

START AT THE BAR.

Competition at the Bar was not then what it is now—the number of counsel at the Bar when young Brett was called was only 2800—a third of what it is now—and Brett had just the qualities calculated to make a good impression on attorneys—a vigorous, masterful personality, plenty of self-confidence, a pretty wit, and the aforesaid determination to get on. He chose the Northern Circuit—in itself a bold step, as that circuit is generally credited with having the strongest Bar of all the circuits—was known as a jovial and popular member of the circuit mess, and was soon in request in shipping and commercial cases at the Liverpool Court of Passage and in London. To the last, as someone has said, he dealt with a bill of lading with a peculiar relish. He knew the world well, too, and saw shrewdly through men and motives. “I recollect once acting,” he said, “as counsel at Liverpool in a case where some important Liverpool people were concerned. They said to me: ‘We are defending this case on principle.’ I said: ‘If that is so, I think I know a point of law—a miserable point of law—on which the case for the other side could be upset. Of course, you will not take advantage of it if you are fighting a principle.’ They said: ‘Well, we should like to win’; and I said: ‘Now I know exactly what you mean by saying you are defending on principle.’”

PARLIAMENTARY VENTURES AND THE BENCH.

With the same boldness with which he chose his circuit he challenged the seat of the redoubtable Richard Cobden, in the character of a high Tory—a hopeless contest, of course, politically, but, professionally, a useful advertisement. His next tilt in the political arena served even better to bring him into notoriety. He wooed the constituency of the quaint little fishing village of Helston, in Cornwall, a close borough. The voting resulted in a tie, and after polling-hours the mayor gave his casting-vote in favour of Brett's opponent. This, of course, was a gross irregularity, and for it the mayor was summoned to appear at the Bar of the House of Commons. The sitting member was unseated on petition in favour of Brett, and for a time the eyes of the world were fixed upon the little Cornish borough.

Not long after Brett's entry into Parliament Mr. Disraeli was wrestling with the subject of the "compound householder," and Brett brought his knowledge as a revising barrister to the aid of the Government. He had his reward when a vacancy occurred among the law officers by Sir Jasper Selwyn's promotion to the Bench, and he became Solicitor-General, with Sir John Karlake as Attorney-General, and, on a vacancy occurring on the Bench of the old Court of Common Pleas, he was offered and accepted the appointment. A puisne judgeship has usually been deemed somewhat below the pretensions of a Solicitor-General; but it was the realisation of Brett's long-cherished hopes, and he quickly proved that in aspiring to the Bench he had not misjudged his natural aptitude. He was a strong and rapid judge, and showed to special advantage at *Nisi Prius* and in criminal cases.

THE GAS STOKERS' CONSPIRACY.

A case which attracted a great deal of attention shortly after his elevation to the Bench was his trial of the gas stokers for conspiracy. It was the old story—a unionist employé dismissed for misconduct and replaced by a non-unionist, and a consequent refusal by the unionist men to go on working. The result of the strike might have been most serious—might have plunged the metropolis in total darkness for hours—and a prosecution for conspiracy, in which the present Lord Chancellor (then Mr. Hardinge Giffard) led for the Crown, was instituted against certain of the strikers. Mr. Justice Brett summed up the case very lucidly to the jury, and the jury brought in a verdict of guilty, with a recommendation to mercy on the ground that the men had been "misled." Mr. Justice Brett disregarded the recommendation, and sentenced the men to twelve months' imprisonment. "I cannot doubt," he said in passing sentence, "that the obvious result was great danger to the public of this metropolis; that that danger was present to your minds; and that, acting upon the knowledge of the effect you thought it would have upon your masters' minds, you entered into this conspiracy—a wicked and dangerous conspiracy—in order to force your masters to follow your will." The sentence created a great hubbub among the partisans of labour. It was denounced as "savagely cruel," "vindictive," "unjust and unprecedented," and there were the usual meetings to express sympathy with the

victims; but, if crimes are to be punished as they tend to public mischief, who shall say that the sentence was excessive?

THE ETHICS OF PUNISHMENT.

Another sensational case which came before him shortly afterwards was that of Colonel Valentine Baker, and, oddly enough, in this case it was for over-leniency in the sentence passed that he was attacked. The outrage was, in the judge's own words, "as bad as such a crime could possibly be"; there was "no palliation." The punishment awarded was a fine of £500 and twelve months' imprisonment as a "misdemeanant of the first division," who, it will be remembered, is not to be deemed a "criminal prisoner" within the meaning of the Prisons Act, 1863. Of course, the outcry was raised of "one law for the rich and another for the poor"; but who, again, is prepared to fit the punishment exactly to the crime? As Mr. Justice Brett said: "Hard labour which to a dock labourer would be merely irksome would to the *habitué* of a London club be simply torture"; and even this severity of physical punishment is, after all, only a secondary consideration. The real sting of the punishment for such a man is the disgrace—deep, poignant, indelible—which a criminal conviction carries with it.

A correspondent of the *Law Times*, under the signature of "S.," quotes two cases from his own experience which illustrate admirably how well the judge knew when to be lenient and when to be severe:—

"It was," he says, "I think, the first circuit in which his Lordship officiated as a judge of assize, and, being for that year under-sheriff of the county, I was sitting at his side on the bench. A party of men (fourteen or fifteen in number) were arraigned for a riot, they having in a violent way lent themselves to the support of a pseudo-Countess of Derwentwater (herself subsequently tried and convicted), who was laying claim to considerable estates in the county of Northumberland and elsewhere. All the defendants but one were represented by Mr. Campbell Foster as their counsel, and pleaded not guilty; but one of them, a country auctioneer, who had been 'the countess's' henchman, while also pleading not guilty, disdained legal help, and fustily conducted his own case.

"The trial had proceeded a very short way, when the judge, leaning over to Mr. Campbell Foster, said to him, *sotto voce*,

' Mr. Campbell Foster, don't you think your clients might withdraw their pleas of not guilty and leave me to deal with the case?' Counsel understood the hint, but said he had no authority to act for the auctioneer. The judge then suggested that it might be represented to that worthy that he ought not to stand out against the wishes of the other defendants, and the result was that all of them withdrew their pleas and threw themselves on the mercy of the court. The judge then addressed them in words which I have never forgotten: ' Now, what I am going to say at the outset doesn't apply to you (the auctioneer). I intend to deal with you by yourself. It is clear to me that you other men have been misled, and, out of a kindly feeling for a woman who, you were told, was being kept out of her rights, you were guilty of disorderly and violent conduct. You were very silly to let a man like that (pointing to the auctioneer) prompt you to break the law, for you may be sure that in this land of ours right always in the end prevails. But you were not seeking anything for yourselves, and so I am going to let you go upon your own recognisances to appear to receive judgment hereafter if called upon. But, recollect, if there is any recurrence of this violence you will be severely dealt with. And now (addressing the auctioneer) I have to deal with you. See what a scrape you have got these poor men into. I suppose you think yourself a clever fellow; and you ought to know better, and I have been rather puzzled what to do with you.' (Here the auctioneer broke down and cried out, ' Be merciful to me, my Lord!'). ' Ah, well,' continued the judge, laughing, ' I don't think you meant to be a criminal, and I do think you are as great a fool as the other men, so you may go as they do.'

" The effect was electrical. The auctioneer blurted out, ' Oh, thank you, my Lord!' and his co-defendants laughed hilariously; but there was no more disorder on the ' countess's' behalf, and the auctioneer subsided into obscurity and unimportance.

" The other case involved a charge against a young man who had been a clerk in a bank, and, while in that capacity, had abstracted from the safe a bag of silver coin representing a value of £5—or, it might be, £10. The theft had not been discovered before the clerk, a year or so afterwards, quitted his employment in the bank, and he subsequently wrote to the directors acknowledging what he had done, with the praiseworthy object of sheltering the

other clerks from the suspicion that otherwise might have attached to them, and offering restitution.

"The directors had no choice but to prosecute, and on his trial the clerk pleaded guilty, the prosecution recommending him to mercy.

"The judge sat for a few moments before passing sentence, evidently in deep thought, and then addressed the unhappy culprit to this effect: 'You have pleaded guilty to a grave and disgraceful breach of trust. You were in a confidential position, which you abused, and it is only by an accident that your theft was not detected before you confessed it. Your penitence is, I hope, sincere, but your theft might have caused incalculable distress and suffering to several innocent fellow-clerks, and in a commercial country like this it cannot be too widely known that a breach of faith and honesty such as you committed cannot be obliterated by subsequent confession. I feel bound, therefore, to pass on you a terrible sentence, and that is five years' penal servitude.'

"I saw the tears coursing down the judge's cheeks as he said this."

THE "NOBLE ART."

Another matter in which as a judge Brett exhibited his independence, and came in for some sharp criticism in consequence, was his attitude towards fighting.

The question is one on which judges have differed widely. In the year 1828, during the summer assizes, two cases of killing by prize-fighting came before two very remarkable judges on different circuits. One of the judges was Sir John Alan Park, and he declared that if a case of killing came before him and the prisoner was convicted, he would leave the convict "to be hanged by the neck." The other judge was Sir William Draper Best, who admired the pugilistic art, and he declared that so long as that way of settling differences was predominant we should never hear of stabbing with the knife. These judicial dicta mark two well-defined tendencies in the Anglo-Saxon character—the one affirming the sacredness of a man's person, the other combative or sporting. The Common Law of England—which is the reflection of the national temper—exhibits its characteristic good sense in the reconciling of these antagonistic instincts. It allows what old Izaak Walton would call "honest

pastimes," though attended with risk to life and limb. It prohibits fighting, whether in the ring or in the street, or anywhere else. "Nothing can be clearer," as Mr. Justice Hawkins said in *Reg. v. Coney* (46 L. T. Rep. 314; 8 Q. B. Div. 553), "than that every fight in which the object and intent of the combatant is to subdue the other by violent blows is or has a direct tendency to a breach of the peace"; and no consent can in such a case render the contest lawful or destroy the right of the Crown to protect the public and keep the peace, for a man cannot agree to take the risks of disablement or death.

Mr. Justice Brett in dealing with the question divided fighting into three categories: (1) Unfair fighting, to be punished severely. (2) Prize-fighting, which he stigmatised as "brutal and disgraceful." (3) Fair fighting; and of this he said: "Although fighting is contrary to law, I will not punish so long as a man fights fairly, even should an accident occur." This was good news, of course, for the rougher classes, and several cases of manslaughter from fighting which followed soon after showed how quickly a judicial dictum may bear fruit. He was, indeed, very tolerant of the weaknesses of human nature. Whether it was a pugilist, or a debtor, or an erring solicitor, he strove to admit excuses and to mitigate punishment. His was a heart to sympathise with woe.

A PAINFUL INCIDENT.

A "Hetty Sorrell"—a young unmarried woman—was being tried before him at the Worcester Summer Assizes on the serious charge of child-murder. The jury had retired from the court, and several of the leading barristers—including the late Baron (then Mr.) Huddleston, Q.C., Mr. Jelf, and others—had also availed themselves of the interval to go outside into the corridors and get a breath of fresh air. Presently the jury filed back into court and delivered their verdict of "Guilty." The judge had assumed the black cap, whilst the trembling creature in front of him stood, supported by female prison warders, awaiting her doom. Just at this moment, when all the court were hushed in silence, the strains of a barrel-organ came through the open doors from the street outside. Quickly lifting up his head, the judge, in slightly-heightened tones, called out to the ushers: "Stop that music—close that door! It is sadly out of place with the painful duty I have to perform." The order was at once complied with.

and the judge, his eyes bedimmed with tears, passed the dreadful sentence.

THE JUDICATURE ACT.

About the time of his elevation to the Bench the whole of our judicial machinery was undergoing a reconstruction. Common Law and equity were being brought together, and Mr. Justice Brett's vigorous common-sense and freedom from technicality pointed him out as one well qualified to preside over the fusion. The Court of Appeal is, as the late Lord Bowen pointed out, the pivot of the new one-judge system, and to this important court Brett was appointed in 1875, under the title of a Justice of Appeal. Those who can carry back their recollections to this period, when he sat in the full maturity of his powers at Lincoln's Inn with Lord Justice James and Lord Justice Baggallay, will remember how readily he assimilated the novelties of equity, often far from congenial to the Common Law mind, and with what strong common-sense and logical force he expressed himself in his judgments. Not less terse and vigorous—Lord Justice James once complimented him on putting it "like a code"—were his contributions to the law in the other branch of the Appeal Court at Westminster, where he had mostly Lord Bramwell and Lord Justice Cotton as his colleagues. When he said, contrasting himself with Lord Bowen, that he had been content to deal with "common business matters in common business language" he did himself less than justice. His judgments may have lacked form and finish—scientific precision of language—but they were thoroughly sound, and were inspired by an intense desire to do right by all manner of persons. To his friends he used to say: "I don't know whether I do justice, but I'll take my oath I try with all my might to do it," and so he did. He set himself with might and main to solve the particular conundrum brought before him to the satisfaction of his moral sense, and he rarely failed to do substantial justice; the pity was that he trusted too much to the light of Nature supplemented by the artificial light of authority.

THE "SCIENCE" OF LAW.

"The law of England," he once said, "is not a science. It is a practical application of the rule of right and wrong to the particular case before the court, and the canon of law is that that rule should be adopted and applied to the case which people of

honour, candour, and fairness in the position of the two parties would apply in respect of the matter in hand." Law not a science! Strange heresy it seems in a Master of the Rolls; but we must beware of accepting *obiter dicta* as authentic opinions, especially with a judge, like Lord Esher, not careful to weigh his words, *nec dicti studiosus*. What he meant to protest against was the pseudo-science of technical rules, because he goes on to point out—what is undeniably true—that the basis of all law is to be found in those moral principles which may be conveniently summarised as "the law of Nature." These are the weightier matters of the law—not the mint, anise, and cummin of special pleading or artificial rules of construction. "When you are asked to advise," said Tidd—of Practice fame—to a pupil, "think what the answer ought to be, and you will generally find when you look into the cases that what ought to be the law is the law." Lord Esher put it a little differently: "The business of a judge," he said, "is to find a good legal reason for the conclusions of common-sense." In the same spirit he once scandalised Lord Justice Cotton, as an old conveyancer, by speaking disrespectfully of the "legal estate" as "mere matter of form." But whatever lapses this freedom from technicality betrayed him into at times, it won for him the confidence of the commercial world, and this confidence was cemented by the marked respect which he paid to the verdicts of juries, particularly special juries in London, Manchester, and Liverpool. He used to say if twelve reasonable men could reasonably find such a verdict it ought to stand. The result of this extreme deference was in a way unfortunate. It became practically impossible while he ruled in Appeal Court No. 1 to obtain a new trial on the ground that the verdict was against the weight of evidence, and the new trial paper dwindled to a vanishing-point.

"AT ALL HIS JOKES, FOR MANY A JOKE HAD HE."

As he grew older he took things more lightly—few judges can maintain for a great number of years a uniformly-high standard of excellence—and he was fond of extracting as much entertainment as he could out of cases. Under his *régime* Court of Appeal No. 1 was at least never dull. A visitor had not been there two minutes before he was laughing at some sally of Lord Esher. The Master of the Rolls was declaring—*à propos* of the Kempton Park puzzle, What is a place?—that for his own part

he thought every spot was a "place" except a tightrope; or telling the distracted wife of a debtor—who had gone down on her knees in court and implored him to "spare her husband"—not to talk nonsense about "the disgrace of bankruptcy, for all that is exploded now"; or, at the rising of the court just before the Long Vacation, saying to the Bar, "Good-bye," and then, with a merry twinkle in his eye, "for the present"; or—for he was not governed by precedent—placing a little granddaughter beside him on the Bench, showing her the various documents in the case, and announcing to the Bar that a new judge had been appointed. How often, too, was he engaged in gay and gallant badinage with the lady litigant in person. One of these, who wanted him to try her case himself, once delighted him greatly. He had been telling her that her case had been sent to be tried by a certain learned judge without a jury, adding: "He is a capital lawyer, you know, and will try your case very nicely." "Oh, yes, my Lord," she replied, "Lord Justice — is all very well as to law; but my case requires so much common-sense!" In a case relating to an alleged fraudulent prospectus the counsel before him was arguing that the prospectus had deceived a large number of persons, including some country clergymen, who had been induced to apply for shares in a worthless company. Lord Esher was unconvinced and incredulous, and said: "Now, just imagine for a moment that I am a country curate." "My Lord," replied counsel, "my imagination is limited"—and Lord Esher laughed as heartily as his brethren and the Bar.

Good humour, as a rule, sat smiling on his brow; but there were times when he was irritable, perhaps petulant, and the Bar

Learned to trace

The day's disasters in his morning's face.

FORENSIC EXPERIENCES IN APPEAL COURT NO. 1.

"Opinions in the Profession," says Mr. Justice Jelf, writing (in the *Law Magazine*) of his later days, "were divided both as to his methods of arriving at justice and as to the pleasure of arguing in his court. To some the Master of the Rolls seemed hard and uncourteous, breaking in upon the arguments of counsel with every sort of criticism, both of form and substance, in a manner not a little disconcerting to anyone not accustomed to the rough-and-tumble of the Profession. On the other hand, those who watched closely his process of threshing out a case could

detect in his method neither unkindness nor unfairness. His *modus operandi* was intelligible, and would have been defended by himself in some such language as the following: 'Here is an advocate, full of strong asseverations of the righteousness of his client's cause. He must be brought to his bearings. He must be made to face without disguise or dissimulation the real points at issue. If he makes general statements he must be forced to condescend to particulars. If he exaggerates the absurdity of the exaggeration must be ruthlessly exposed. His arguments must be pushed to their logical conclusions, and he must deal as he goes along with questions put in order to test the validity of his reasoning.'

Whether the dignity of the court was always sufficiently kept in view during these discussions is open to considerable doubt, but as regards the results—given the requisite amount of courage and clearheadedness on the part of counsel to pass well through the ordeal—truth and justice, as a rule, ultimately prevailed. Nor were there wanting counsel to whom the excitement of the contest conducted on such lines was a stimulus and a delight. To the bystanders it might seem that to fight hard before Lord Esher was a thankless and an unwelcome task which might break the spirit of the most courageous and confuse the thoughts of the most clearheaded. And undoubtedly there were many in the Profession to whom the necessity of arguing under the conditions above described was distasteful and disheartening; and there are and ever will be cases to which this new application of the Socratic dialogue is unsuited. But to those who entered into the spirit of the strife there was exhilaration in the very thought of one of those "field days" in Appeal Court No. 1. They knew that when Lord Esher was most fiercely attacking them he entertained no unkindly feeling towards them personally, but all the time favourably appreciated their energy, their skill, and their courage, and never lost an opportunity in or out of court of expressing his warm admiration of their efforts. "You are a splendid fighter," he would say to one; and to another, "You are quite right to fight as hard; it is your duty." No one, indeed, had a higher opinion of, or a more affectionate regard for, the Bar. In acknowledging the welcome of the Attorney-General on his return after illness he said: "The congratulations of the Bar have made me very happy. You all know the feelings which I have always entertained towards the Bar. I am one of you, and

it is only when sitting in court that I cease in one sense to be a member of the Bar. The moment I leave the court we are all fellow-barristers and equals one with another."

"SOLVE SENESCENTEM."

When, on his retirement in 1897, the Queen conferred on him a viscounty—the highest honour, as he remarked with just pride, ever bestowed for purely judicial services—everyone felt that the reward was well deserved, a fitting crown to a great career. Two years later—June, 1899—he died at Heath Farm, his country house at Watford.

"Whenever you die, Charles," said Lady Stanley to her brother, "you will die a young man." It might have been said of Lord Esher. He, too, had the secret of perennial youth.

SOME JUDICIAL DECISIONS.

His principal characteristics as a judge, his robust good sense and his faculty for getting to the bottom of things—these qualities were exhibited rather in his dealing with a case, in his sifting of evidence, his probing questions, and interlocutory criticisms than in his formal judgments, and these are things not to be reproduced; but some of the innumerable points of law which he ruled may be noticed here.

THE PHAETON AND THE BROKEN POLE.

A gentleman bought a phaeton of a carriage-builder, and gave orders for a pole and splinter-bar to be made and fitted to it. The phaeton was duly sent home, and while the owner was driving it with two horses the horses swerved and the pole broke off short at the carriage; the horses became restive and were much damaged—to the extent of £130 or £140. Could the plaintiff get this amount or only £3, the value of a new pole? The jury had found that there was no negligence on the carriage-builder's part, and on this finding Justices Blackburn and Lush thought the plaintiff could get only £3; but their decision was reversed by the Court of Appeal (*Randall v. Newson*, 36 L. T. Rep. 164; 2 Q. B. Div. 102). "The question is," said Lord Justice Brett in delivering the judgment of the court, "what in such a contract is the implied undertaking of the seller as to the efficiency of the pole? Is it an absolute warranty that the pole shall be reasonably fit for the purpose or is it limited to defects which might be discovered by care and skill?" The answer of

the court was that it was an absolute warranty. As Chief Justice Best put it in *Brown v. Edgington* (3 M. & G. 279), "If the contractor sells the article for a particular purpose he undertakes that it shall be fit for that particular purpose."

MISTAKES IN TELEGRAMS.

In *Dickson v. Reuter's Telegraph Company* (37 L. T. Rep. 370; 3 C. P. 1) a firm of merchants at Valparaiso received a telegraphic message which they understood, and reasonably understood, to be a direction from correspondents in Liverpool to ship large quantities of barley to England, and this they did, only to find that the supposed order was a mistake caused by the negligence of the telegraph company. A fall in barley occurred, and the firm sustained serious loss, for which they brought an action against the company. Would such an action lie? The Court of Appeal said "No." "Upon consideration of the nature of the business of a telegraph company," said Lord Justice Brett, "it seems to me plain that all that they undertake to do is to deliver a message from the person who employs them and that they perform the part of mere messengers; *prima facie*, therefore, their only contract is with the person who employs them to send and deliver a message." There was no duty on the part of the company toward the plaintiff firm either by contract or by law. Looking at the extent of business carried on by telegraph, this state of the law can hardly be considered satisfactory. In the United States telegraph companies are treated as public servants, and are held to a high degree of diligence and a strict discharge of duty—so much so, that in some States any person beneficially interested in a message, though neither sender nor recipient, may maintain a suit for damages for errors or failure to deliver. We certainly need some such strengthening of the law here.

TITLE UNDER A BANK OF ENGLAND NOTE.

A Bank of England note is a document *sui generis*. It is a negotiable instrument embodying an ambulatory contract; but, more than that, it is actual currency; more than that, anyone taking a certain amount of bullion to the Bank is entitled, by Act of Parliament, to have a Bank of England note given him in exchange. Great, therefore, was the dismay of the plaintiff in *Suffell v. Bank of England* (47 L. T. Rep. 146)—a *bona fide* holder for value—to find his notes refused payment by the Bank

on the ground that the numbers of the notes had been altered. It has been well settled, as long ago as Coke, that when a deed—or, for the matter of that, any instrument, whether under seal or not—is altered in a point material it becomes void (*Pigot's case*, 11 Rep. 26). Then, was the number of the note a material point? That was the question—and what made it a somewhat nice one was that the alteration did not alter the contract. True, said the court, but it altered the business effect of the note; for the purpose of using the note as currency the number was material.

PRIVILEGE AND THE CHARITY ORGANISATION SOCIETY.

A daughter of a deceased officer in the Army was in distressed circumstances, and a lady interested herself in obtaining subscriptions to make some provision for her. Then another lady, also interested, applied to the Charity Organisation Society for information, and the society made an unfavourable report on the case, which she communicated, by their permission, to the first lady, and the deceased officer's daughter in consequence lost the subscriptions. Thereupon she sued the society for defamation, and the society set up privilege—that it was acting in the interests of society, discharging a moral and social duty in telling the facts, and Lord Justice Brett held (*Waller v. Lock*, 45 L. T. Rep. 242; 7 Q. B. Div. 619) that it was. It concerns the community that charity should not be misapplied. But let the busybody beware how he puts this principle in practice and plays the censor in regard to persons with a "past."

LORD BOWEN.

DR. JOHNSON once defined genius as a great natural ability accidentally determined in a particular direction. The definition is well illustrated in the case of Lord Bowen. He had abilities which might have made him a brilliant journalist, a world-renowned scholar, a great scientist, a profound theologian; but Fate willed that he should be a lawyer, and an admirable lawyer and judge he became, infusing freshness and originality into the driest disquisitions of the law. His mind was at once broad and subtle—a rare combination—able, like the elephant's trunk, to tear up a tree or pick up a pin. He had the artist's sense of form, the poet's divine gift of choice language, the scholar's wide culture, all fused together by a genial and delicate humour. Endowments like these went to make his judgments masterpieces. Whatever he did, indeed, he was bound to do well. Yet law was not perhaps the ideal vocation for him. "I simply hate law," he once said, in the confidence of a Sunday talk, to the Dean of Wells, adding, however, "A man may be a fool to choose a profession, but he must be an idiot to give it up." Literature was the predominant bias of his soul.

RUGBY AND OXFORD.

His Rugby record was a magnificent one. He was a sort of Tom Brown and Arthur in one—a hero of the cricket-field and the running-path, "able to jump a cow as it stood," yet to be found reading the *Alcestis* in his dormitory at fifteen for his own delectation. A Balliol scholarship was but the prelude to a series of brilliant University successes—the Hertford, the Ireland culminating in a Balliol scholarship and the presidency of the Union, and crowned by a lifelong friendship with the master, Jowett, for whom he ever cherished a reverential affection. With such a record there was but one career for him—the *carrière ouverte au talent*, with a perspective of politics in the background—and to Lincoln's Inn he came to batten on the husks of con-

veyancing and equity and special pleading, feeling, after his Oxford life, almost as bad as the elegant Ovid in exile at Tomis.

NOVITIATE AT LINCOLN'S INN.

"I well recollect," he said, addressing the Birmingham Law Students' Society, "the dreary days with which my own experience of the law began in the chambers of a once-famous Lincoln's Inn conveyancer; the gloom of a London atmosphere without, the whitewashed misery of the pupils' room within, both rendered more emphatic by what appeared to us to be the hopeless dinginess of the occupations of the inhabitants. There stood all our dismal textbooks in rows—the endless Acts of Parliament, the cases and the authorities, the piles of forms and of precedents—calculated to extinguish all desire of knowledge even in the most thirsty soul. To use the language of the sacred text, it seemed a barren and a dry land in which no water ran and, with all this, no adequate method of study, no sound and intelligible principle upon which to collect and to assort our information." He felt like Dante lost in the dark wood before he descended into the shades.

So much, indeed, did he detest the drudgery of his legal novitiate that to avoid passing the chambers—No. 2, Dr. Johnson's Buildings, the scene of his slavery—he for years used to make a *détour* every morning.

His next master in the law—Christie, the well-known conveyancer—was a much more congenial spirit. He had literary tastes, loved works of fiction, and "many a half-hour have I spent with him," says Bowen, "discussing Balzac, while his confidential clerk was under the impression that we were settling the draft of some mortgage or settlement." Bowen was himself an ardent lover of fiction. "To the young," as he once said, "the novel is often the key that unlocks Paradise, but a novel ranks also as one of the consolations of advancing years by the side of philosophy and whist. We can purchase for as trifling a sum as will furnish a Chinaman with opium the means of transporting ourselves at a moment's notice into a visionary world."

When Bowen was about being called to the Bar the *Saturday Review* had just been started, and the founder, Mr. Beresford-Hope was on the look-out for brilliant recruits. Bowen was pressed into the service, and became a regular and valued contributor till he seceded in a fit of indignation at an attack on his

friend Dean Stanley, fortunately, perhaps, for his future career—for how many lawyers' bones lie bleaching on the shore of those sirens Literature and Journalism!

FIRST APPEARANCE BEFORE CHIEF JUSTICE COCKBURN.

Great as was Bowen's academic reputation and untiring his industry, he made but slow way at the Bar. His first appearance in court was not a success. He was most graciously received in the Queen's Bench by Chief Justice Cockburn. The Chief had heard of him, and, though not free from royal caprice, he beamed on Bowen, and listened at the outset with interest and attention. Alas! a weak voice and a delivery hesitating and somewhat over-refined for the rough and rapid work of the Bar annoyed the great man, and as the argument proceeded he ceased to listen, and threw himself back in his chair with a gesture of impatience and disappointment. Despite this unlucky start, Bowen got by degrees into practice. His abilities could not be ignored and his industry was untiring, but the struggle was a severe one—at one time he even consulted Tom Hughes as to what colony he should emigrate to—and the struggle was made worse by the bad health from which through life he suffered—the result of the excessive strain, physical and mental, which he had gone through at Rugby and Oxford.

He had, too, by an early marriage with Miss Emily Rendel, "given hostages to fortune," and under the combined effect of matrimonial and professional responsibilities he altogether broke down, and had to take a year's complete rest. His nervous system, always highly strung, was utterly overwrought. Charles Lamb tells us that when he got a letter, or a visitor called, his writing was over for that day. Carlyle was wrought up to melodramatic frenzy by the crowing of a cock or the buzzing of a blue-bottle. It was the same with Bowen. The slightest noise or movement in the room where he was at work caused him acute distress. But a year's travel with his wife in Norway and Switzerland, wintering on the Riviera and at Rome, braced his energies and brought him back fit to re-enter the arena. We wonder at the great ages to which judges often attain. The truth is that they are men of exceptional physique and constitution. It is this superior vitality, their staying power, which carries them through the stress of the struggle at the Bar, and preserves them—Nestors—on the Bench.

The year 1870 saw Bowen appointed a commissioner on the working of the Truck Act and Recorder of Penzance, and the following year began the *cause célèbre* known as the *Tichborne* case.

THE TICHBORNE CASE: "WOULD YOU BE SURPRISED TO HEAR!"

Bowen appeared against the Claimant—with Coleridge as his leader—both in the trial at *Nisi Prius* before Chief Justice Bovill and in the criminal trial "at Bar" before Lord Chief Justice Cockburn and Justices Mellor and Lush, and rendered his leader invaluable aid in both. It was Bowen, it was said, who invented in consultation the phrase "Would you be surprised to hear that—?" with which Coleridge introduced so many of his questions to the Claimant in his cross-examination. The phrase passed into a popular catchword, but without its real significance being understood. "The object with which it was devised," says Sir Herbert Stephen, "was to abstain from giving in the form of the question the least hint as to whether it would be correctly answered in the affirmative or in the negative."

Three long years did this portentous case drag on, but it gave Bowen an opportunity of describing the scene in a graphic little *jeu d'esprit*:

"Amid the case that never ends
We sat and held a brief,
Mathew and I, a pair of friends,
And one a withered leaf."

"Mathew" was the present Lord Justice—"a withered leaf," as he facetiously termed himself, because the prolongation of the trial was alienating all his clients.

"Meanwhile about us and afar
Again arose the storm;
Kenealy and the Chief at war,
Each in the best of form.

"Of virtue, science, letters, truth
They talked till all was blue;
Of Paul de Kock—the bane of youth—
Of Bamfield, Moore, Carew:

"If fools are oftener fat or thin
Which first forget their tongue;
Why all tobacco mixed with gin
Is poison to the young;

"And whether Fielding's better bred,
Or Sterne, so full of fun;
Poor Mathew sighed and shook his head—
The will of God be done."

During the progress of this record trial Bowen was appointed Junior Counsel to the Treasury on the nomination of Sir John Coleridge, who knew Bowen's merits well, and was a very faithful friend, as Lord Justice Mathew said, to those he liked. The post of "devil" to the Attorney-General is known as an almost sure stepping-stone to judicial preferment, but it is a post which may well tax the powers of the strongest, and the strain was the more severe to a man who bestowed, as Bowen did, the most scrupulous care on whatever he took up.

MADE A JUDGE—THE BURGLAR'S EVENING STROLL.

Fortunately at this critical juncture a vacancy occurred on the Bench, and it was offered by Lord Cairns to Bowen in May, 1879. Even then—such is human nature—there was the *amari aliquid* in the cup. The Bench closed the avenue to a political career of which he had always cherished hopes. But Fate was kinder than he knew. Bowen was too sensitive ever to have succeeded in the political arena.

A good lawyer can never be said to be wasted on the Bench, yet there is a great deal of judicial work at *Nisi Prius* which can be as well, if not better, done by a man of no great talent or legal erudition, but gifted with shrewdness and knowledge of the world and familiar with the rules of evidence. Bowen's intellect was too fine an instrument for this rough work—it was cutting blocks with a razor; his judgment too critical and fastidious; juries did not understand him. The following story is a good illustration. He was trying a case of burglary with a Welsh jury, and it was urged for the defence that the prisoner was in the habit of walking on the housetops at midnight, and had merely taken off his boots and dropped into the house out of curiosity. In summing up Bowen said to the jury: "If you believe that the prisoner considers the housetops the proper place for an evening stroll and that the desire to inspect the inside of the houses was but a natural and excusable curiosity you will acquit him and will approve his conduct in showing so much consideration as to take off his boots for fear of disturbing the sleepers." The irony was unmarked; the jury took him seriously, and acquitted the prisoner. He never tried the ironical vein again. It recalls the story of Lord Kenyon trying an action for a penalty for shooting game without a licence. "Gentlemen," said the defendant's counsel, "it is true that they have sworn my client fired at the

bird, that it fell dead, and that he bagged it. It is of no use to deny that. But how does it appear that the bird was killed by the shot? What proof is there that it did not die of fright?" And the jury thought there was none.

It was not till Bowen was elevated to the Court of Appeal, on the death of Lord Justice Holker, that his judicial genius shone out in all its strength. "It might seem exaggerated if one said," observes Lord Davey, "that he combined the breadth of Lord Mansfield with the accuracy of Lord Wensleydale, but it would give an idea of the truth." When a case came before him his wide vision, his mastery of principles enabled him to see almost at a glance the whole board and the bearings of the pieces. Whilst an advocate was laying the foundations of his argument, says Lord Justice Fry (his colleague in the Court of Appeal for many years), Bowen was already engaged in a critical examination of the top storey. He soon detected the weak place in an argument, but he never wearied of investigating or discussing a point so long as he thought that anything remained to be got at. To the Bar he was studiously, elaborately, polite. The utmost extent of his protest with a too-persistent advocate would be to say in his soft, cooing voice: "You have made your point, Mr. X., over and over again, but, so far as I can see, there is nothing in it. What is the good of labouring it? If you multiply zero by infinity it is but zero still."

LAW BOOKS AND LITERATURE.

A pity it seems that Bowen never wrote a law book, but the desire to attain immortality in that way seemed to him a doubtful passion. It was mere "bricks and mortar," not literary art; besides, "you write a history of law, or a treatise about it, and then a puff of reform comes and alters it all and makes your history or treatise useless." There is truth, no doubt, in this view; but surely it does not take sufficient account of the continuity of law. Legal changes are not mere scene-shifting, but evolution, and from this standpoint no honest work is wasted. Bowen's literary aspirations found expression in his translation of the "Æneid," and in Virgil, the ambition of all scholars—

Wielder of the stateliest measure ever moulded by the lips of man—
he had a subject well fitted to set off to the best advantage his special gifts. Unfortunately he chose a metre—the shortened

rhyming hexameter—which, whatever its merits, but ill reproduces

The varying verse, the full resounding line,
The long majestic march and energy divine

of the original. The truth is—we are learning it only by repeated failure—a work of genius is untranslatable.

IN SOCIETY: JEUX D'ESPRIT.

Brilliant, versatile, vivacious, overflowing with “intellectual conviviality” and playful wit—no wonder Bowen was a *persona grata* in London society. How gracefully could he turn a compliment! Some ladies on a Swiss tour had been climbing to a perilous eminence on an Alpine crag. “You have solved, ladies,” said Bowen, “the problem which perplexed the Schoolmen—how many angels can stand on the point of a needle.” “Good phrases,” as Beatrice says in *Much Ado About Nothing*, “are, and ever were, commendable”—and Bowen was an excellent phrase-maker. The unadorned plainness of speech of a brother judge troubled him. “There is a distressing nudity,” he said, “about A. L. Smith’s language.” “Struck with sterility” was one of the happy expressions he coined to describe premises not rateable for unproductiveness. A lecture which he delivered on “Education” is strewn with such flowers as these: “The system of competitive examination is a sad necessity. Knowledge is wooed for her dowry, not her diviner charms”; “You may polish the pewter till it shines without its becoming silver”; “Instruction ladled out in a hurry is not education”; “In ancient times, when duty to the State was the keynote of civilisation, education was that culture of mind and body which tended to turn out the ideal citizen.”

A jurist he once playfully defined as “a man who knows something about the law of every country except his own,” and at another time remarked of volunteers: “Volunteers are not, I believe, liable to go abroad except in case of invasion.”

Someone had mentioned a work entitled “Defence of the Church of England: by a Beneficed Clergyman.” Bowen suggested, “In other words, a ‘Defence of the Thirty-nine Articles, by a *bonâ fide* holder for value.’”

“On another occasion,” says Sir H. Cunningham in his admirable sketch of the judge, “reference was made to the fact that a publisher who was popularly credited with driving some-

what hard bargains with authors, had built a church at his own expense. 'Ah!' Bowen exclaimed, 'the old story! *Sanguis martyrum, semen ecclesie.*'"

The plaintiff in a certain case claimed a right to a piece of uninclosed land, and grounded his claim on the fact that his donkey had been habitually pastured upon it. The judge at the close of the argument inquired whether the plaintiff claimed the land through his accredited agent the donkey. "Yes, my Lord," was Bowen's prompt reply; "my contention is *Qui facit per asinum facit per se.*"

In *The Mogul Steamship Company v. Macgregor* (66 L. T. 1; 58 L. J. Q. B. 465)—the Shipping Ring case—when counsel for the aggrieved shipowners cited Lord Coke's reference to a very ancient law: "Thou shalt not take in pledge the nether or the upper millstone" (*quia animans suam apposuit tibi*) (Deut. xxiv. 6)—where he says that by this it appears that every man's trade maintains his life, and that, therefore, he ought not to be deprived or dispossessed of it any more than of his life—Bowen remarked: "Does not Lord Coke in one respect resemble the enemy of mankind in that he can always quote Scripture when it suits his purpose?"

His *jeux d'esprit*, classical and otherwise, are charming. Here is a specimen given by Sir Henry Cunningham—a poetical request for a lift to the then Lord Chancellor's breakfast in 1883, addressed to his friend Mathew, now the Lord Justice:

"My dear J.C., Will you be free, To carry me, Beside of thee,
In your buggee, To Selborne's tea, If breakfast he, Intends for
we, On 2 November next D.V., Eighteen hundred eighty-three
A.D., For Lady B., From Cornwall G., Will absent be, And says
that she, Would rather see, Her husband be, D dash dash D,
Than send to London her buggee, For such a melancholy spree,
As Selborne's toast and Selborne's tea."

"What a libel on me!" adds Lady Bowen.

"TO THE UNKNOWN GOD."

A traveller, Mr. Haldane tells us, who had penetrated into a remote part of India found the natives offering up a sacrifice to a far-off but all-powerful god who had just restored to the tribe the land which the Government of the day had taken from it. He asked the name of the god. The reply was: "We know nothing of him but that he is a good god, and that his name is the

Judicial Committee of the Privy Council." There is something pathetic in this faith of distant peoples in the divine power of British justice, but there is also much to be proud of. And to what do we owe it? The love of justice, of fair play, is no doubt a deeply-rooted instinct of our race, but the fountain flows through the administrators of the law. It is the integrity, the incorruptibility, the absolute impartiality of our judges which keeps the stream pure and makes it strong. Bowen gave eloquent expression to this truth at a banquet once at the Mansion House. In responding to the toast of "The Judges," he said: "There is no human being whose smile or frown; there is no Government, Tory or Liberal, whose favour or disfavour can start the pulse of an English judge upon the Bench, or move by one hair's breadth the even equipoise of the scales of justice." This is no rhetoric; we know that every syllable of it is true.

"The worst of these learned professions," Bowen somewhere remarks, "is that life goes so quick. You begin one morning to read briefs; you go on reading, with short intervals for refreshment, past Christmases, Easters, Long Vacations, just as you pass stations in a first-class express. Here you look up, and the time has just about come for the guard to begin to take the tickets." Alas! the end of life's journey was reached only too soon for Bowen. Shortly after his appointment, in 1893, as a Lord of Appeal, and when lawyers were congratulating themselves on the strength which his presence and counsels would give to the House of Lords and the Privy Council, his health began to fail rapidly, and he died on April 10th, 1894.

HIS JUDICIAL GENIUS.

English law has, we know, been declared to be the perfection of reason, and as such it is too often devoutly accepted by English lawyers. It is sufficient that a rule of law exists—be it a rule of the common law or a section of a statute—the English lawyer inquires no further; to him, in Pope's words, "Whatever is, is right." This spirit leads to much of the distrust of lawyers found among laymen who have not the same implicit faith in the infallibility of the law, and want to know the why and the wherefore—the common-sense of the thing. Lord Bowen was not one of these "scribes" of English law, fettered to the letter. He went always to the principles which underlay the letter, and these principles he expounded with most sweet reasonableness and in

graceful and felicitous language. Law was to him living, and a judge's duty to endeavour to apply legal doctrines so as to meet—to use his own words—"the broadening wants or requirements of a growing country and the gradual illumination of the public conscience." He ever kept in mind Lord Nottingham's words in the *Duke of Norfolk's* case: "Pray let us so resolve cases here that they may stand with the reason of mankind when they are debated abroad."

COVENANTS IN RESTRAINT OF TRADE.

Maxim Nordenfelt Ammunition Company v. Nordenfelt (71 L. T. Rep. 489; (1893) 1 Ch. 630), dealing with covenants in restraint of trade, supplies an example. The policy of English law was, and is, that no one should be allowed to contract himself out of his liberty to trade, because trade is good for the kingdom; but it is equally important, as Bowen points out, that every man should be at liberty to sell the goodwill of his trade on the best terms he can get, and this he cannot do without covenanting not to compete. Such a covenant is not really in restraint of trade—rather in furtherance of it, as in the *Nordenfelt* case, where a thriving company with a large capital was substituted for an individual trader; but English law, still true to its original principle, only allows such covenants so far as they are reasonably necessary to protect the buyer of the business. The necessity of the protection is the measure of the relaxation of the rule. In arriving at this necessity—in judging of the reasonableness of the restraint—we must look, however, at the changed and changing conditions of commerce—remember how railways and steamships, postal communication, telegraphs and advertisements, have centralised business and altered the entire aspect of local restraints on trade, and so the law must be moulded to meet the new conditions. This is what the modern cases—the *Nordenfelt* case especially—emphasise.

"THE ENGLISHMAN'S CASTLE."

Sir Henry Maine has shown us in his "Early History of Institutions" how curiously the form of legal proceedings often reproduces semi-barbarous customs. The law of distress and replevin is an instance; it is the survival—under forms of law—of a series of raids and reprisals, and yet even in those "wild times" one spot was still sacred—a man's homestead. Here was

an oasis of peace in a wide waste of lawlessness. *Semayne's* case (5 Co. 91), where it is laid down that "a man's house is his castle," was only affirming a recognised principle of much greater antiquity. In *American Concentrated Must Corporation v. Hendry* (68 L. T. Rep. 742) Bowen examines this early principle of English law and discriminates with great care what a landlord's broker may and what he may not do in carrying on this primitive warfare of distress. He may not, for instance, if the demised premises consist of a warehouse and courtyard, because he has managed to get peaceably into the courtyard, break open the outer door of the warehouse.

"VOLENTI NON FIT INJURIA."

"I employ a builder to mend the broken slates upon my roof, and he tumbles off. Have I," asks Bowen, in *Thomas v. Quartermaine* (57 L. T. Rep. 537; 18 Q. B. Div. 695), "been guilty of any negligence or breach of duty towards him? Was I bound to erect a parapet round my roof before I had the slates mended?" Of course not, we reply. The builder knows what he is about, and takes the risk. Then, if an employee in a brewery accidentally falls into a vat of boiling liquor which he knows all about and is scalded—as happened in *Thomas v. Quartermaine*—is he any better off? No, says Bowen, *Volenti non fit injuria*. True, his knowing of the risk is not conclusive, for the maxim is *Volenti non fit injuria*, not *Scienti non fit*; but, when an employee goes on working with knowledge of a particular risk, it can point to only one conclusion, and that is that he elects to run the risk.

This principle is still applicable in cases outside the Workmen's Compensation Act, 1897, which only relates to specially dangerous employments, such as in mines and factories or on railways.

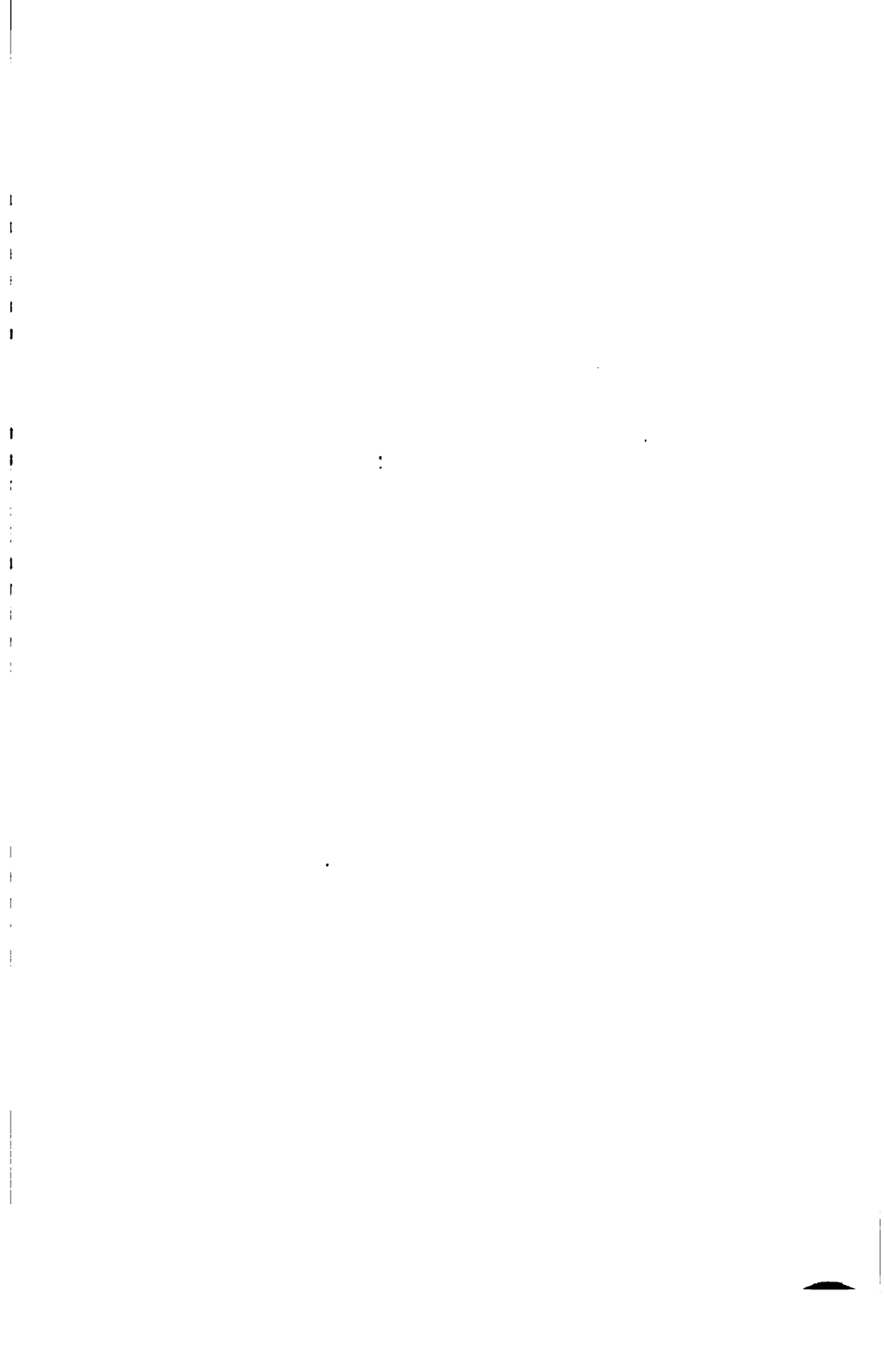
THE "AUTHOR" OF A PHOTOGRAPH.

Who is the "author" of a photograph under the Copyright Act, 1862? The question arose in this way (*Nottage v. Jackson*, 49 L. T. Rep. 339; 11 Q. B. Div. 627): A firm of well-known photographers sent a photographic artist in their employ to take a photograph of the Australian team of cricketers, then in England, at the Oval, which he did, and the firm registered themselves as proprietors and "authors" of the photograph. The photograph was pirated, the firm brought an action, and were

nonsuited on the ground that they were not the "authors." "Could the British Government," said Bowen, "supposing they sent out people on board ship to take a photograph of the transit of Venus, in any sense be considered the authors of the photograph?" The "author" is the person who creates the picture—not the firm who, "sitting in the distance," merely finance the operation, "Nature finding the sun."

THE EVENING AND THE MORNING POST.

A well-known trade name with a reputation attached, whether it is for a cigarette or a lady's corset, a necktie or a newspaper, is in these advertising days a gold mine, and to appropriate it presents to an enterprising person of easy morals the simplest short cut to a fortune. In *Borthwick v. Evening Post* (58 L. T. Rep. 252; 37 Ch. Div. 449) this sort of enterprising person had started an *Evening Post*, and the proprietor of the *Morning Post* not unnaturally objected. "The world is wide," as Bowen said, "and there are many names." It really is inexcusable and capable of but one interpretation when a person takes a name so similar to another's as to be calculated to deceive; but an intention to deceive the public is not actionable except at the suit of someone injured, and the *Morning Post* could not satisfy the court that it had suffered or was likely to suffer by the rivalry. "Counsel," said Bowen, "was driven to this ingenious suggestion, that a person going by railway might wish to buy his *Morning Post* overnight. I cannot imagine a gentleman buying the *Morning Post* overnight. It is as unlikely as if you were to wish to have your breakfast overnight. The only case in which I can conceive a person wanting his breakfast overnight is when he is not likely to have it the next morning; but, *ex hypothesi*, he could have his *Morning Post* the next morning, and, if so, where is the injury?"





LORD HERSCHELL.

LORD HERSCHELL.

LORD HERSCHELL was one of those predestined—one might almost say consecrated—to the service of the law. His sister, Mrs. Cunliffe, tells us that from the age of six or seven he never varied in his resolution to follow the law as his profession, and that his brother and sisters used to tease him by asking him what title he would assume as Lord Chancellor. By way of preparing himself he used to deliver lectures—like De Quincey's precocious elder brother—to the family circle on subjects of public interest, one being upon the then new invention of the electric telegraph, and another on the Corn Laws, the agitation for the repeal of which was then at its height.

A SCHOOL ANECDOTE.

He received his early education at a grammar school in the suburbs of South London. "The only anecdote," says Mr. Williamson, "I ever heard him relate of his school days was the following. The head master was a very excellent person, but no great classic, and was in the habit of making the most terrible false quantities in his pronunciation of classical names, to the great distress of his under-master—a false quantity in those days was enough to blight a man's prospects in life. The relations between the two would appear to have been somewhat strained, for eventually a sharp quarrel arose, and the subordinate received his dismissal in the hearing of the assembled school; but as he was leaving the room he delivered a Parthian shot at the unfortunate "head," proclaiming in a loud voice that he would "rather be tried before the Areopagus and be banished to Pergamus than continue longer in his situation." "Herschell told me this story," adds Mr. Williamson, "on the hill of the

Areopagus, when we were together at Athens in the autumn of 1886."

UNIVERSITY COLLEGE: LORD BROUGHAM'S COMPLIMENT.

From this academy—after some intermediate travels in Germany and the Holy Land, concluding with a voyage up the Nile, which may have laid the foundation of his lifelong love of travel—he matriculated at the London University, and became a student of University College, Gower Street. Here he was one of the best speakers in the University Debating Society, displaying from the outset the same command of language and lucidity of style that distinguished him so remarkably in after-life, and, in conjunction with Mr. (now Sir) R. D. Littler, edited a *University Review*. One of the articles in the *Review* was so good as to attract the notice of Lord Brougham, who inquired into the authorship, and on being informed that the editors were two intending law students he sent for them, and after complimenting them on their periodical presented each with a volume of his own works.

THE NORTHERN CIRCUIT: THE DESPONDING TRIO.

Herschell commenced his legal career in the chambers of Mr. Chitty, the well-known special pleader, and had there, among his fellow pupils, the late Lord Justice A. L. Smith, the late Sir Joseph Chitty, and Mr. Justice Charles. Later he was a pupil of Mr. Hannen, afterwards Lord Hannen. He was called to the Bar in 1860, and immediately joined the Northern Circuit. Although absolutely without any interest or professional connection whatever, he soon, by his ability and close adherence to business, attracted attention; but five or six years passed without his attaining to any substantial practice; indeed, so disheartened did he become that he has told me, says Mr. Williamson, he at one time contemplated abandoning the English Bar altogether and devoting himself to practising in the consular courts in China. It is amusing, in the light of subsequent events, to hear that during one Liverpool assize he and two other brother barristers partook together of a very indifferent dinner in their lodgings, compared notes as to the apparent hopelessness of their pros and planned emigration—one to the Straits Settlements another to India. Hear it, ye faint-hearted and desponding novices of the Bar! One of the three was Herschell (after twice Lord Chancellor), another was Lord Russell of K^r

(Lord Chief Justice of England), and the third is the present Speaker of the House of Commons. Herschell's chance came in 1868, when Hannen, the leader of the Northern Circuit, was elevated to the Bench and several leading juniors took silk. At the Liverpool Assizes in 1869 he found eighteen heavy briefs waiting for him. The tide of fortune had fairly begun to flow, and it continued to flow in increasing volume until it carried him to the Woolsack.

Charles Russell was also rising fast on the same circuit, and had hopes of leading it. Discussing his prospects, a friend remarked, "You have formidable competitors—Holker, Herschell." "Oh, John Holker!" said Russell. "I admit that he is a better man than I am; but then he won't stay long. But Herschell!—you surprise me! I tell you honestly I never dreamt of Herschell as a competitor of mine." But a few years changed this complacent estimate, and when Russell was asked in 1885 whom he regarded as his most formidable antagonist at the Bar he answered, "Herschell."

Under the leadership of these two master spirits the work on the Northern Circuit went smoothly and rapidly. "We were both quick," said Russell. "We lost no time in coming to the point, and we kept to it. We understood and trusted one another."

A very distinguished advocate and judge was once asked what quality most commands success at the Bar. He replied, "Clear-headed common-sense." Herschell possessed this quality in an eminent degree; and it won him success not only at the Bar but in the House of Commons.

PARLIAMENT: HERSCHELL AND HIS CLERK.

Herschell entered Parliament in 1874 as Liberal member for the City of Durham, and soon became favourably known to the leaders of his party by the assiduity of his attendance in the House and his readiness in rendering assistance. The story goes that when he entered politics the fortunes of the Liberal party were at their blackest, and his clerk, who was a clerk of the old school and took an almost proprietary interest in his career, used often to brood over the political situation. At last, on the day when Lord Beaconsfield returned in triumph from Berlin and was received with such unparalleled enthusiasm that he seemed certain of a fresh lease of power the clerk confided his feelings

to Mr. Herschell in these moving terms: "Don't you think, sir, in view of the turn events seem to be taking, that our choice of politics was a little premature?"

SOLICITOR-GENERAL: LIVING LABORIOUS DAYS.

But no; the pendulum swung back, and when Mr. Gladstone formed his Government in 1880 Herschell had his reward. The competition for the office of Solicitor-General was somewhat acute, but Lord Selborne and Lord Hartington expressed such strong opinions upon Herschell's merits that his claims carried the day. "Full well I recollect," says Lord James of Hereford, "how I conveyed to him the news of his appointment; and, speaking from my experience as Law Officer in 1873 and 1874, I told him that we should find our work overwhelming, almost impossible properly to accomplish if we did not loyally co-operate to assist each other, and I offered to do my best to effect this co-operation. He held out his hand, and the bargain was made. During five years of exceptionally heavy responsibility never once did the Solicitor-General fail that bargain to fulfil. But, true as he was to me—his immediate colleague—he was equally loyal to every member of the Government." Over and over again Mr. Gladstone has been heard to acknowledge the value of his services in passing the Irish Land Act of 1881 through committee. The Corrupt Practices Act of 1883 and the Bankruptcy Act of the same year were other illustrations out of many which might be given of his Parliamentary tact and skill. He had a peculiar genius for meeting difficulties in committee, for rapidly devising, for instance, the right words for the bare rudiment and intention of a clause or any amendment. "The only man who ever came near him in this way in resourcefulness and ingenuity," says Mr. John Morley, "was Sir Henry Jenkyns, the late Parliamentary counsel to the Treasury." "He seemed," continues Lord James of Hereford—so long his colleague—"never to weary, either physically or mentally. During his Solicitor-Generalship he would commence his forensic labours at ten o'clock; occupied by them until four, he would then assiduously attend in the House of Commons until long after midnight—no twelve o'clock existed then. When the House rose, he would bid a weak colleague take some real rest, whilst he would proceed to with the 'Cases for Opinion'; and so next morning he would have to recommence his labours without the enjoyment of

repose than could be found in an armchair. It was this sense of loyal devotion to duty that caused Sir Farrer Herschell materially to aid in establishing a new position for the law officers in the House of Commons. In former days they were but seldom seen in the House of Commons. They attended only when legal questions were discussed or a critical division was expected. Mr. Gladstone was apt to tell how, when passing the Succession Duty Act of 1853, he sent over and over again without avail to the Attorney-General asking him for his assistance, and at last received an answer that he knew nothing about the death duties, and that the Chancellor of the Exchequer must rely on the Solicitor-General. Gradually the attendance of the law officers increased, and, if reference be made to the returns of divisions in the House of Commons between 1880 and 1885, it will be found that the Solicitor-General was so seldom absent from them that the very Ministerial Whips scarcely had him on the list."

THE WOOLSACK: APPOINTMENT OF JUSTICES.

In 1886 occurred Mr. Gladstone's conversion to Home Rule and the memorable secession of Liberal Unionists—Lord Hartington, Mr. Chamberlain, and Sir Henry James. Herschell reconciled himself to the new policy, and became Chancellor with general applause. "The law appointments," says Lord Selborne in a letter to his son, commenting on the new Administration, "are all three as good as they can possibly be: Herschell, Charles Russell, and Davey, by universal consent the three first men at the Bar." "Quickly" was the motto of his crest, and Herschell had lived up to it. At the time he achieved the Woolsack he was only forty-nine—an earlier age, it has been said, than any Chancellor before; but this is a mistake. Jeffreys the notorious, Lord Hardwicke, and Lord Thurlow were all younger at the date of their appointment.

Lord Thurlow was once asked how he got through his business as Lord Chancellor. "Oh!" he replied, "just as a pickpocket gets through a horsepond—he must get through." To a man like Lord Herschell, strictly conscientious in the discharge of his public duties, the burden of his great office was peculiarly heavy. This conscientiousness showed itself in many ways. For instance, as Chancellor he had to recommend Justices of the Peace for the Bench. An easy-going virtue would have made short work of this duty. But Lord Herschell insisted on examining the case of

every candidate, to satisfy himself that he was a fit person to administer justice. He resolutely refused to prostitute his power of appointment to party purposes: "I would rather renounce my office to-morrow," he said—and he aroused much wrath in consequence among the party managers. A passage from a reply of his to a deputation on the subject gives a glimpse behind the scenes of his official life, and effectually explodes the popular notion of the Chancellorship as an easy place with a large salary. "From the time when I come in the morning," he said, "till evening, I have not a moment unoccupied. I am occupied with my secretaries whilst I am eating my lunch, and very often receive deputations when I am eating my lunch. I am engaged with my secretaries whilst I am dressing and undressing for the purpose of attending the House of Lords, and it is very often the case that I am at work till six o'clock in the evening, and very often much later. During that time I have to discuss every conceivable question. I am constantly receiving letters from lunatics to say they are not lunatics. You cannot put them aside; there may be something that deserves inquiry, and I have to ask for a report about it, and when I receive the report I have to consider it. I am always receiving complaints of this or that thing done wrong by this or that County Court from all parts of the kingdom; something about what a coroner has done, or questions about the administration of justice throughout the country, complaints of magistrates, and a multitude of other matters. During the whole of this year I have had no holiday at all. There is not a day—at all events, certainly not three days—literally in the whole year in which I am not hard at work, and on many days working ten, eleven, twelve, and thirteen hours." And, as if this was not enough, Lord Herschell was President of the Imperial Institute, of the Social Science Association, of the Selden Society, and of the Society for the Prevention of Cruelty to Children.

SOCIETY OF COMPARATIVE LEGISLATION.

It is to Lord Herschell's exertions that we owe also the Society of Comparative Legislation. Sir Henry Maine has marked that "the capital fact in the mechanism of modern States is the energy of Legislatures." Here, for instance—to take Great Britain alone—is this vast and varied Empire of ours, with some sixty separate Legislatures, all busily engaged in making intere

ing and important experiments in legislation, and yet, incredible as it may appear, until the initiation of the society each portion of the Empire was legislating in almost total ignorance of what the others were about. Such an anomaly impressed Lord Herschell as it must any thinking man, and we now have, thanks to him, a critical summary of the legislation of all parts of the Empire and of some foreign countries, with a prospect in time of a survey of the legislation of the whole civilised world.

SOME PERSONAL CHARACTERISTICS.

Herschell was a delightful companion both at home and in travel. He could be sociable in the midst of all his hard work. Like Sir Walter Scott, who wrote "Marmion" and "The Lady of the Lake" in the family circle, Herschell read his briefs at home in his smoking-room, and it never disturbed him to have people in the room conversing—indeed, it appeared to be rather a relief to him than otherwise, and he would lay down his papers and join in the conversation if anything caught his ear which interested him. He had a wonderful power of mastering unfamiliar subjects—witness the Currency Commission. The work of the Commission was one of exceptional difficulty, and when Herschell accepted the presidency he was absolutely ignorant of the subject, but he went down to the country supplied with a goodly collection of Blue-books, pamphlets, and other literature bearing on the subject, and when he returned he was as well posted in all the points at issue as the best of his colleagues.

His memory, says his friend Mr. Williamson, was astonishing; he hardly ever made a note; and yet, though the most unmethodical of men, he never was at fault. In travelling he never kept an account, but when it came to a periodical settlement with his fellow travellers, he would accurately remember every payment he had made two or three days before, even to the smallest sums paid to a porter or sacristan. In truth, his wonderful memory sometimes proved a snare, and certainly was a matter of despair to his private secretaries, who would receive indignant letters asking why some previous communication had not been answered. The secretary had never seen it, but on reference to Herschell he would clearly remember the subject-matter of the missing document, which eventually would be unearthed from the recesses of the pockets of his coat, and which he had opened himself, but had omitted to pass on to his secretary to be disposed

of. It was the regular practice of his confidential clerk, when Herschell was at the Bar, to clear out on Saturday afternoons the pockets of his court coat. He generally found there numerous letters, sometimes of great importance, often containing cheques in payment of fees.

One of his pet aversions was the action for breach of promise of marriage—treating a woman like a “bale of wool.” It profaned marriage, and was, in his view, an abuse of the process of the court—a form of law-licensed blackmailing without even antiquity to commend it, for the action dates only back to Charles I. Accordingly, nearly every year he brought in a Bill to abolish the action, or at all events to limit the damages, as in Austria and Holland, to actual pecuniary loss sustained, such as the lady's trousseau or the wedding-cake. No doubt the action is at times abused by the Mrs. Bardells of the world, but in these cases the sagacity of juries is generally equal to the situation, and in *bona fide* cases damages, if unsentimental, are still a solatium. They are certainly preferable as a remedy to specific performance, as it was before Lord Hardwicke's Act, when the woman could go into court and compel the man to marry her.

From his mother, Helen Mowbray, of Edinburgh, who was a fine musician, Lord Herschell inherited a love of music, and this and travel were his two great recreations. When he was eleven years old a friend gave him a concertina, and he set himself to learn it with dogged perseverance. Later on he acquired some proficiency in playing the violoncello—enough to take part in an orchestra in a performance of Mendelssohn's “Hymn of Praise.” It was a great pleasure to him to get two or three of the pupils of the Royal College of Music to come to his house on a Friday evening, even when he was most busy, to play trios and quartettes by the most classical composers with him. He was a very good musician without being much of a performer.

MISSION TO THE UNITED STATES, AND DEATH.

A man of Lord Herschell's ability—a man who combines, as he did, consummate legal knowledge with real statesmanship—is sure to be overtaken. The Government knows his value too well, and is always requisitioning his services. In 1898 disputes had arisen between Great Britain and the United States as to the Alaska seal fisheries and other questions, and Herschell, who had a keen desire to see the two great English-speaking nations

on terms of amity, was persuaded, on the assurance that he was a *persona grata* in the States, to act as commissioner for adjustment of the differences. It was, as he said on sailing, a "gigantic undertaking," and behind it loomed the little less onerous Venezuelan Arbitration. Both weighed on his spirit. One day at Washington, while stepping out of his carriage, he slipped and fell, breaking one of the bones of the pelvis. The accident was thought nothing of at the time. Senator Fairbanks called upon him while he was laid up, and tells us how he found him lying upon his bed, to all appearance in the full enjoyment of his customary health. He was in a reminiscent mood, and talked entertainingly of his experience at the English Bar; of his Parliamentary service; of his membership of the Gladstone Ministry; of Mr. Gladstone's characteristics, of his pre-eminent qualities, and of his absolute ability to promptly meet every exigency; of the British colonial system, and of the relations between Great Britain and the United States. A few hours afterwards he was dead. Startling as was the suddenness of his death, the post-mortem examination revealed the fact that he was not the strong man he was generally believed to be—in fact, he was worn out.

HIS JUDICIAL EXCELLENCE.

At the time of his death there was no clearer or more masculine intellect on the Bench than Lord Hershell. His judicial mind, his wide knowledge of affairs, and his great powers of lucid exposition eminently fitted him to deal with the important questions which come before the House of Lords and the Privy Council. In commercial and company cases he showed to peculiar advantage. To name only a few, there is *Trevor v. Whitworth* (57 L. T. Rep. 457; 12 App. Cas. 409), deciding that a company cannot purchase its own shares; *Salomon v. Salomon and Co.* (75 L. T. Rep. 426; (1897) A. C. 22), emphasising the legal personality of a company and its effectual constitution, though six out of the seven subscribers of the memorandum are dummies; *London Joint Stock Company v. Simmons* (66 L. T. Rep. 625; (1892) A. C. 201), recognising the right of a bank to hold negotiable securities deposited with it for an advance by a broker without his client's authority as against the client; *Balkie Consolidated Company v. Tomkinson* (69 L. T. Rep. 598; (1893) A. C. 396), establishing an estoppel against a company where its secre-

tary has "certified" a transfer; *Lovell and Christmas v. Walter Beauchamp* (71 L. T. Rep. 587; (1894) A. C. 607), elucidating with admirable clearness the position of an infant member of a bankrupt firm.

CONDITIONS ON TICKETS.

In *Richardson v. Rowntree* (70 L. T. Rep. 817; (1894) A. C. 217) a shipping company had issued to a steerage passenger from Philadelphia to Liverpool a ticket folded up, with a number of conditions on it, printed in small type, beginning at the letter (a) and going down to (i). One of these conditions was: "The company is not under any circumstances liable to an amount exceeding 100 dollars for loss of, or injury to, the passenger or his luggage." Two hours after the passenger went on board she fell overboard—owing to the alleged negligence of the company—and was injured. She brought her action, and at the trial the jury found that the passenger knew there was printing on the ticket, but did not know that the printing contained conditions as to the terms of the contract of carriage; also that the company had not done what was reasonably sufficient to give the passenger notice of the conditions. Under these circumstances, Lord Herschell and the other law lords held that she was not bound by the condition—the notice given was not reasonably sufficient to inform the passenger at the time of making the contract that the company intended to contract only on special terms. This is quite in accordance with Roman law. Special terms must be stated "palam," as Ulpian says (D. 14, 3 de inst. act. 11, sects. 2, 3); and "palam," he goes on to explain, means *claris litteris unde de plano recte legi possit*. For our law to expect a steerage passenger to read a dozen conditions in small print at the peril of forfeiting his rights would certainly detract from that eulogium which pronounces it the "perfection of reason."

CUTTING A NEIGHBOUR'S BOUGHS.

Self-help is one of the characteristic principles of English law rooted in Anglo-Saxon independence of spirit. If, for instance, your neighbour's tree overhangs your ground you need not bring an action, but may abate the nuisance by cutting the overhanging branches; and this is what the defendant in *Lemmon v. Wel* (71 L. T. Rep. 647; (1894) A. C. 1) had done. It may not be very neighbourly to do so if the tree is doing no harm, but the law allows it. What, however, the aggrieved tree-owner co

tended was that he ought to have been given notice before his ornamental oaks and elms were spoilt in this way, but Lord Herschell could find no authority for this contention. The case is a good illustration of the maxim *Non omne quod licet honestum est*.

NEWSPAPER AMENITIES.

Scarlett, the famous verdict-winner, once argued, on the authority of Lord Kenyon's decision in *Heriot v. Stuart*, that editors of newspapers enjoy immunity for internecine warfare, but Lord Ellenborough would not hear of it. Mere vulgar abuse is one thing, and calumny is another. How, we wonder, would the scathing diatribes of the great Pott of the *Eatonswill Gazette* against the rival *Independent* have fared before Lord Ellenborough? In *Australian Newspaper Company v. Bennett* (70 L. T. Rep. 597; (1894) A. C. 284) the *Australian Star*, in commenting in an article on an account given by its rival—the *Evening News*—of a boatrace, said: "According to the *Market-street Evening Ananias*, both Kemp and Maclean won the boat-race yesterday—poor little silly noozy!" This language, the *News* contended, was defamatory, but the jury found a verdict for the defendant, and Lord Herschell, on appeal to the Privy Council, would not set it aside, not being satisfied that the verdict was one which no reasonable men could find. "Ananias" was strong, certainly, but then—

Sacred interpreter of human thought,

How few respect or use thee as they ought!

It might be mere editorial "badinage" or just vulgar abuse. Perhaps it was used in a "Pickwickian sense."

PUFFING AT THE EXPENSE OF OTHERS.

In *White v. Mellin* (72 L. T. Rep. 334; (1895) A. C. 154) a chemist had sold a bottle or bottles of Mellin's Food, and upon the outside wrapper had pasted an advertisement in these terms: "The public are recommended to try Dr. Vance's prepared food for infants and invalids, it being far more nutritious and healthful than any other preparation yet offered. Local agent: Timothy White, Chemist, Portsmouth." The proprietors of Mellin's Food contended that this was a disparagement of their property, for which an action for an injunction, if not for damages would lie; but the House of Lords, reversing the Court of Appeal, held that two essential ingredients were wanting—

there was no proof (1) of the statement being false, or (2) of special damage. Lord Herschell doubted whether any action of disparagement would lie because a man said his goods were better than another's, either generally or in this or that particular. If it would courts of law would be turned into a machinery for advertising rival productions by obtaining a judicial determination which of the two was the better.

MONOPOLISING AN IDEA.

Copyright supplies some pretty puzzles, and *Hanfstaengl Art Publishing Company v. Barnes and Co.* (72 L. T. Rep. 1; (1895) A. C. 20; 64 L. J. 81, Ch.) is one of them. The plaintiff was the owner of the copyright in some popular pictures called "Courtship," "First Love," "Pets," &c. The enterprising manager of the Empire Theatre put on the stage some "living pictures" of the same subjects. Then came in the *Daily Graphic* with a pictorial illustration of the "living pictures," and the copyright owner said: "This is an infringement of my rights. Here is a young lady, with a parasol, standing in a sentimental attitude by a rustic stile, with a young man close beside her—just the idea of my picture." The idea, perhaps, said the court, but not the "design" within the meaning of the Act—the hair, the dress, the pose are different—and imitating the idea will not do. "The idea," as Lord Herschell remarked, "of a young man courting a young woman at a country stile is of great antiquity." It would be a pretty thing if the plaintiff, because of his two figures in amorous proximity, his parasol, and his stile, was going to monopolise all scenes of rustic flirtation.

LORD RUSSELL OF KILLOWEN.

ERSKINE, Scarlett, Charles Russell—these are the three greatest names in the annals of forensic advocacy in England. All three attained the highest honours of the Bench. Erskine was Chancellor; Scarlett, Lord Chief Baron; Charles Russell, Lord Chief Justice of England; but to Lord Russell alone it was given to shine with equal lustre in both spheres of Bar and Bench, to demonstrate that there is no inherent incompatibility—as is so often supposed—between greatness as an advocate and greatness as a judge; that so far, indeed, from this being the case, it is the possession of the judicial mind which is the true secret of success in each.

EARLY DAYS IN IRELAND.

Carlingford Lough, on the north-east coast of Ireland, is a charming spot, with a glorious view of mountain and sea, and here it was—at Seafield House, Killowen—that Charles Russell, with his brother Mathew and his two sisters, spent a healthy and happy boyhood, with plenty of boating and fishing—a good preparation for the strenuous struggles of the Bar that were to come.

Great men, it has often been said, have remarkable mothers, and it was so in Lord Russell's case. His mother was a handsome, clever woman, clear-headed and strong-willed, like her distinguished son—strict, too, in religious observances. "How we did keep Sunday!" exclaims his sister. "Mamma was most particular on that point. How solemn and holy everything was, whilst the calm that seemed to me to be over the whole country was like the sensible presence of God!" The piano was never heard except in hymns, no games of cards were allowed, and yet there was nothing of the kill-joy spirit about it. All sorts of childish games, riddles, conundrums, and stories made the evening

cheerful. Early associations like these sink deep into the youthful mind, and, amid all the strife and distractions of his busy life, the memory of these home scenes enshrined itself as a hallowing influence in the secret recesses of Charles Russell's soul.

JOINS THE ENGLISH BAR.

He started his career as a solicitor in Belfast, and his fine intellect might have spent itself in the petty activities of a country solicitor's office but for a timely word of advice from Judge Theophilus Jones at the Newry Quarter Sessions. That judge was much struck by the young solicitor's ability in the conduct of his case. He asked Russell to come and lunch with him, and at lunch he said to him: "You are wasting yourself here. Go to England and join a circuit where there are Irish. Try Liverpool, where the Irish are strong." It argued no small courage on Russell's part to take the advice to quit his growing practice in Belfast for the uncertainties of the English Bar. Prudent friends were as ready to dissuade him from going as ever they were Christian in the "Pilgrim's Progress"; but he had a just confidence in himself—Charles Russell never wanted for courage—and to London he came, and, with his young bride, Miss Ellen Mulholland, by his side, set himself to face the world. He threw himself, with the keen zest of conscious power, into the full tide of London life; attended Maine's lectures on Roman Law and Jurisprudence, which made a profound and enduring impression on him; frequented the gallery of the House; heard "Dizzy" and Gladstone thunder against one another, and wrote a weekly London letter for a London newspaper; but he never let himself be distracted from his main object, knowing that the law is a jealous mistress and must be served with an exclusive devotion. "It is the only way," he said, "by which you can succeed at the Bar." "I don't think I ever desponded," he adds; "but I will give you a curious instance of the feeling of despair which sometimes comes over men—and able men, too. During my first years at the Bar, Gully, Herschell, and I dined together on circuit one night. Gully and Herschell were in a very desponding mood. They almost despaired of success in England. Gully proposed going to the Straits Settlement, and Herschell to the Indian Bar." It is curious to think of that night and to remember what these men ultimately became—Herschell Lord Chancellor, Gully Speaker of the House of Commons. Russell, had,

indeed, no reason to despond. He made £117 in his first year, £261 in his second, £441 in his third, and £1096 in his fourth.

THE MISSING WATCH.

There is an anecdote of him at this period worth repeating as characteristic of the man. It happened once when he had first come to London and was laying the foundation of his great career that the future Lord Chief Justice went to the pit of a theatre. The piece was popular; the pit was crowded, and the young advocate had only standing room. All on a sudden a man at his side cried out that his watch was stolen. Mr. Russell and two other men were hemmed in. "It is one of you three!" cried the man minus his watch. "Well, we had better go out and be searched," said Mr. Russell, with the alertness of mind that did not fail him at a trying moment amidst an excited crowd. A detective was at hand, and the suggestion was accepted. As Mr. Russell walked out the idea flashed through his mind that if the man behind him had the stolen property he would probably try to secrete it in the pocket of his front-rank man. Quick as thought he drew his coat tails about him—only to feel, to his horror, something large and smooth and round already in his pocket. While he was still wondering what this might mean for him the detective energetically seized the hindmost man, exclaiming, "What, you rascal, at it again!" To Mr. Russell and the other man he apologised, and bade them go free. But Mr. Russell, before he had taken many steps, reflected that he could not keep the watch. He went back to the box-office and explained, with a courage on which he afterwards said he rarely experienced greater demands, that, though he did not take the watch, he had it. So saying, he put his hand into his pocket and pulled out—a forgotten snuff-box!

SOME MEMORABLE CASES.

His practice at first lay mainly in the Liverpool Court of Passage and on the Northern Circuit. But a Liverpool reputation is not long in reaching London in these days. The first important London case in which he was engaged was *Re Grazebrook*, and so impressed was Lord Westbury with the ability of his argument that he shortly afterwards offered him a County Court judgeship. By 1878 he was in the full tide of professional success. Thenceforward his history is written in the *causes célèbres* of the last quarter of the nineteenth century. One of

the earliest was the "convent case" of *Saurin v. Starr*—a case in which a young lady who had joined a convent complained of being sent away, and which had thus all the piquancy of a religious scandal. "How happy," exclaims Eloisa in Pope's poem:

"How happy is the blameless vestal's lot!
The world forgetting, by the world forgot;
Eternal sunshine of the spotless mind,
Each prayer accepted and each wish resigned;
Grace shines around her with serenest beams,
And whispering angels prompt her golden dreams."

But if anyone wishes to compare romance and reality—Pope's picture and the true inner life of the convent, with its petty squabbles and "low-thoughted care"—he will find it admirably illustrated in the story of Miss Saurin.

The Belt libel case was another *cause célèbre*. The alleged libel was that Belt, who was a fashionable sculptor, was an artistic impostor, and that the busts and pieces of sculpture which he laid claim to were in fact the work of his pupils or assistants. The case lasted forty-three days, and was the topic of conversation at every dinner-table and in every club. Other cases in which Russell figured conspicuously were the Fortescue breach of promise case, the Dilke case, the Colin Campbell divorce case, the Baccarat case, the Osborne case, and the Maybrick poisoning case; but his most signal triumph was the great speech which he delivered before the Parnell Commission. Coleridge has somewhere defined eloquence as "reason penetrated and made red-hot by passion." Sir Charles Russell's speech answers well to the description. It was penetrated and made red-hot with the fire of patriotism—with a passionate love for the land of his birth.

HIS GENIUS AS AN ADVOCATE.

"The power," says Lord Justice Mathew, "which made him (Charles Russell) the greatest advocate of his time was best displayed when fraud or perfidy or malice had to be exposed. It has been said that the finest actors off the stage are the members of the Bar. This was not true of Russell. He felt the indignation and contempt which he poured upon the witness. His searching questions flashed in rapid succession; his vehemence of manner, and his determination to force out the truth, secure him a complete mastery of the dishonest witness. His extraordinary power when addressing a jury was owing not so much to

any oratorical display as to the authority which he could always exercise over those he sought to influence. Spellbound under his vigorous and often passionate reasoning, their verdict was often due to the merits, not of the litigant, but of his counsel." Somebody once said that his effect on a witness was that of a cobra on a rabbit. Describe the power, analyse it as we will, it remains as inexplicable as genius; it flashed from his personality; he was, as Lord Bowen said, an "elemental force," and his imperious will and masterful temper, his energy and concentration, were but the outward and visible signs of this elemental force. Pitt possessed the same power. He could quell an adversary with a glance.

"I once," says a barrister, "had an opportunity of realising the effect which Russell must always have produced on juries. I came into court just as he was about to speak in some great case, the particulars of which I now forget. I got near the jury-box and had a good view of him—could see every expression, every gesture, every glance. I then realised for the first time what a splendid man he was—what an impressive personality. I forget what he said. I cannot tell you whether the speech was good or bad. But I don't forget Russell; he appears before me now as vividly as when I saw him on that day. He seemed to me to be quite irresistible, not from anything he said, but from the whole appearance and demeanour of the man. Charles Russell, sitting quietly in court, taking no note, looking calmly round, and occasionally tapping the lid of his snuff-box, dominated everyone who came within the sphere of his influence."

"THE GAME IS ON THE TABLE."

Mr. O'Brien, in his interesting memoir, tells how Russell once pounced down on his junior. "What are you doing?" "Taking a note," was the answer. "What the —— do you mean by saying you are taking a note? Why don't you watch the case?" "How like Russell," said a friend to whom he told the story. "It was just the same in playing cards with him. He used to insist on my playing whist, and, worse still, on my being his partner. I knew very little about whist; whenever a card was played I used to look at my hand to see what I had got. Russell would get very impatient at this. He would rap the table and say: 'Why are you looking at your cards? Why don't you watch the game? The game is on the table.' He did not want to look at his cards; he knew them by heart." "So it was," adds

Mr. O'Brien, "in law. The game was on the table there, too. He knew all that could be known about the case before he came into court. In court he watched the other side, and played on the instant without looking at his hand." But he did not trust his genius alone. He supplemented nature by art—got up his briefs industriously. To qualify himself for arguing mercantile cases at Liverpool he would sit late into the night with some expert friend being coached in commercial routine, and great was the astonishment of commercial witnesses when, in cross-examination next morning, he discovered a knowledge of customs and terms of trade as to the manner born. Whatever he did, he did thoroughly—threw himself heart and soul into his work. "What a fool I am!" he was once heard to say as he entered the robing-room, flushed with his exertions in court, "knocking myself to pieces about a twopenny-halfpenny dispute." But he could not help knocking himself to pieces—it was part of the intensity of his nature.

HIS METHODS OF WORK.

Speaking some years before his death of his professional methods, he said: "If you ask me to reduce the common habit of my life to a formula, I will tell you that I have only four ways of preparing my work. First, to do one thing at a time, whether it is reading a brief or eating oysters, concentrating what faculties I am endowed with upon whatever I am doing at the moment; secondly, when dealing with complicated facts, to arrange the narrative of events in the order of dates—a rule not always acted on, but which enables you to unravel the most complicated story, and to see the relation of one set of facts to other facts. My third rule is, never to trouble about authorities or case law supposed to bear upon a particular point until I have accurately and definitely ascertained the precise facts. The last rule is one which the professional man will appreciate better, perhaps, than the layman. It is not only valuable—I may say this, as I did not invent it—but very interesting to me individually as I got it from Lord Westbury, when a young hand at the Bar and pleading before him. I was plunging into citation of cases, when he very good-naturedly pulled me up and said: 'Mr. Russell, don't trouble yourself with authorities until we have ascertained with precision the facts, and then we shall probably find that a number of authorities which seem to bear some relation to the question have really nothing important to do with it.' My fourth rule is,

Try and apply the judicial faculty to your own case in order to determine what are its strong and weak points, and in order to settle in your own mind what is the real turning-point in the case. This method enables you to discard irrelevant topics, and to mass your strength on the point on which the case hinges."

SOME PERSONAL CHARACTERISTICS.

"His habits of work," says Mr. Charles W. Mathews, "at all times revealed the strong man. Often when he was at the Bar, and when some sensational case was adjourned for the day, have I stayed with him in his chambers, and, as his junior, submitted something which had occurred to me, in the hope of its being useful, and almost as often has come the rebuke: 'It's past five o'clock. I don't intend to resume any thought of the case which is proceeding until we meet here at ten o'clock to-morrow morning. Depend upon it, we have devoted as many hours to our work as can be usefully given to-day. In the morning our refreshed minds may bring us fresh ideas. Will you kindly tell my clerk to call me in twenty minutes as you go out, for I am speaking at Hackney to-night, and if possible I always sleep between day and night work?' Simple as seem the words I have above quoted, each one of them is something more than an indication of strength, in indicating how strength not only can but should be husbanded. . . . What a power that power of sleep at moments when feebler mortals, under the apprehension of some public performance, are frightening themselves into panic which, though it may endure only until they face their audience and are well through their first spoken sentence, eats into their nervous strength, first to shatter and by repeated and continuous strain to destroy! But it must not be assumed," goes on Mr. Mathews, "that Lord Russell was not nervous when he rose to speak upon an occasion which he deemed one of importance. He has often told me that, in his opinion, a speaker required to be nervous to produce of his best, and that an audience was much more sympathetic to one who approached them nervously, and who by degrees, and in their sight and hearing, lost his constraint under the influences of his own enthusiasm and their encouragement."

For eloquence of the old *ore rotundo* school, Lord Russell had much more contempt than liking, and, as he was not himself apt to be swayed by "tall talking" or "word-spinning," he could not

believe that it had any effect, even of a transitory character, on others. According to him, eloquence consisted in the power of evoking the sympathy and stirring the feelings of your audience. "Every man can be eloquent, and on occasion every man is eloquent," I have heard him assert. He has only to convey to his audience that he feels what he says, and to make them feel what he is saying, to accomplish the most difficult task which can be set to eloquence and to win its highest reward. On ordinary occasions he disregarded "forms," and even disliked peroration; but, when the occasion warranted, let all who delight in real eloquence turn to the report of the proceedings before the Parnell Commission to satisfy themselves that, given the "cause," he could conjoin the "form" to it. As a rule, I know for a certainty that he did not prepare what he was going to say. His "note" was at most a skeleton of incidents and dates in chronological order, for which he was a great stickler. Lucidity was his first ambition—to make his tribunal follow and understand his case his first aim, and of self-display he never thought at all. The word "dwell," written in his own hand, was the most elaborate direction to himself which I have ever seen in any note of his prepared either for any opening or reply, and this signified that he was to make the most of that particular point.

"In dealing with an English jury it is better," he said to Mr. O'Brien, "to go straight to the point—the less *finesse* the better. They are busy men, and they want to get away quickly. The great thing in dealing with an English jury is not to lose time. Mere *finesse* they don't appreciate—go straight at the witness and at the point. Throw your cards on the table. It is a simple method, and, I think, a good method." Like the present Lord Chancellor, he had great confidence in juries. Mr. Edward Dicey once remarked to him, after he had become Lord Chief Justice, that if he (Dicey) were on his trial as an innocent man he would sooner be tried by a judge than by a jury. Lord Russell's answer was that if Mr. Dicey knew as much of judges as he did he would change his opinion—that juries, as a rule, took a more common-sense view of a case than the judges.

Charles Russell was no forensic or judicial humorist—he was far too much in earnest; but he had wit at command if he wanted it. "What's the extreme penalty for bigamy, Russell?" said a brother barrister sitting by him in court. "Two mothers-in-law," replied Russell promptly. On the hearing of a case in the

Court for Crown Cases Reserved he said: "I remember a case in which a very innocent remark of my own elicited the fact of a previous conviction. A prisoner was addressing the jury very effectively on his own behalf, but he spoke in a low voice, and, not hearing some of his observations, I said: 'What did you say? What was your last sentence?' 'Six months, my Lord,' he replied."

Lord Russell was not a great reader—few men of action are; but he always carried with him two books. One was Locke on the Human Understanding and the other the *Imitatio Christi*. Locke appealed to his logical faculty—his passion for clearness of thought, directness, lucidity; Thomas à Kempis to the spiritual side of his nature, for he was through life a devout and loyal Catholic. One other thing he always carried in his bag, and that was a pack of cards—this also symbolical, for cards and horses were the chosen recreations of his life.

Intellectually the most striking and admirable quality in Lord Russell was his wide and clear vision. He took large views, which English lawyers so seldom do. In this he resembled his great countryman Lord Cairns. His address on International Law at Saratoga is a good illustration; so is his address on Legal Education, delivered in Lincoln's Inn Hall. Whatever the question he touched, he raised it to a higher platform. It was this quality which inspired the confidence reposed in him by foreign nations and marked him out as a mediator in the disputes of nations.

POLITICS.

Side by side with his professional avocations he was taking an active part in politics. He threw himself with characteristic ardour into the Home Rule controversy. He was a capital platform speaker, and he spoke in all parts of the country. No place was too remote or too small. He would travel from London after a busy day in the courts, and spend the evening in exercising his fervid oratory in heated halls. The double strain of this professional work and politics was severe, and told upon his health. It explained what surprised many—his acceptance of a Lordship of Appeal on Lord Bowen's death. A few months later, however, he found his true sphere. Lord Chief Justice Coleridge died, and Lord Russell succeeded to his place.

LORD CHIEF JUSTICE.

"What does the Bar say of me?" he asked one of his friends soon after his elevation. "They are delighted to find your Lord-

ship so gentle and patient," was the reply. "I suppose," retorted the great man, "those were the virtues that it was thought I should lack." He was an ideal Chief Justice—calm, impressive, and of indisputable authority. "To see him at his best," says one who knew him well, "was to see him presiding over a trial where great interests were at stake and passions ran high. Then and there he was a true Chief Justice: the majesty of the law speaking through him in apt and dignified words." Such was the scene when Dr. Jameson and his associates were tried before him at Bar for their deplorable raid. But such opportunities are rare. . Nowadays the King's Bench is for the most part engaged in threading the labyrinth of statutory provisions—Local Government or Public Health, Revenue or Finance Acts—not in great judicial displays or in laying down important principles of law.

THE ADMISSIBILITY OF CONFESSIONS.

One of the most honourable characteristics of our English criminal law—however Draconian its severity in the past—was and is its scrupulous fairness to prisoners. Witness, for instance, the rule that a confession procured either by promise or threat is not admissible. The reason is to guard against the possibility of an innocent person being from weakness seduced to accuse himself in hopes of obtaining thereby more favour, or for fear of meeting with worse punishment. In *Reg. v. Rose* (18 Cox C. C. 717) the prisoner was indicted for larceny of certain corn, chaff, sheep, poultry, and grass seeds, the property of his master. The master, in the presence of a police-constable, had asked the prisoner how he accounted for the number of the sheep on the farm being less than it should be, and the prisoner admitted that he had sold a lamb and a ewe to certain persons. The master then said: "You had better tell me all about the corn that is gone," adding it "would be better" for the prisoner to do so. On this the prisoner was convicted, but the Court for Crown Cases Reserved held that the conviction could not stand. The confession was not voluntary; it was, as Lord Russell said, preceded by an inducement held out by a person in authority. *Reg. v. Farnborough* (73 L. T. Rep. 351; (1895) 2 Q. B. 484) is another illustration showing how carefully our criminal law is administered. The prisoner in this case was charged with stealing milk. After the jury had been absent some time, the judge sent for them, and, in answer to questions put by him, they said

they had not agreed upon their verdict, but that they believed the only witness for the prosecution. The judge thereupon caused a verdict of "Guilty" to be entered. But the Court for Crown Cases Reserved set it aside. "There might," as Lord Russell said, "have been many facts which would have justified the jury in drawing the inference that there was no felonious intent. The prisoner might have thought he was allowed to take the milk, or he might have intended to pay for it. It was entirely beyond the function of the judge to draw any inference of fact and thereby supply an essential part of the charge." If this were not so any traveller who took a bun from a railway buffet, meaning to pay for it, might find himself convicted of petty larceny.

NEWSPAPERS AND FALSE PRETENCES.

In *Reg. v. Silverlock* (72 L. T. Rep. 298; 18 Cox. C. C. 104) the prisoner had been convicted of obtaining money by false pretences. He had advertised in the *Christian World* for a housekeeper, and had obtained from a lady, on the faith of his false pretences, a deposit of £5. Application was made to quash the conviction on the ground that it was not stated in the indictment that the false pretence was made to any definite person; but Lord Russell promptly overruled the technicality. "The advertisement is addressed," he said, "to all to whom knowledge of it may come." This is a most necessary principle to uphold in these days, when newspaper advertisements are the favourite medium for frauds of all kinds.

LORD WATSON.

"Some are born great," soliloquises Malvolio, "some achieve greatness, and some have greatness thrust upon them." Lord Watson was one of those who have greatness thrust upon them. He had none of that fever of ambition which consumes so many public men. His natural taste was for a quiet country life and the pursuits of a country gentleman. But, happily for the cause of jurisprudence, Fate beckoned him to a legal career.

William Lord Watson was born in 1827 in the manse, Covington, Lanarkshire, where his father was minister. How many great men have been reared in those quiet manses and parsonage houses! And what wonder, for there are learnt the lessons of "plain living and high thinking."

Educated at Glasgow and Edinburgh, he was admitted an advocate in 1857—then twenty-four—but nearly ten years elapsed before he entered on his career.

LOVE OF SPORT: PRITCHARD THE POISONER.

"How he spent his ten years of waiting I cannot say," says Lord Stormonth-Darling, "for he was in good junior practice before I knew him. I have never heard that he passed through any of those spasms of despair which vex the souls of some ultimately-successful counsel. He wrote no law book, but he reported a little, and he must have been, in a variety of ways, 'makin' himself a' the time,' to quote Shortreed's expressive phrase about the great writer whose works were Watson's favourite study. The interests which he had outside his profession were mostly those of a sportsman. His early training had made him a lover of the fields and woods, and he used to say of himself that perhaps he ought to have been a gamekeeper. An excellent, if somewhat masterful, keeper the great judge would have made, for not only was he a very good and remark-

ably-quick shot, but he threw a fine fly, and he knew far more about the habits of game and fish than the majority of those who go in pursuit of them. He was also to be seen on the golf links in days before golf had become a cosmopolitan pastime; and on the curling-pond he had few equals. These were healthy tastes, which, joined to a sociable habit of mind, did much, I daresay, to prevent his brooding over his briefness." Like so many men of ability, he had a certain indolence of temperament. Duty, not inclination, made him industrious in later life. In London—*gurgite vasto*—he might never have emerged; but Edinburgh is a smaller world, and in its polite society such talents as Lord Watson's could not remain hid. His chance came when a friend fell ill and recommended Watson to take his place. One of the earliest cases in which he was engaged was the trial of the notorious poisoner, Dr. Pritchard. Pritchard was a plausible and unprincipled Glasgow doctor, whom somebody once described as "the prettiest liar of his time." Had he been content with this accomplishment he might have ended respectably, but he went on to administer antimony in large doses to his mother-in-law and his wife in the most cold-blooded way in order to accelerate a legacy coming to him on their deaths. Watson was for the defence, but no amount of legal learning or forensic ability could have saved Pritchard in the face of the evidence. Before his execution he admitted his guilt, and acknowledged the justice of his sentence. It is a curious thing that antimony has the property of preserving the victim's body uncorrupted, fresh as in life, as if to testify—so the Middle Ages would have thought—against the murderer.

SOLICITOR-GENERAL FOR SCOTLAND.

Watson was a staunch Conservative in politics—a rarity among Scotch lawyers—and in 1874 Mr. Disraeli selected him as his Solicitor-General. Thenceforward his rise was rapid. In 1875 he became Dean of the Faculty of Advocates, in 1876 Lord Advocate, and in 1880, on the death of Lord Gordon, Lord of Appeal. As Lord Advocate it fell to his lot to conduct the prosecution of the Glasgow Bank directors. The failure of the Glasgow Bank was one of those commercial catastrophes which cause widespread ruin and disaster. It was an object-lesson in the perils of unlimited liability. Many a pitched battle—as Lord Bramwell said—had caused less misery than that "horrible

Glasgow Bank case." The directors were all, on January 31st, 1879, found guilty of uttering false balance-sheets, and were sentenced—two to eighteen months' imprisonment, and the other five to eight months'. Once in his proper sphere as Lord of Appeal, each year made more apparent the greatness of Lord Watson's judicial genius.

IN THE PRIVY COUNCIL: CANADIAN FEDERATION.

"I am indulging in no panegyric," said Mr. Haldane, addressing the Scots Law Society, "inspired by mere personal regard for a great judge whom I was privileged to know, when I say that he had rendered more services to the Empire than many a distinguished statesman. Those who have followed closely the recent history of Canada know, and can illustrate, what I mean. In 1867 Lord Carnarvon passed his Confederation Act, which created a Constitution in accordance with resolutions passed in various parts of Canada. Under this Constitution there was to be a Central Parliament and executive at Ottawa to deal with the general affairs of Canada, and Parliaments and executives in the provinces which should deal with provincial matters. The people of the colony, who were suspicious of interference from Downing-street, also obtained power to create a Supreme Court for Canada which should settle any Constitutional questions that might arise, the intention being to get rid as far as possible of the Privy Council as a Canadian Court of Appeal. This court was not set up for some years, but when it was it began to produce a very different effect in the colony from that which was intended. The judges took, or were supposed to take, the view that the meaning of the Confederation Act was that the largest interpretation was to be put upon the powers of the Central or Dominion Government, and the smallest on those of the provinces. About twenty years ago a series of decisions was given by the Supreme Court of Canada which certainly gave colour to this view. There was alarm in the provinces, and the result was a succession of appeals to the Queen, for which special leave was obtained from the Privy Council. I well remember the circumstances of these cases, for it so happened that when a junior I was taken into them on behalf of Ontario, which bore the brunt of the struggle with the Dominion before the Privy Council. So important were they deemed in Canada that the Provincial Prime Ministers used

to come over to argue in person with the assistance of the English counsel. Almost from the first Lord Watson took the lead in the decision of these appeals. He worked out a different view of the Canadian Constitution from that which had been foreshadowed by the Canadian courts. He filled in the skeleton which the Confederation Act had established, and, in large measure, shaped the growth of the fibre which grew around it. He established the independence of the provinces and their executives. He settled the burning question controversies as to the Liquor Laws, and as to which Government, Dominion or Provincial, had the title to gold and silver. His name will be long and gratefully remembered by Canadian statesmen. It is difficult to realise that he is gone. He was *the* Privy Council judge *par excellence*. His mind was wholly free from any tendency to technicality, and he never failed to endeavour to interpret the law according to the spirit of the jurisprudence of the colony from which the appeal came. If it was a Cape appeal he was a Roman-Dutch lawyer; if it was an Indian case of adoption he entered into the religious reasons for the rule to be applied. If it was a Quebec case of substitution under the old French Code or a Jersey appeal under the Custom of Normandy it was just the same. He imported none of the prejudices of the Scotch or English lawyer. In the House of Lords he was just as striking, whether it was a Scotch appeal or an English case about some abstruse question of real property law. He was a great judge. For you his name will go down to posterity coupled with those of your great Scottish lawyers—the men of whom Inglis was the type. For us in England he will be recalled as one of the most superb judges that ever sat in the House of Lords. But the greatest memory of him will, to my mind, be that which must long be preserved in the distant colonies of the Empire, for which he was the embodiment not only of a great legal intellect, but of absolute freedom from partisanship, and a passionate love of justice.”

STUDY OF THE CIVIL LAW: THE LAW OF NATURE.

This fine legal intelligence and freedom from provincialism Lord Watson owed in a great measure to his early training in the civil law. Mr. Bryce, in his recent “Studies,” has dwelt on the educational value of the civil law, on the good sense which distinguishes the Roman jurists, their large and liberal views

of law, their philosophic spirit and sense of historical proportion. These qualities were reflected in Lord Watson. The Stoics postulated a universe animated and actuated by reason, and we, with the marvels of science before us, may be permitted, perhaps, to do the same. The Stoics saw in man's reason a part—a scintilla—of this *mens universi*; and may not we? But what is it, where is it, this right reason according to which the Stoics would have us live—in particular, that form of right reason or natural equity which governs human conduct—the chief concern of laws? May not the truth be this, that the whole history of law is just a continual endeavour to get at this right reason amid the changes and readjustments which accompany the evolution of society—an endeavour illustrated in the constant appeal in modern times to an ideal standard of reasonableness? Laws are, as Hooker says, the “voices of right reason”; and in this drama it is the great jurists of the world such as Paul and Papinian, Grotius and Savigny, Maine and Lord Watson who are the interpreters—who reveal to us this law of Nature, of right reason, and discern the manner of its application. The Roman jurists reached it through the *jus gentium* and the morality on which all law is based. We, too, like the Romans, have our moral principles and our *jus gentium* in the varied systems which make up the legal mosaic of the British Empire, the native laws and customs of Hindoo and Mohammedan, Parsee and Chinese; and it is from a comparison of these that the true jurist like Lord Watson gets at those fundamental principles, which—stripped of technicality—are much the same in all countries.

JUDICIAL CHARACTERISTICS.

“Some years since,” says Mr. Haldane, “when the English Bench was very strong, I asked Lord Bowen whom he took to be the greatest English lawyer upon it. He answered, ‘Watson.’” No one who has seen him at work in an English appeal will wonder. He had read English law, and he had done what only a mind of great power could have accomplished so completely—he had mastered what he had read without letting it in the least master him. There was in his legal criticisms that same quality of inevitableness which is so important elsewhere, and in his case this quality made his judgments on even the most technical points of English conveyancing the conclusions of an obviously-great judge. This is what made it an intel-

lectual treat to argue before him. There was once an English lawyer, he adds, who, after years of tasting the sweets of life, placed them in this order: "I would rather," he said, "go to church than go to the play: I would rather go to the play than go shooting: I would rather argue before Lord Watson than go to church."

Lord Watson's mind was singularly acute and logical. He recognised at once a good point and a bad point. He spared no pains to get to the bottom of the question before him, never writing a judgment without the greatest consideration or without consulting every source of information open to him. In breadth of view and grasp of legal principles he had no superior; but what was most striking in him was the impartial temper of his mind. "He seemed," said Lord Stormonth-Darling, "to be the fairest-minded man I ever knew." If he had a fault it was that he was too apt to interrupt counsel in order to pursue a train of reasoning of his own. Courts of justice exist for the redress of grievances, not the discussion of moot points of law, and many of our greatest judges, impressed with the importance of dispatch, have adopted the Socratic method with counsel by way of getting at the real point at issue. Sir George Jessel did it; so did Lord Esher; and so did Lord Watson. It spoils the symmetry of an argument, no doubt; it is fatal to rhetoric: but truth is more than symmetry or rhetoric.

Lord Watson was once pursuing this method with counsel in a trade-union case in which the question was what constituted "molesting." "I think," said Lord Morris slyly, "the House quite understands now the meaning of molesting a man in his business." It is worth noting, however, that President Grévy regarded it as one of the best attributes of the English Bench that the judges condescended to argue cases with the counsel engaged. French judges never interrupt, and, as a consequence, frequently got erroneous impressions. A counsel who knew Lord Watson once ventured to complain to him, in private, of his too-frequent interruptions of counsel: "Eh, mon," said Lord Watson—he retained his broad Scotch to the last—"ye should no complain of that, for I never interrupt a fool."

SOME DECISIONS: CONDONATION IN SCOTCH LAW.

A comparison of the differences of English and Scotch law is both interesting and instructive. Take the doctrine of con-

donation of adultery, for instance. In England condonation is conditional on future good behaviour. Misconduct revives the old offence (*Blandford v. Blandford*, 48 L. T. Rep. 238; 8 P. Div. 19).

In Scotland it is otherwise. The condonation which the law infers from the resumption of conjugal intercourse by a husband or wife who is in the full knowledge of the other spouse's guilt is absolute and unconditional. The acts of adultery or cruelty condoned are extinguished, and can never thereafter be made the grounds of an action of divorce (*Collins v. Collins*, 9 App. Cas. 205). This is surely the more reasonable. Is it right, as Lord Blackburn remarked, that one spouse, fully aware of the misconduct of the other spouse and having elected to forgive it, should be permitted to treat the other as a spouse and to live together, and yet to reserve a power to fall back upon the bygone forgiven offence as a substantive ground for redress? Such a distrust must poison the atmosphere of mutual love and confidence which ought to surround married life.

THE REMEDY OF HABEAS CORPUS.

In *Barnardo v. Ford* (67 L. T. Rep. 1; (1892) A. C. 326), which was, as Lord Watson said, a litigation little calculated to advance the interests of institutions engaged in the useful work of reclaiming children from the streets, Dr. Barnardo—the well-known philanthropist—had picked up a little waif at Southampton, and the mother had said, "Take charge of it; I cannot." Then a Romish priest got the mother's ear, and she wrote to Dr. Barnardo to hand the child over to him. Dr. Barnardo replied that he was no longer with him—in fact, the child had been sent to Canada. The next move was a writ of *habeas corpus* requiring Dr. Barnardo to produce the child which he had not got. Would the writ lie?—that was the question. The Court of Appeal thought it would, but the Law Lords dissented. "The remedy of *habeas corpus*," said Lord Watson, "is, in my opinion, intended to facilitate the release of persons actually detained in unlawful custody, and was not meant to afford the means of inflicting penalties upon those persons by whom they were at some time or other illegally detained. Accordingly the writ invariably sets forth that the individual whose release is sought, whether adult or infant, is taken and detained in the custody of the person to whom the writ is addressed—and rightly so,

because it is the fact of detention and nothing else which gives the court its jurisdiction."

ARTICLES OF ASSOCIATION: INDOOR AND OUTDOOR
MANAGEMENT.

Muirhead v. Forth and North Sea Steamboat Mutual Insurance Society (6 R. C. 59) is an illustration how thoroughly Lord Watson had mastered the intricacies of English company law. A marine insurance company had altered its articles by providing that no steamboat was to be insured to more than four-fifths of its value, and had issued to the plaintiff, the owner of a steamboat, a policy of insurance on the terms contained in "the articles of association." This policy was, in fact, in excess of the four-fifths rule. The insured steamboat was lost, and the company, having discovered the excess, refused to pay. But it so happened that there had been a flaw in the resolution altering the articles, and the plaintiff said, "This new article is invalid—not a term of my contract. My contract is governed by the articles which are valid." But the House of Lords overruled the contention. The irregularity was a matter of the indoor management. Had the company set up the invalidity of the article against the plaintiff he would have been entitled to say it did not concern him—everything was *ex facie* regular. Then, could he do what the company could not—set up the irregularity himself? No. In familiar language, what was sauce for the goose was sauce for the gander.

"ARE YOU TEMPERATE?"

A Scotch bailie made a proposal to an insurance company to insure his life, and received a number of printed questions to answer, among them: "(1) Are you temperate in your habits? (2) Have you always been so?" to which the bailie replied: "(1) Temperate. (2) Yes," and subscribed an agreement that the declaration was the basis of the contract. Eight months afterwards he died of chronic hepatitis—a disease of the liver brought on by drink. The company refused to pay, and the policy-owner brought his action. Had the bailie given merely his own opinion about himself or had he warranted his temperance as a fact—that was the first question. The House of Lords, reversing the Court of Session, held that it was a warranty. But what is temperance? As Lord Watson justly remarked, men differ so much in their capacity for imbibing strong drinks that

quantity affords no test. In judging of a man's sobriety, his position in life and the habits of the class to which he belongs must always be taken into account. What was temperance in the days of Pitt would be intemperance with us. All this, however, admitted, the bailie was manifestly, on the evidence, in the habit of taking more drink than was good for him, and the insurance company emerged successfully from the litigation.

SNOW AND SALT: A STATUTORY NUISANCE.

The first impulse of unregenerate human nature when anything untoward happens is to transfer it to somebody else—if a bull is ravaging in your flower garden, to open the gate into your neighbour's. The next is to put the blame on your neighbour—a favourite subterfuge, from Adam downwards. Both these frailties were exemplified in *Ogston v. Aberdeen District Tramways Company* (75 L. T. Rep. 633; (1897) A. C. 111). Aberdeen being visited with a snowstorm, the tramway company proceeded to rid itself of the annoyance by clearing its line with a snow-plough, and piling up the snow along the track; then it strewed salt on the rails to prevent the snow freezing into the grooves of the rails. From the point of view of the company's own convenience this was all right—nay, laudable—in facilitating traffic, but it ignored the fact that the pernicious mixture thus generated—the briny slush—permeated the snow, inflicting grievous bodily injury on horses, chilling human soles, and rotting human boots—in a word, causing a nuisance. The nuisance, indeed, could not be denied, but the tramway company said it was a necessary nuisance, committed under an implied statutory authority, and when driven from this position they said: "It is all the fault of the highway authority. They ought to have cleared away the snow, and then there would have been no nuisance." Thus this soulless corporation. But the court would not listen to the plea that anyone may create a nuisance and shelter himself from responsibility by suggesting that somebody else is under a legal responsibility to remove it. Snowstorms are not unknown phenomena in winter in Scotland. Glasgow and Edinburgh and Dundee have discovered the art of dealing with a heavy downfall; and what Edinburgh can do Aberdeen may do. This is a good logic. So the House of Lords sent away the tramway company, like a naughty boy, to copy out the maxim *Sic utere tuo ut alienum non lædas*.

INDEX.

- A.
- Abduction, thinking abducted girl over age, 291
- Abinger, Lord, 73
- Accident to Sir Cresswell Cresswell, 129
- Accord and satisfaction, English law as to, 233
- "Across country," meaning of, in a steeplechase, 72
- Acting, Scarlett's consummate, 78
- Actor, every good judge an, 335
- Administration suits, costs of, 386
- Admiral, Court of the Lord High, 234
- Admiralty Court, Dr. Lushington in the, 44
the old Court of, 234
- Adolphus' retort to Scarlett, 75
- Adulter, admission of, by wife not evidence against co-respondent, 130
effect on wife's agency, 190
imputing, to medical man no libel, 146
no bar to wife's right of dower, 23, 282
- "Adversity," Baron Alderson's stanzas to, 92
- Advice to young barristers, Lord Hannen's, 338
- Advocacy, Charles Russell's genius for, 432
ethics of, by Baron Bramwell and Dr. Johnson, 194
fas and *nefas* of, 166
- Advocates, the College of, 235-6
- Affidavits, Charles Reade on, 238
- Affreightment, the law of our flag governs the contract of, 191
- Agapemone case, the, 32
- Alabama claims, Chief Justice Cockburn on, 161
- Alaska Arbitration, Lord Herschell and the, 424-5
- Alderman Wood, 175
- Alderson, Baron, 91
commends Roundell Palmer, 370-1
- Alexandra Palace case, 320-1
- Allotment of shares must be communicated, 211
- Alteration of will and of deed, difference of presumption, 174
- Amateur doctor, the, 146
theatricals, 255
- Ambition, Campbell's highest, 136
for wooolsack, Lord Eldon's warning against, 3
- America, Lord Coleridge's visit to, 363
Lord Herschell's visit to, 424-5
- Amicus curiæ*, Mr. Lee as, 28
- Ancient lights, Sir G. Jessel on, 231
- Apologising to a prisoner, 19
- Apple, the harm that came of eating an, 360-1
- "Applepie Kelly," 304
- Appointment by parent to languishing child, 182
- Arbitrator, discretion of, as to mode of inquiry, 89
- Arches, the court of, 235
- Architect, Mr. Justice Maule's opinion about, 71
- Arrest for debt, Mr. Justice Maule's view of, 71
- Articles of association: indoor and outdoor management, 447
not a contract with third persons, 310
- Athletes at Bar and on Bench, 141
- Attention to business, Lord Langdale on, 11
- Attorneys, giving names of, in "Reports," 134
- "Attwood," death of Mr., 85
- Auctioneer may not sell for bills, 81
- Audita querela*, Lord Campbell's joke, 137
- Austin, Charles, his earnings at the Bar, 59
John, 142
Lord Melbourne on, 377
- Authorities, Lord Westbury on the citation of, 434

- B.
- Babbage, of the calculating machine, and Maule J., 68
- Baby, a cheque for, 63
- Backgammon, Lord Lyndhurst and, 325
- Bacon's Lord, ideal judge, 332
- Bacon, Vice-Chancellor, 311
habits of, 313-4
- Bad law and Lord Justice Knight Bruce, 28
- Ballet not an "entertainment of the stage," 284
- Bank of England note, title under, 403-4
- Banns of marriage, informality in, 119
- Bankruptcy Act, 1869, 313
- Baptismal regeneration, Bishop Philpott and, 17-18
- Bar—
advice to young members of, Lord Hannen's, 338
athletes at, 141
Bench and Baron Alderson, opinion as to, 91
Lethe runs between, 177
success at, 35, 96, 125, 192-3, 224, 258, 339
- Barber, Sugden the son of, anecdote in regard to, 109
- Baron Surrebutter, 35
- Barrister, the, and Mr. Justice Cresswell—"Stop!" 126
without connection, a ship without water, 133
- Barristers, encouragement for young, 125
House of Commons "infested" with, 205
- Battel, trial by wager of, 20
- Bayley's, Mr. Justice, compliment to Alderson, 93
- "Beating the bounds" a valid custom, 107
- "Beautiful demurrer," a, 34
- Beecher Stowe's, Mrs., description of Lord Campbell, 137-8
her version of the Byron scandal, 42
"Sunny Memories of Foreign Lands," 137-8
- Belt libel case, the, 432
- Benjamin, anecdote of, when interrupted, 206-7
high opinion of Lord Cairns, 206
quitting House of Lords, 372
- Bench, advantages of, and Parliament, 161
- Bench (*contd.*)—
longevity of, 311
the, pleasanter to find truth than arguments 118
- Bethell's rudeness to Willes, 186
- Bigamist, Maule J. and the, 68-9
- Bigamy as a crime, 191
extreme penalty for, 435
- Billingsgate and a slander action, 351
- Birthday odes to his wife, Lord Hatherley's, 180
- Bishop, the, and Mr. Justice Patteson, 144
- Blackburn, Mr. Justice, 258
Cockburn, Chief Justice, learns his law from, 161
- Blackleg, exposure of the arts of a, by Chief Justice Jervis, 52-3
- Blackmoor, Lord Selborne at, 377-8
- Blank transfers, 232
- Blasphemy, the law of, 366
- "Blowing up his attorney," Maule J.'s foibles, 67
- "Boiling down the law," 348
- Boldness, Bacon on, 149
- Bon mots* of Bramwell, Lord, 196-7
of Knight Bruce, Lord Justice, 28-9, 31-2
of Westbury, Lord, 36, 150-1
- Boni judicio est ampliari justitiam, non jurisdictionem, 6
- Bosanquet, Mr. Justice, retirement of, 126
- Boswellising the Duke of Wellington 289-90
- Bottomry bonds, Dr. Lushington on, 46
- Bowen, Lord, 405-16
- Boxing, when unlawful, 201
- Boy-eating case, the, 365-6
- Boys at play and the origin of the common law, 199
- Bradlaugh, Charles, and the Parliamentary oath, 221
- Bramwell, Lord, 192
on Chief Justice Cockburn's love of notoriety, 162
- Brasenose College retains Bethell, 149-50
- "Brawling" in church, 49
- Braxfield, the old Scotch judge, 171
- Breach of promise actions, 200, 291, 310, 424
damages in, 191
- Brett, J., on rioting, 394-5
- Briefs, Scarlett's short way with, 74
- Briggs, murder of Mr., 335

- Bright, John, his anticipations of Lord Hatherley's ominence, 179
- Bringing down his intellect: anecdote of Maule, J., 67
- "British in India," the, by Lord Justice James, 270
- Brougham, Lord—
- Berryer banquet, at, 166
 - grand coquin, 103
 - names the best speaker in the House of Lords, 231
 - Page Wood, Vice-Chancellor and, 179
 - patron of Pepys, afterwards Lord Cottenham, 2
 - presents his works to Herschell, 418
 - sarcasm on Sugden, 109
 - Scarlett, and, 76, 168
- Brusqueness of manner in Maule, J., 66
- Bryce, Mr., on Lord Cairns, 204
- on Sir George Jessel's methods, 228
 - on Mellish, 244
- Bull, the, and the red tie, 123
- Buller's, Mr. Justice, despatch of business, 74
- Burgess's anchovy sauce, 31
- Burglar's evening stroll, the, 409
- Burial, right of Christian, 146.7
- Burke on "temper," 105
- Burns on fireside happiness, 178
- Byron, Lady, consults Dr. Lushington, 41.2
- Byron secret, the, 42*n*
- C
- Cab to Westminster Hall, Pollock, Chief Baron's theory, 120
- Cabby and the "Courts of Justice," 361
- Cadi, an English, 326.7
- Cairns, Lord, 203
- on Lord Justice James, 268
- Cam, a sacrifice to, 322.3
- Campbell, Lord, 132
- Bethell, and, 152
 - Blackburn's appointment, on, 260
 - Brougham and, 2
 - compliment to Hannen, 334
 - Court for Crown Cases Reserved, on, a "parcel of carpenters," 254
 - Divorce Court, on the, 128
 - profession of the law, on, 118
 - recommends Tindal, C.J. to keep his horse, 21
- Campbell, Lord (*contd.*)—
- aliphod judgments, on, 178
 - Sugden, interview with, 111
 - Willes, on the appointment of Mr. Justice, 184
- Canadian Federation, Lord Watson and, 412.3
- Canning, a friend of Scarlett's, 79
- Mellish's godfather, 242
- Canon law not part of the law of England, 129.30
- Capital punishment, Baron Alderson on, 94
- Baron Martin's repugnance to, 218
- Cardigan, trial of Lord, 106
- Cards, Charles Russell et, 433.4
- Caroline, Queen—
- epigram on, 103
 - funeral of, 42
 - trial of, 42, 103
- Carpenters, the Six, 35, 80
- Carriage pole, warranty of fitness, 402.3
- "Carry on business" as a wine merchant, 28
- Cases, citation of, Lord Westbury on, 434.5
- Castle, the Englishman's, 222, 255, 414.5
- Cause list, Sir G. Jessel exhausting, 229
- "Cave resignationibus," 29
- "Caveat emptor," 97
- Cedant arma togæ, 51
- Ceremony and rite, distinction between, 240
- Chambers, Vice-Chancellor Bacon in, 316.7
- Chancellorship, the labours of the, 422
- Lord Langdale, weighing pros and cons, 15-16
 - Roundell Palmer refuses, 374.5
- Chancery, the Court of, 328.9
- Lord St. Leonard's defence of, 115
 - writ in, 385.6
- Channel pilots and the imaginary current, 265
- Character, evidence of, 191
- Chargé d'affaires not the rights of an ambassador, 56
- Charles Reade: his play "Gold," 181
- Chartist rioters, prosecution of, 51
- Chase, history of the, by Chief Justice Cockburn, 161
- Chatterton's forgeries, 148
- Chaucer's Serjeant of the Law, 235

- Cheaper law, Lord Bramwell's advice, 202
 Checkmate, Braxfield, the Scotch judge, gives to his friend, 171
 Cheering an invalid, a special demurrer, 34
 Chelmsford, Lord, passed over in favour of Lord Cairns, 206
 Chief Justiceship of the King's Bench, the Attorney-General's right to, 51
 Child passenger, 256
 Chitty, Lord Justice, sketch of, 381-390
 Church, parishioners bound to repair parish, 107
 rates, 240
 Churchwarden, power of, to turn a person out of church when service not going on, 98-9
 Circuit—
 Chitty, J., going, 384-5
 Erle on the western, 276
 Pollock starting for the northern, 117
 Wilde sets the example of reading briefs on the western, 84-5
 system, Sydney Smith on, 192
 Circumstantial evidence, 53
 Civil and Canon Law, the Courts of, 235
 Civil Law, educational value of, 443-4
 Civis Romanns sum, 159
 Clark, Sir Andrew, his love of his profession, 144
 Claimant's complaint, the, 201
 Clandestine marriages, 319
 "Clean hands," joke of, 386
 Clergyman protected from arrest while officiating, 24
 Clever Court, a, 95
 "Clever hack," description of horse as a, not a warranty of soundness, 264-5
 Clever woman in the witness-box—Scarlett's adroitness, 77
 Cleverness a bane, 59
 Closing the Court, Lord Denman in a passion, 105
 Cock fighting, 215
 Cockburn, Chief Justice, 157, 253
 assists Mr. Justice Lush at an entertainment, 254
 Cockburn's, Chief Justice, reception of Bowen, 407
 Codification of Indian Law, 348-9
 Mr. Justice Maule on, 69-70
 Colenso case, the, 268
 Coleridge, Sir John, 146
 Coleridge parting with Mr. Justice Wightman, 171
 Coleridge, Lord, sketch of, 355-67
 on Lord Cairns' distribution of patronage, 207
 on Erle as an advocate, 278
 Coleridge, Samuel Taylor, anecdote of, 262
 College of Advocates, 235-6
 Collisions at sea, both ships to blame, 47
 Committing a friend, 192
 Common Law Procedure Act, 186
 Companies' Act, 1862, law under, 320
 Company borrowing on deposit of deeds, 248
 holding shares in another company, 212
 law, Lord Cairns helps to make, 212
 law and Lord Herschell, 425
 Comparative Legislation, Society of, 422-3
 Compliment paid by a lady to Chief Justice Cockburn, 162
 paid by Palmer, the poisoner, to Cockburn's advocacy, 160
 Compromise behind attorney's back, 24
 Condition precedent, what is, 155
 "Condonation" and forgiveness, distinction between, 130, 445-6
 Condonation in Scotch law, 445-6
 Confession of guilt to counsel, duty of counsel, 85-6
 Confessions, admissibility of, 438-9
 Confidence in your future, Chief Justice Cockburn, 157
 Conscientiousness and a smoky chimney, 10
 Consideration in English law, the doctrine of, 89, 173
 "Consummating" a marriage, 127
 Contempt of court, Parliamentary privilege, 6
 Contractor and servant, difference between, 173
 Contracts by correspondence, 212-3
 Contributories, liability of past member, 182, 212
 Convent, the inner life of a, 165, 360, 432
 Conveyancing, avidities of, 370
 Convocation and its "Synodical Judgment," Lord Westbury on, 153

- Copyright, dramatic, 181
 musical, 114, 190
 in sketches, Prince Albert's case, 30
- Corporation cannot commit a crime, 263
 the mind of a, 64
- Corpus delicti*, producing, 71
- Correspondence, contracts by, 212-3
- Cottenham, Lord, 1
- Counsel, allowance of, to prisoners, 211, 312
- Country pleasures of Chief Justice Erle, 281
- Court, levity in, 336
- Courts, hours of, in Dr. Lushington's day, 45
- "Courts of Justice" and the cabby, 361
- Courts, the old Courts in Banc at Westminster, their weight, 50
- Courvoisier, trial of, 20
- Covenants no restraint of trade, 414
- Cowper and Thurlow as fellow-pupils, 250
- Cowper's Tirocinium, 296
- Cranworth, Lord (Baron Rolfe), 59, 260
- Cranworth's Act, 62
- "Crawling reptile," Brougham's venom, 109-10
- Cremation, legality of, 352
- Crimean War and questions of international law, 45
- Cresswell, Sir Cresswell, 124
- Cricket, Chitty as wicket-keeper, 382
 lawyers and, 327
- Criminal code, draft, for England, 350
 Page Wood shocked at, 176
 severity of our, 89
- Criminal law, technicality of, 146
 view of, 347
- Criminal procedure, French and English system compared, 347-8
- Crogate's case, a *jeu d'esprit*, 35
- Crompton, Mr Justice, 294
 and young Charles Russell, 299
- Cross-examining, Lord Abinger, 77
 Lord Coleridge's talent for, 358-9
 not examining crossly, 95
- Crossing a cheque, 222
- Culture, law and, 362
- D.
- Dallas, Chief Justice, anecdote of, 285
- Dancing, Campbell takes lessons in, 134
- David Copperfield and "The Commons," 235
- Day and Martin, 16-7
- Deaf juryman, the, and Baron Alderson, 95
 and Chief Justice Erle, 279
- Deafness, Baron Martin's, 221
 Mr. Justice Patteson's, 144
- Dean of Winchester and Baron Martin, 220
- Death, presumption of, anecdote of, 13-4
 nature of, 39, 249, 273
- Debentures, equities on assignment, 212
 remedies of debenture holders, 212
- Debt, imprisonment for, 200-1
- Debtor and creditor, the Roman law of, 56
- Debtors, in the old days, 312-3
- Debts, father not liable to pay his son's, 57
- Début* of—
 Bowen, 407
 Bramwell, 192
 Cockburn, 158
 Roundell Palmer, 370
 Scarlett (Lord Abinger), 73
- Deceased wife's sister, marriage with, 197
 half-sister, 264
- Deceit, in action of, motive does not matter, 24
- Declamation, 252
- Declarations of right by Court, 320
- Deer, when personal property, 290
- Defending a case on principle, 392
- Denman, Lord, 100
- Deodand, 63
- Desertion by husband, 131
- Desponding trio, the, 418-9
- "Die by his own hand"—Life insurance policy, 71
- Digestion, the benefits of a good, 121
- Dinner at Mr. Justice Patteson's, 148
- Directors' breach of trust 272
 duty as to prospectus, 328
 negligence, 114
- Discretion, the exercise of, 316
- Distress for rent, 87
- Dividend declaring: responsibility of directors, 249, 274
- Divorce court, establishment of, 127
 debates, evils of, 127-8
 how to obtain a, under the old law, 42, 68-9, 127-8
- Docketing a judgment, a "sad" technicality, 28

Doctor attending in expectation of legacy, 72
 Dog and the scienter doctrine, 81, 89, 173, 190, 290
 at railway station, 190
 when not a chattel, 140
 Doing what is pleasant, Fitzjames Stephen's repartee, 344
Doli capax—a young lady of seventeen, 31-2
 Domicile, definition of, 17
 Dominoes not an unlawful game, 140
 Don Pacifico incident, the, 158
 Double portions, rule against, 5
 Doubting, in a counsel, 149
 in a judge, 227
 Dramatic criticism, Lord Campbell's, 133
 Dramatic entertainment, place of, what is, 353-4
 "Drink," what is, 196
 Drunkenness, what is, 447-8
 Drunkenness of seamen, 240
 Duelling, the law of, 55
 Duty and pleasure, 344

E.

"Eating the pipes," 226
 Ecclesiastical judgments, 48
 Edgeworth, Miss, being swung by neck to make her grow, 100
 Eldon, Lord, his compliment to Lord Cottenham, 2
 value as a lawyer, 58
 warning against legal ambition, 2
 "Elevated situation," attaining, 116
 Ellenborough, Lord, and arguments, 386
 bad law, 134
 rushing through his list like a rhinoceros, 74
 Eloping with a music master, 131
 Eloquence, 252, 267
 Cairns', 208, 209
 Charles Russell on, 435-6
 Cockburn's, 158
 Embezzlement by clerk, Brett J. on, 395-6
 Englishman's house his castle, 222, 255, 414-5
 Epigram on a curate, 31
 on a long nose—Patteson, J.'s memory, 143
 on Queen Caroline, 103
 Epitaph, Baron Martin's choice of an, 221
 for Chief Justice Cockburn, 166

Epitaph (*contd.*)—

 on Lord Justice Chitty, 387
 on Preston, the conveyancer, 111
 Epping Forest case, the, 227
 Equity, Lord Bramwell on, 199
 Sir G. Jessel's conception of, 231
 Erle, Chief Justice, 276
 Erskine, 51, 133
 Esher, Lord, 391-404
 Eskgrove, the Scotch judge, his mode of pronouncing sentence, 219
 Essays and reviews, 48, 153, 156
 Estoppel, the doctrine of, 264
 by share certificate, 164
 Evelyn, the High Sheriff, fined, 262
 Evening consultations, 117, 216
 Evidence, circumstantial, 53
 —rape—disproving prosecutrix's denial as to others, 256
 to explain a will, 38
 Exceptions to an answer, Bethell draws, 148
 Executory trusts, Lord St. Leonards on, 114
 Eye, the value of an, 261
 Eyre, Governor of Jamaica, 164

F

Faggots and faggots, Baron Parke thinks aloud, 40
 Fainting fit, Baron Parke's, and how it was cured, 34
 Fallacies, popular legal, 343
 False pretences—the cheese-taster, 121
 Fanny Kemble and her sympathetic imagination, 213
 Farewell, Vice-Chancellor Bacon's, 317
 Father and son, transactions between, 114-5
 Fencing an excavation in land, when a duty, 292
Feræ naturæ animals, when they become the property of the hunter, 173
Fiat justitia, ruat cælum, 386
 Fictions in law, 330-1
 Fighting, Brett J. on, 397
 Fine language, the dangers of, 127
 Fire of London, the Great, and Chicago, 364
 Fitzgerald's, Mr. Percy, description of Cockburn, C.J., 162-3.
 Floating debenture, a, 268
 Follett's, Sir William, "tips" for the profession, 357
 Football, when unlawful, 201

- Forbearance with young counsel, how
 Page Wood learnt it, 177
 Franconia, the, 164
 Franklin, Dr., anecdote of, 306
 Fraud by a corporation, 64
 Frauds, Statute of, and contracts,
 378-9
 French criminal system and English
 compared, 347-8
 Fresh air, Baron Parke's passion for,
 36, 121
 Fuseli, the painter, 295
 Fusion of law and equity, 375-6
 Future property, effect of an assign-
 ment of, 154
- G
- Garotting stopped by Baron Bramwell,
 195
 Gascoigne, Chief Justice, 7
 Gas stokers' conspiracy, the, 398
 "Genius of common sense," 227
 "Gent," Mr. Justice Wightman on a,
 169
 George IV.'s anger at Denman, 103
 "Gey lot of counsellors," a, 298
 Ghosts, training for, 100
 Gifts, perfecting imperfect, 30, 63
 Gladstone's, Mr., appointment of
 Mellish, 245 n.
 Glasgow Bank directors, prosecution
 of, 441-2
 Glenfield starch case, the, 182
 "Good impression," Bramwell makes
 a, 194
 Goods, sending wrong: acceptance,
 139-40
 Goodwin Sands and Tenterden steeple,
 265
 Goodwood cup, Baron Martin nearly
 wins, 216
 Gorham case, the, 17-8
 Gospel of the English in India, English
 law, the, 349
 Gout, Lord Justice Mellish's sufferings
 from, 246
 Governess not a domestic servant,
 222
 "Grand National," what is the?, 351
 Governor Eyre, 164-265
 Greek count's shooting and Lord
 Westbury, 153
 Green, Matthew, on the labyrinth of
 of law, 167
 Green Park and St. James's Park, 36
 Greville and Maule, J., 6G
 Griselda, the northern, 48
- H
- H's, dropping, 226
Habeas corpus, the remedy of, 446
 Hairwash, selling deleterious, liability
 for, 309
 Hale's veneration for the common law,
 233
 Ham, the, and Bramwell, B.'s, sum-
 ming up, 196
 "Handsome Jack" and "Long John,"
 357
 Hannen, Lord, 332-43
 Happiness and a good digestion, 79
 Happiness, ingredients of, 383
 Hatherley, Lord, 175
 Hatton, the seat of Pollock, Chief
 Baron, 121
 Hatton-garden murder, the, 218
 Healy, Mr. Timothy, and Lord
 Hannen, 339-40
 Hearing well, what is, in a judge, 206
 Heckling a vicar, 49
 Helston and its Mayor, 392
 Hernand, Lord, 252
 Herschell, Lord, 417-28
 Hetty Sorrell, a, 397
 Hold to your bargain, 200
 "Holidays, my," lines by Baron
 Alderson, 96
 Holker, Lord Justice: his remark
 when appointed Lord Justice, 254
 Holroyd v. Marshall, 155
 Home Rule, Charles Russell and, 437
 Homicide and "necessity," 365-6
 Honeymoon, Patteson's, 141
 Heniton, Mr. Justice Patteson's seat,
 145
 Hood, a lively Hood for a livelihood, 246
 Horse fraud, a, and Chief Justice
 Erle, 278
 Horse frightened at a load of hay, 66
 Horses, Baron Martin's fondness for,
 216-7
 Hospital not to be a public nuisance,
 264
 Houghton, Lord, 217
 Hounds in mourning, 21
 House of Commons "infested" with
 lawyers, 205
Humphreys v. Brogden, 139
 Husband and wife—
 dress, husband not liable for, if
 wife a sufficient allowance, 222
 husband no right to imprison
 wife, 284
 wife pledging husband's credit,
 200

- I.
- Identification doctrine—The Bernina, 47, 89
- Illegitimate children, gifts to, 212, 248-9
- Impediment in speech, Chief Justice Erle's, 276
- Imprisonment for debt, Lord Bramwell on, 200
- Improbabilities, some, 201
- Impromptu instruments not to be too strictly construed, 24
- Impudence, a forensic term for, wanted, 230
- Inchbald, Mrs., her cure for stammering, 84
- Indian Penal Code, 349
- Industry of Wilde (Lord Truro), 84-5
- Infant, crossing line—identification with grandmother, 300
fraudulently representing himself of full age, 300
liability for shares, 222
religious education of, 248-73
what are necessaries for, 174, 200, 232
- Injunction against an opera singer, 114
granting, under hedge, 327
- Innkeeper, liability for negligence, 283
lien on guests' horses, 88
no lien on guests' clothes, 80
- Inns of Court Volunteers, 133, 187
- Insuring safety, duty of, 309
- Insanity not a privilege, 200
- Insolvency of buyer, effect on contract, 248
- Insolvent Debtors' Relief Acts, 313
- Interest reipublice ut sit finis litum*, 366-7
- International law, Sir Robert Phillimore's contributions to, 241
- Interrupting counsel, 206, 445
- Irish church, Lord Cairns' defence of, 208
- Irony, Lord Justice Knight Bruce's gift of, 29, 32
- Irony to a jury, Mr. Justice Bowen, 409, 410
- Irony, Mr. Justice Maule's, 66, 68
- "It is not yours"—a moral tale, 9
- "It shall be lawful," 265
- "It's the riding that has done it," 160
- J.
- Jack Kelch, the overseer who was mistaken for, 22
- Jackson case, the, 284
- James, Edwin, his reply to Lord Campbell, 137
- James, Lord Justice, 266
- Jarndyce v. Jarndyce, 269
- Joffrey and Cookburn examining a witness, 359 n
- Jeffreys and Scroggs, 16
evening amusements, 326
- Jervis, Chief Justice, 50
- Jessel, Sir George, 224
- Jeu d'esprit* of Lord Bowen, 408, 411-412
of Lord Justice James on Lord Westbury, 271
"Mr. Leach made a speech," 10
- Jouines farceurs* at Cambridge, 258
- Jews, civil disabilities of, 221, 224
- Jobber's liability, a, 211
- John Doe and Richard Roe, deaths of, 330
- Johnson, Dr., on Scotchmen, 132
- Jokes, some of Lord Esher's, 399-400
- Journalism as a staff, 346-7
- Jowett, Professor, on the religious education of children, 273
- Judge, an angry, Serjeant Wilkins' remark on, 126
asks to be treated "as a vertebrate animal," 150
- Judges, Bethell on, 152
- Judicature Act, 398
before the, 375
- Judicial Anger, 126
- Judicial errors, costs of correcting 363-4
differences, 63
glories, 136
immunity from actions, 300
impatience, 100, 137
interruptions, 206, 445
joking, 336, 59, 137
machine, Scarlett's, 75
rudeness, 126
- Julian, the Emperor, 187
- Jumping, anecdote of Roundell Palmer, 374
- Jurist, definition of a, 411
- Jurists, the value of a class of, 377
- Jury, Baron Alderson and the, 95
Baron Martin's laconic summings up to, 218
Chief Justice Erle on our jury system, 279
Charles Russell's advice for dealing with, 436

Jury, judge telling, to reconsider verdict, 123
 Justice, pure administration of, value of, 349
 Justices of the peace, Lord Herschell's care in appointing, 4, 21-2

K.

Kelly, Fitzroy, Chief Baron, 267, 302
 Kemble, Fanny, and her sympathetic imagination, 213
 Kenyon, Lord, his despatch of business, 74
 trained in school of special pleading, 167
 Kent, trial of Constance, 139
 Kindersley, Vice-Chancellor, 322
 Kindheartedness of Baron Martin, 218
 King's highway, the safety of—the cellar flap, 283
 Kirk White's lines to Byron, 190
 Knight Bruce, Lord Justice, 26
 sarcasm about costs in administration actions, 269

L.

Laconic sentence, a, 196
 Ladies and their luggage, 367
 Ladies requested to leave the Court, 70
 Lady litigant and Lord Esher, 400
 Lady's right to change her mind, 65
Laisses faire, 198
 Land Registry Act, the, 152
 Landlord not bound to repair, 139
 Langdale, Lord, 8-18
 Larceny, keeping contents of bureau, 39
 keeping sovereign given as shilling, 354
 money obtained on forged cheque, 256
 partridges reared under hen the subject of, 265
 putting hand into empty pocket, 301
 Latent ambiguity, 38
 Laughter in Court—Chief Justice Erle, 279
 Law as it is, not as it ought to be, 69
 "boiling down" the, 348
 books and literature, 410-411
 Bowen and, 405
 charms of the, 333
 composite character of English, 41
 functions of, 282
 literature and, 362
 love of, 34, 144

Law (contd.)—

mathematics and, 9, 258
 merchant, Cockburn, C.J. on the, 164-5
 officers attendance in House, 421
 popular fallacies in, 343
 profession of, Campbell's opinion, 118
 reforms, Lord Langdale's, 13
 science of, 398
 technicality, 103, 144, 146
 Lawn tennis, Chitty J. and, 384
 Lawsuits and their evils, 32
 Lawyer Scarlett and Lawyer Brougham, the countryman's opinion on the respective merits of, 168
 Lawyers, are they pessimists? 192
 and literature, 31, 91
 not popular in "The House," 1, 205
 nothing so good for, as a, little starvation, 102
 success at bar, 27, 92, 125, 192, 224, 258
 who have borne arms, 51
 Leach, Vice-Chancellor, description of, on bench, 177
 Legal education in 1818, 324, 376-7
 estate, the, 399
 heresy, 195
 pedigree of Campbell, 286
 Legatee, misdescription of, 16
 witnesses, 330
 Legitimate comment by a newspaper, what is, 164
 selfishness, 364-5
 Legitimation of children, 274
 Levity in Court, 336
 Libel—
 class, on a, 5
 dueller, on the, 55
 medical man, imputation of adultery, 146
 poisoning foxes, 173
 telling a story against yourself, 22
 Liberal-Conservative, a, 238
 Liberal principles and getting into debt, 277
 Lien, cases on, 38, 56, 80, 87, 182
 Life peerages and Lord Wensleydale, 37
 Light of justice waning in August, 31
 "Light that Failed," 356
 "Limited liability," "mention it in my life," 198, 214
 Literature, dangerous for a barrister to be accused of, 31

Litigation, decay of, 324
 Litledale, Mr. Justice, his fondness for work, 113
 his propensity to doubt, 142
 his subtlety as a pleader, 142
 Little girl, Maule, J., and the, 71
 "Little Lord Fauntleroy" case, 181
 Long Vacation, Lord Langdale on the, 14
 Longevity of Bench, 311
 "Longs and Shorts" at Eton, 345
 "Lord gie us a guid conceit o' oursel's," 224
 Lords Justices of Appeal, James and Mellish, 245, 269
 Lost will, Lord St. Leonards', 113
 Lowe, Robert, and the lesson of Winchester, 344-5
 Luddites, the origin of the, 102
 Luggage, Ladies and their, 367
 Lumley v. Wagner, 113
 Lunacy not a privilege, 200
 Lunatic asylum, Lord St. Leonards' visit to, 112
 contracts of a, 121
 dissolution of marriage of, 240, 310
 husband liable for necessaries supplied to wife, 222
 rights of an alleged, 30
 Lush, Lord Justice, 250
 Lushington, The Right Honble. Stephen, 41, 239
 Lyndhurst, Lord, 133
 "brisk" as a bee at eighty, 143
 courtesy of, to young Page Wood, 177

M.

Macaulay, his account of old rivalry of Brougham and Pollock on the Northern Circuit, 118
 Machinery smashing, 36, 93
 McNaghten case, 158
 Macnaghten, Lady, 216
 Malins, Sir Richard, 203
 Malt tax, Sir Fitzroy Kelly's motion for repeal of, 305
 Mandatory injunction, 232
 Mannings, the trial of the, 119
 Maritime law and Dr. Lushington, 45
 and Sir Robert Phillimore, 241
 Market overt, sale in, what is, 107, 301
 Marriage—
 Bar and, 346
 breach of promise actions, 191, 200, 291, 310, 424

Marriage (contd.)—
 "consummation" of 127
 contract of, the, 182, 341-2
 control of husband, 284
 deceased wife's sister, with, 197, 379-380
 half sister, with, 264
 dissolution, 131
 by Scotch Court, 130
 Dr. Lushington's view, of, 47, 48
 fees, 255
 foreign court cannot dissolve English, 39
 mixed marriages, 273
 presumption in favour of 6, 182
 promise of 122
 settling down to work, and, 101
 Married woman (see Wife), 149
 Martin and Pollock, Chief Baron, 118, 217
 Masters in Chancery, 325
 Mathematical tripos, anecdote of Pollock looking at the list, 117-8
 Mathematics and law, 9, 258
 Maule, Mr. Justice, 66
 and the little girl, 71
 "Measure for Measure," Baron Martin's opinion of, 215
 Mellish, Lord Justice, 242
 Memory, Lord Herschell's, 423
 Lord Justice Knight Bruce's wonderful, 26
 Mercifulness of Baron Martin, 218-9
 Merits of a case of some importance, 167
 Merivale's account of Denman's and Shadwell's tour, 101
 Middle Temple, the working-man's Inn, 259
 Mill, John Stuart, on our debt to posterity, 306
 "Minerals," definition of, 247-8
 Misrepresentation of intention, 65
 what is a material, 22
 Mistakes in telegrams, 403
 Mixed marriages, evils of, 273
 Mobilia sequuntur personam, 155
 Model boy, Lord Selbourne a, 368
 Modesty of a lawyer, 168
 Monckton Milnes (Lord Houghton), 217
 Moody and Sankey, Lord Cairn attends, 209
 More, Mrs. Hannah, Mr. Justice Wightman reads the memoirs of, 170
 Motion day at the Rolls, tem. Sir C. Jessel, 229

- Motion of course, a, Bethell's sarcasm, 150
- Moustaches, a barrister with, Bacon, V.C.'s aversion to, 314
- Mucian gens* of England, the, 116
- Müller trial, the, 119
- Music, Lord Herschell's fondness for, 424
- "My Holidays," lines by Baron Alderson, 96
- N.
- Name, a man's right to his own, 31
 taking another's trade, 416
- Napoleon and the code, 150
 and his mental cupboard, 229
- Nature, Law of, 399, 444
- Necessaries, infant, for, 174
- "Necessaries men," 47
- Negligence, no such thing as absolute, 201
- Negotiability, policy of our law in favour of, 191
- Nerves, Bowen's highly strung, 407
- Nervousness of Cairns as a speaker when first called, 204
- Nesters of the Bench, 311
- Neutrals, 46
- "Never Too Late to Mend," 181
- Newspaper libels—Legitimate comment, 163-4
- Newspaper Libel and Registration, Act, 1881, 301
- Newspapers and false pretences, 439
- "Noble art," the, 396-7
- Norton, The Hon. Mrs., and Lord Melbourne, 21
- Note, Bank of England, title under, 403-4
- "Notorious evil liver," a, 240
- Novalis—Character is destiny, 266
- Novels—
 Lord Bowen on, 406
 Lord Selborne's fondness for, 378
 Mr. Justice Crompton's passion for, 297
 Mr. Justice Maule's, 71
- Novitiate, Bowen on his legal, 406
- Nuisance—
 Lord Justice Knight Bruce's definition of, 29
 property, to, and person, 155
 snow and salt, 448
 wood naphtha, 122
- "Nulla dies sine linea," Sugden's practice, 113
- O.
- Oath of abjuration, scene on Willes, J. taking, 187
- Obstinacy in a judge, 278
- Officers in Her Majesty's service, legal dangers of, 47
- Old Bailey, the, in Page Wood's young days, 177
- Opie, Mrs., and Baron Alderson, 92
- Order, Mr. Justice Maule petitions for some sort of, 70
- Ottery St. Mary, the home of the Coleridges, 355
- Oxford, charms of, 356
- Oxford and Cambridge boat race, 391
- Oxford and Tractarianism, 369
- P.
- Page, Judge, 171
- Page Wood (Lord Hatherley), 175
- Palmer, the poisoner, trial of, 139, 160
 his compliment to Cockburn, 160
- Pandects, Bethell recommends the study of, 152
- Parke, Baron (Lord Wensleydale), 34
- Parliament, privilege of, in case of contempt, 5, 6
- Parnell Commission, the, 338-40
- Parry, Serjeant, his method with a jury, 76
 retort about Sir George Jessel's h's, 226
- Partnership, what is, 39, 232
- Patent law—prior publication, what is, 232
- Patteson, Bishop, 141
- Patteson, Mr. Justice, 141
 Vaughan Williams a pupil of, 287
- Pauper, getting rid of a female, 107
 selling the corpse of a, 122
- Peccadillo, Lord Selborne's youthful, 368
- Peel's house. Cockburn calls at, 157
- Pell, Mr., and his stories, 313
- Penal code of India, 348-9
- Penalty or liquidated damages, 23
- Penance in a white sheet still within the jurisdiction, 48
- Pepys, afterwards Lord Cottenham, 1
 Samuel, his description of the Admiralty Court, 234-5
- Perpetuity Lewis, 28
- Per proc., signature, 89
- Person, a debtor's, part of his property, 55-6
- Perspective in law, 270

- Pew in parish church does not give a vote, 284
- Phillimore, Sir Robert, 234
- Philosophizing, Englishmen not prone to, 344
- "Philpotts non obstante," 290
- Photograph, the "author" of a, 415-6
- Piano, Kinderaley and his, 323
- Pickles and sauces, rights of the Queen's subjects to manufacture, 31
- Pitt's glance, 433
- "Plain living and high thinking," 102
- Pleaders' Bible, the, 142, 287
- Pleadings in Baron Parke's time, 34
- Poetic licence in Court, 29
- Politics, choosing your side too soon ; Herschell and his clerk, 419-420
- Pollock, Chief Baron, 116
description of, 311
Sir Frederick, on Mr. Justice Willes, 184
- "Poor Fox," 109
- Popular legal fallacies, 343
- Post, contracts by, 201
- Post, the morning and the evening, 416
- Posterity, what has it done for us ? 306
- "Postman" of the Exchequer, the, 51
- Power of appointment, abuse of, 181
- Practice, the importance of, 251
of conveyancers, 273
- Precatory trusts, 30
- Prehistoric boat, the, 389
- Preston, the conveyancer, Sir G. Rose's epitaph on, 111
- Presumption, alteration of will and of deed, different, 174
death of, 39, 249, 273
marriage, in favour of, 6
- Principal and agent, 247
- Prisoners, confession by, to counsel, 85
counsel interviewing, 85
- Pritchard, the poisoner, 441
- Privilege and the Charity Organisation Society, 404
from arrest, 222
- Privy Council, obligation of secrecy, 308
- Prize-fighters and Mr. Justice Crompton, 298
- Prize-fighting and Mr. Justice Brett, 397
- Proctors, 235
- Prodigal and money-lender, 378-9
son cut adrift, what to do, 57
- Promise of marriage, 89
- Promoters, fiduciary relationship of, to company, 231, 272
liability of, 211
- Prophecy of James' eminence by his grandfather, 266
of Selborne's eminence, 369
- Prospectus, duty of directors in issuing, 328
- "Providence not having seen fit to interpose," 70
- Public houses, Lord Selborne advised not to frequent, 373
- Public justice must be satisfied before civil remedy available, 180
- Public schools in Cowper's time, 323
the lesson of, 344
- Public speaking and nervousness, 435
- Puffer at auction, employment of a, 121
- Punishment, ethics of, 394
- Pupilising, the system of, 323, 377
- "Push on," Campbell's motto, 134

Q

- Quackery in medicine, 146
- "Queen Mab," prosecution of Moxen for publishing Shelley's, 106
- Queen Victoria and Lord Hatherley's visit to Windsor, 180
- Qui facit per asinum facit per se, 412
- Qui prior est tempore potior est jure, 328
- Quid leges sine moribus, 19

E

- Racing, Baron Martin's fondness for, 215, 216, 220
- Radicalism and success in 1820, 11-12
- Railway company—
child straying on to line, 292
infant passenger, 255
medical attendance on injured passenger, 310
not liable for undiscoverable defect, latent flaw in axle, 254
- Railway companies, shabby conduct of, in case of accidents, 249
cannot charge more for package containing several parcels, 223
- Railway ticket, not delivering up, 254
- Rats, the ravages of, at sea, 283
- Receivers and the court, 329-30
- Recreations of Lawyers, 325
- Religion, Lord Hatherley's deep sense of, 180
Lord Cairns', 208
Lord Justice Lush's, 253

- Religious conscientiousness of Lord Cairns as to Sunday, 204
- Repairs, landlord not liable for, 80, 139
- Repeating arguments—"a long time ago," 169
- Reporters, judges who have been, 92, 125, 134, 259
- Reports of proceedings in Court privileged, 24
at public meetings, 300
- Requisites on title, Lord Justice James' remarks on, 270
- Residence, condition of, 319-20
- Restitution of conjugal rights, 130
- Restraint on anticipation, the, 16
- Retirement of Mr. Justice Patteson, 144
- "Reverend," Wesleyan minister entitled to be called, 240
- Revoking a will, 342-3
- Ridley, Mrs., Lord Alvanley's joke about, 79
- Ridsdale ritual case, 308
- Rite and ceremony, distinction between, 240
- "Roaring" in a horse, is it unsoundness, 21
- Rolfe, Baron (Lord Cranworth), 58
- Rollo, Lady, and her hounds, 21
- Rolls, evening sittings at the, 117
- Rolt, Sir John, on Chief Justice Erle, 280
- Roundabouts, the rival, 389-390
- Roundell Palmer, 368-380
- "Running Rein" fraud, 97
- Rush, the murderer of Mr. Jermy, 60
- Russell, Lord John, Sidney Smith's joke on his diminutiveness, 160
- Russell, Charles and Herschell, 419
- Russell, Lord, of Killowen, sketch of, 429-439
- Russell, Sir Charles, on Chitty J. 385
- Rylands v. Fletcher, 308-9
- S.
- St. James's Park and Green Park, 36
- St. Leonards, Lord, 108
his will, 113, 164, 231
"no genius" in the barber line, 250
- St. Paul's School, 52, 83, 333
- Sarcasm, Bacon V.C.'s, 315
- Saunders, William's, the Pleader's Bible, 142, 287
- Saurin v. Starr, 165, 432
- Saving sixpence, Lord Justice Knight Bruce, 27
- Scarlett, Miss, 79
- Scarlett (Lord Abinger), 73
adroitness in cross-examining, instance of, 77
Brongham and, 168
forensic machine, his, 75
secrets of his verdict winning, 76, 77
- School anecdote of Lord Herschell, 417
attendance and filial duty, 353
- Scienter, the doctrine of, 122
- Scintilla juris*, the theories of, 110-1
- "Scotching" French, Lord Campbell, 226
- Scotch judge, mode of preparing judgment, 187
- Scotch law, condonation in, 445-6
- Scotchman caught young, much may be done with, 258
- Scotland, its noblest prospect for Scotchmen, 132
- Seamen, favour shown by English law to, 46
- Seamen's wages, 241
- Secondary evidence of contents of bill of exchange, 89
- Seduction, recoiling on the head of the seducer, 60
unsentimental view of, in our law, 39, 98, 173, 191
- Selborne, Lord, sketch of, 368-380
his description of Lord Cottenham, 3
his remark on Sir G. Jessel, 224
on Mellish as an advocate, 244
- Selden on Equity, 199
- Self-help in English law, 88
- Selwyn, Bishop, asks Lady Patteson for Coley, 145
- Selwyn, Lord Justice, and Lord Justice Page Wood, 179
- Sentence of death, Mrs. Manning and, 119
"Sentence, What was your last?" 437
- Sensibility, Mr. Justice Willes's, 189
- Separation agreements, validity of, 4
deed not a "necessary," 39
development of policy of law as to, 231
- Serjeant B. a "roarer," 21
Williams, 285
- Servant and contractor, difference between, 173
dismissal of, 106, 121
- Serving a drunken man, 353
- Sermons, right of criticising, 97
- Settled Land Acts, 388-9

Settlement of chattels, 181
 Shadwell and Denman reduced to
 destitution, 102
 and King Jeroboam, 150
 Shakespeare an "overrated man," 215
 Shares, agreement to place not an
 agreement to take, 273
 effect of misrepresentation in con-
 tract to take, 181
 Shenstone's "Schoolmistress," 83
 Sheridan a dunce at school, 241
 Sheriff, liability of, 56
 Shipping Bing case, the, 412
 Shooting, Chief Justice Cockburn's, at
 Lord Westbury's, 163
 "Short Cuts," Lord Justice Knight
 Bruce's, 28
 Sidney Smith on Brougham, a "wasp,"
 110
 on the circuit system, 192
 on Lord John Russell, 159
 "Silver-tongued mediocrity, a,"
 "Dizzy's" epigram, 358
 Simony, Sir R. Phillimore on, 238
 Slander of chastity and loss of hos-
 pitality, 265
 Slavery, abolition of, 312
 Smith refusing to shoe horse, 87
 Snow and salt as a nuisance, 448
 Socialism, Lord Bramwell on, 198
 Society of Comparative Legislation,
 422-3
 Solicitor, negligence of, 107
 not personally liable for witness's
 expenses, 39
 scope of business, general invest-
 ment, 139
 Solicitors, judges who have begun as,
 83, 250
 Sovereign, no jurisdiction in our
 courts over independent, 5
 "Speak up," Bethell's repartee, 151
 Special pleading, 142, 167, 243, 296
 "Spirit" of an Act, 269
 Spiritualism—the Home case, 268
 Stammering, a cure for, 84
 Stanley, Lord, as a speaker, 231
 Starvation, nothing so good for a
 lawyer as a little, 102
 Statute of Frauds—effect on contracts,
 378-9
 Stealing a mortgage deed, 55
 Stephen, Sir James Fitzjames, 344-54
 some judicial traits, 351
 Stewards' right to warn off race-
 course, 97
 Stockdale v. Hansard, 86, 106

Stock Exchange—authority to broker,
 146
 Stoics and the *mens universi*, 444
 Stomach, the, a cooking-machine, 120
 "Stop!"—Sir C. Cresswell to counsel,
 126
 Stopping a pertinacious counsel, 230
 "Stores," the, as chemists, 263
 Stowell, Lord, 130, 239
 String and brown paper of a case, the,
 28
 "Struck with sterility," 411
Sua cuique voluptas, 383-4
 Submission the wife's duty, 48
 Subpoena—solicitor not liable for
 witness's expenses, 39
 Substratum of a company, 212
 Sugden (Lord St. Leonards), 108
 Sugden's sarcasm on Brougham, 109
 spirited reply on being taunted
 with being the son of a barber,
 109
 Suicide of Mr. Justice Willes, 189
 Sunday brief, Cairns refuses a, 204
 Sunday contracts—sale of wine, 81
 the stallion "at home," 38
 racing in the Bois de Boulogne
 and Baron Martin, 220
 Sunday-school teaching, Lord Cairns's,
 209
 Lord Hatherley's, 180
 Vice-Chancellor Kindersley's, 327
 Support for surface of land from mine
 owner, 139
 house built, 155
 house built at edge of land, 80-81
 Surety, discharge of, by release of
 principal, 248
 Surplus assets of a company, prin-
 ciple of distribution of, 248
 Sussex, Duke of, poses the Bishop, 144

T.

Tait, Archbishop, 369-70
 Tart shop, Lord Cairns remembers
 the, 211
 Tawell the poisoner, capture of, 304
 Technicality, 102, 141, 146, 186, 269
 Telegraph first used to protect a
 criminal, 305
 Telegrams, mistakes in, 403
 Temperate—what is it? 447-8
 Temple Church, serjeants seeing
 clients in, 99
 Temple gardens, Mr. Justice Willes'
 midnight walks in, 185
 Tenants in common, 190

- Tenax justitiæ* motto of Lord Justice Lush, 252
- Tennyson, Lord, on Lord Selborne, 378
- Tenterden, C.J.—his compliment to Patteson, 143
- Termagant wife, what to do with a, 196
- Territorial Waters Jurisdiction Act 1878, 164
- Testamentary capacity, test of, 340
- Thames, steaming too fast up the, 47
- Theatre, court not a, 336
- "There the judge presides, not the counsel," 75
- Thinking aloud, Baron Parke's habit of, 40
- Thurlow and the poet Cowper as fellow-pupils, 250
and music, 325-6
- Tichborne case, the, 165, 408
- Ticket-of-leave system, the, 62
- Tickets, conditions on, 426
- Tidd, Campbell and, 133
Cottenham a pupil of, 1
- Time—when the essence of a contract, 212
- Tindal, Chief Justice, 19
and the pig, 103
- "Tips" for the profession, by Sir W. Follett, 357
- "Tirocinium," Cowper's, 322
- Tract for Palmer, a, 373
- Tractarianism, Oxford and, 369
- Trade name, 31, 181
- Trespasser, dragging through a pond, 24
- Truro, Lord (Wilde), 83
leaves solicitor's office for bar, 250
- Trustees and unlimited liability, 214
- "Tubman" of the Exchequer, the, 51
- Turf, Baron Martin's passion for, 220
- Twist, the barrister with a mental, 315-6
- U.
- Unconscionable bargains, 379
- Undertaker, the juryman, 336-7
- Undue influence, what is, 342
- "Unearthing the old fox," 37
- "Unknown God," to the, 412-3
- Union of Ireland and England, Lord Cairns on, 205
- University discipline—running up bills, 283
tests, abolition of, 357-8
- Unjudicial words, Denman's regret for, 100
- Unlimited liability—the Glasgow bank disaster, 214
- Utopia, 89
- V.
- Vaughan Williams, Mr. Justice, 285
- Vegetarianism, Lord Hannen and, 337-8
- "Vendors and Purchasers," Lord St. Leonards', 108
- Verdict winning, Scarlett's secret, 77
- "Verify your quotations," 324
- Virgil—Lord Bowen's translation, 410-11
- Voice, value of, to a speaker, 358
- Volenti non fit injuria*, 200, 415
- Vulpecide, the, 173
- W.
- Wager as to conviction or acquittal, illegality of, 39
of battel, trial by, 20
- Wainwright murder case, the, 165
- Waiver clause in a prospectus, 89
- Walpole, Horace, and a highwayman in Piccadilly, 240
- Ward of Court, plotting against, 329
- Warranting a gun—Langridge v. Levy, 37
- Warranty of habitability of house, none, 97
of horse, 264-5
buyer aware of blindness, 24
servant of horse dealer has authority to give, 283
- Warren Hastings' resolution, 148
- Warwickshire jury, a, 81
- Watch, the missing, anecdote of, 431
- Watkin Williams, Mr. Justice, his opinion of prisoners, 253
- Water—
the law of, in *Chasemore v. Richards*, 37
right to flowing, 221, 264
- Watson, Lord, sketch of, 440-8
- Way of necessity, 121
- "Wedded to truth," Mr. Justice Maule's *bon mot* on, 70
- Wedding cake, history of, a, 211
- Wellington gets Denman a silk gown, 103
- Wellington's remark about Scarlett's advocacy, 78
- Welsh jury, a, 195
- Wensleydale, Lord (Baron Parke), 34

- Westbury—
bon mot on Atherton, 373
 on Lord Cranworth, 61
 on Lord Hatherley, 181
 law reforms, 62
 letter to Sir Robert Phillimore, 239
 Lush's politics, 252
 predicts Cairns' eminence, 203
 presence of mind, 153
 Roundell Palmer on, 371-2
- Western Circuit—
 Baron Parke and the long-winded
 speakers on, 36
 Erle on, 277
- Whaler, when he gets property in the
 fish, 172
- Whewell, Dr., what a prize fighter
 lost in, 345
- Whipping an apprentice to death, 54
- Whist, Buller, J. and, 325
- "Who is conducting this case?"
 314-5
- Wightman, Mr. Justice, 167
- Wife—
 dress, husband not liable for, if
 sufficient allowance, 222
 insanity of, no bar to investiga-
 tion of charge of adultery, 310
 interment of, husband liable for,
 291
 model, the, 48
 pledging husband's credit, 201
 restraint on anticipation, 390
 termagant, 196
- Wilberforce, Bishop, his powers of
 speaking, 159
 and Lord Westbury, 153
- Wilde (Lord Truro), 83
 Wilde's, dinner at, 91
 Wilkins, Serjeant, retort to Mr.
 Justice Crosswell, 126
 Will, Lord St. Leonards', 113, 164
 capacity to make, 340-1
 revoking a, 342-3
 Willes, Mr. Justice, 184
 his opinion of Vaughan Williams,
 288
 anecdote of, 207
 Willis, Mr., on Sir George Jessel, 226
 Williams' Saunders, 287
 Williams, Sir Edward Vaughan, 285
 Winchester College rebellion and Page
 Wood, 176
 "Wine cheereth both God and man,"
 144
 Wit in Chancery, 385-6
 Witness, how to examine a, 359*a*
 Witnesses, compensation for loss of
 time, 23
 legates, 330
 Wooden spoon, Sir Crosswell Cross-
 well as the, 124
 Wordsworth, Bishop, and "The
 Fathers," 184
 "Works," Lord Wensleydale's, 37
 "Would you be surprised to hear?"
 408
 Written judgments, Vice-Chancellor
 Page Wood's objection to, 178
- Y.
 Yachting, Chief Justice Cockburn's
 fondness for, 163
 York Minster, the incendiary of, 93