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WORKS

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JEREMY BENTHAM,

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RATIONALE

OF

JUDICIAL EVIDENCE.

BOOK V.—OF CIRCUMSTANTIAL EVIDENCE.

CHAPTER I.

CIRCUMSTANTIAL EVIDENCE, WHAT—HOW DISTINGUISHED FROM DIRECT EVIDENCE.

THIS book has for its subject, Circumstantial Evidence.

In relation to this, as to all other objects within the compass of this work, its business and aim is to bring to view the course which, it is supposed, ought to be taken by the legislator and the judge.

By the legislator, the result will be, that, under this head, in the way of regulation, very little ought to be done: done, viz. in such sort as to coerce, in the way of obligation (positive or negative,) the will and conduct of the judge.

What remains is, by apposite instructions, to hold up to view such considerations as promise to be of use, in the character of lights, to the understanding of the judge.

To the exercise of this function, power (political power) not being necessary,—it is capable, indeed, of being exercised by the legislator, but so is it of being exercised by anybody else. Addressed more immediately to the legislator, as the fountain of all authority, the judge is the person in whose conduct, if the instructions here endeavoured to be given are destined to have any influence, their influence will be more directly discernible. Instructions *to* the legislator, they are, at the same time, instructions as *from* the legislator to the judge.

Under the denomination either of *circumstantial* or of *direct*, everything to which the denomination of evidence is applicable stands included.

When all the evidence is of that sort which is termed direct, no part of it of the nature of circumstantial, the case is such as affords not room for any *special* inference—for any other inference than that general one, by which, from the discourse by which the existence of this or that fact is asserted, the existence of that fact is inferred, and credited.

When evidence of the circumstantial kind presents itself, and either no evidence at all of the direct kind, or none that is of itself sufficient without the aid of the circumstantial evidence, in every such case, inference—special inference—is necessary. Of some one fact at least (call it for this purpose the principal fact) the existence, with or without the aid of direct evidence applying immediately to that same principal fact, is inferred, viz. from the existence, as established by direct evidence, of some other fact, or more commonly from some cluster of other facts, call them, for this purpose, *evidentiary* facts.

In every case, therefore, of circumstantial evidence, there are always at least two facts to be considered—1. the *factum probandum*, or say, the *principal* fact—the fact the existence of which is supposed or proposed to be proved—the fact evidenced to—the fact which is the subject of proof.—2. The *factum probans*—the evidentiary fact—the fact from the existence of which that of the *factum probandum* is inferred.

The principal fact is in its nature susceptible of two main distinctions. It may be—it cannot but be—either of a *physical* or of a *psychological* nature. If it be a simple one, it cannot be of both natures at once: if it include both, it must be distinguished by the name of a complex or compound fact, for in practice, its properties will in this case be found to be different from what they are in the other.

This same distinction is alike applicable, in every instance, to the evidentiary fact; and the occasions for applying it to that latter object will occur as frequently as the occasions for applying it to the other.

The same fact which, with relation to one fact, bears the relation of a principal fact, will, with relation to another (or even the

same) bear the relation of an evidentiary fact.

In this way, a chain of facts, of any length, may be easily conceived, and chains of different lengths will be frequently exemplified each such link being, at the same time, with reference to a preceding link, a principal fact, and with reference to a succeeding one, an evidentiary fact *

In a chain of this sort, it becomes necessary to distinguish the several precedential or introductory facts (principal and evidentiary) from the ultimate principal fact The ultimate principal fact occupies that station only it is the very fact sought it is not viewed for the purpose of inducing a persuasion of the existence or non-existence of any other fact

In all criminal cases, this fact is a complex fact; and in such case complex, as to include in its composition divers psychological facts, together with at least one fact of the physical kind, affirmative or negative

In the case of direct evidence, the distinction between the principal fact and the evidentiary fact is alike applicable, and the union of the two alike indispensable, as in the case of circumstantial evidence But in the case of direct evidence, the evidentiary fact is throughout of an uniform description It consists in the existence of a person appearing in the character of a deposing witness, and, in the way of discourse, asserting the existence of the principal fact on question, on the ground of its having, in some way or other, come within the cognizance of his perceptive faculties.†

If, in order to make up a complete collection of the facts, the proof of which is necessary to afford a ground for the decision in question, there is no need of forming any conclusion — of drawing any inference — of deducing the persuasion of the existence of any one fact from the existence of any other fact — in a word, from any other source than the direct assertion of a deposing witness, speaking in the character of a percipient witness, — in that case, the proof consists wholly of direct evidence, and nothing that comes under the notion of circumstantial evidence forms any part of it.

But so long as the body of proof, to make it complete, stands in need of any *inference* (though it be but a single inference, and that ever so close and necessary a one,) in so far an article of circumstantial evidence forms a necessary part of it.

In a case regarded as criminal, the body of evidence (unless it consist of confessorial evidence) cannot, if complete, be composed solely of direct evidence how satisfactory soever, it cannot but include a mixture of circumstantial evidence For, to constitute a criminal act, one or more facts of the psychological kind are indispensably requisite in most instances, the sentiment of *consciousness*, with relation to the existence of divers exterior facts, in all cases, *intentionality*, viz the intention of bringing about the obnoxious event, or at least of doing the physical act by which it is produced or endeavoured to be produced ‡

To complete the body of evidence necessary to the proof of a criminal act, proof of psychological facts (one or more) is indispensable but unless by the individual himself whose mind is the scene of them, no fact of the psychological kind can be proved by any direct testimonial evidence Why? — Because, unless stated by the individual himself in whose mind the fact is considered as having place, the existence of any such psychological fact can only be matter of inference What passes or has passed in my own mind, I know by my own internal consciousness, and without any inference concerning what passes or has passed in the mind of Titius, I cannot know but by one or other of two means, viz either from what he himself declares (so far as I credit what he says,) or from the observations I have had the opportunity of making on the subject of his exterior deportment

In regard to a complex act of this class (the class of criminal offences,) direct testimony, therefore, consisting of extraneous testimony alone, cannot but be incompetent, or, at any rate, if a body of extraneous evidence be in itself complete, and (in its effects on the mind of the judge) satisfactory and persuasive, it will be so in part only, in the character of direct evidence, as to the other part (viz in so far as any facts of the psychological class are proved by it,) in the character of circumstantial evidence

In regard to the existence of facts consi-

* Just so is it in the case of a chain of causality, a chain of causes and effects Indeed, every chain of causality is a chain of evidence Every effect is evidentiary of its causes: every cause, in evidence — is evidentiary — of its effects

† This is alike true in the case of hearsay evidence (of which hereafter) as in that of the evidence of an immediate witness; only that, in the case of hearsay evidence, the fact, the existence of which is asserted by the so deposing witness, is — not the fact sought, not the ultimate principal fact — but only a fact supposed to be connected with it; the fact of his having heard, or otherwise perceived, a fact evidentiary with relation to it; viz. a statement given by some other person in relation to such principal fact. Here are two or more articles of evidence combined together; the one judicially exhibited, the other extrajudicially: but both of them belong alike to the head of direct evidence.

‡ If the forbidden act be of the negative cast, it comes to the same thing; only — instead of the *existence* of the intention in question — the psychological fact in question, the psychological fact necessary to the composition of the crime, consists in the *non-existence* of it.

dered in the character of principal facts, it is no uncommon case for the persuasion to be indicated, and to find credence, and that with reason, on the ground of circumstantial evidence alone, without the aid of any direct evidence. But it is seldom indeed that the body of evidence adduced in proof of any such principal fact, would, upon examination, be found to consist purely of direct evidence, unaccompanied by any admixture of circumstantial evidence

This is so true, that, of a body of evidence (say the testimonial evidence of an individual *deposing* in the character of one who was at the time in question a *percipient* witness of the matter of fact in question)—of a body of evidence, delivered in the character of a body of direct evidence,—it is very rare that, upon examination, the whole would be found to consist of direct, without any admixture of circumstantial, evidence Simple perception is the operation of sense, inference is the operation of the judgment But, by the most constantly in exercise of all the senses, viz *sight*, it is seldom that any belief of any matter of fact is produced, but that the judgment has been more or less at work in the production of it *

The evidence afforded by any given mass of testimony is either direct or circumstantial, according to the relation it bears to the fact to which it is considered as applying It is direct, in respect of any and every fact expressly narrated by it, and, in particular, every fact of which the witness represents himself as having been a percipient witness It is circumstantial, in respect of any and every fact not thus expressly narrated by it, in particular, every fact of which the witness does *not* represent himself as having been a percipient witness, and the existence of which, therefore, is matter of inference, being left to be concluded from its supposed connexion with the facts spoken to by the testimony in its character of direct evidence

The testimony of a witness operates as circumstantial evidence, not only in regard to all facts which, not having been actually perceived by him, are by him inferred from facts which he has perceived,—his testimony (or at least the fact of his giving utterance to such testimony) may operate further in the character of circumstantial evidence, in regard to facts which have neither been perceived nor inferred by *him*, but which are inferred by the *judge*, from the fact of his having uttered the testimony In this case, the evidentiary fact is not the testimony itself, but the delivery of it by the witness.

In the character of direct evidence, the truth of any decision grounded on the testimony, will depend altogether upon the truth —the logical truth, the verity—of the testimony. If the facts are (whether knowingly or not knowingly) misrepresented by it, the decision will, in so far as the question of fact is concerned, be erroneous. In the character of circumstantial evidence, the truth of the decision will not depend upon the truth of the testimony it will depend upon the truth, the justness, of the inference grounded on it; on the strength, the real strength of the connexion between the fact assumed (viz. the fact of the utterance of a mass of testimony, assertive of the fact purporting to be asserted by it,) and the fact inferred from that same assumed fact If the inference grounded on the testimony be a just inference, the decision grounded on that inference may be a just decision, although the testimony which it has thus taken for its ground be false A man suspected of a murder is interrogated on the subject of it by a judge if, being guilty, he confesses the fact (including the several circumstances necessary to fix it upon himself as the author of it, and in the character of a crime,) there is no demand for inference—the testimony amounts to a full confession, and operates purely in the character of direct evidence —if, being guilty, he does not confess the fact (he being at the same time pressed with the strings of questions which a man, acting on the occasion with an ordinary degree of zeal, probity, and intelligence, in the character of a judge, will not fail to ply him with,) the testimony thus extracted will almost always, or rather necessarily (in so far as he quits the intrenchments of non-responsion, or its equivalent, evasive responsion) contain a mixture of truth and falsehood. Now it is, that the testimony—not being, in respect of such part of it as is true, full enough to operate of itself with a conclusive force in the character of direct evidence—is consulted (as it were,) and made to operate further, in the character of circumstantial evidence, in which character it may be full enough to operate, and even conclusively; affording full satisfaction—generating a full persuasion,—although, in the character of direct evidence, it was deficient

But on this occasion, such parts of the testimony as are false, may (in so far as they are understood to be false) contribute in support of the conclusion, just as much as the facts that are true. For, not only when the whole narrative is viewed together, in a general point of view, falsehood is, to the apprehension of every rational mind, a strong indication and symptom of delinquency—of whatever modification of delinquency the defendant on the occasion in question happens to be suspected of,—but, in respect of the details of the transaction, this or that particular falsehood (an assertion representing this or that fact as existing at the time and place in question, which did not exist at that time and place, or representing as not existing

* See Berkeley's Essay towards a new Theory of Vision.

at the time and place in question a fact which, at that time and place, did exist) will afford an inference (and that frequently a conclusive and perfectly satisfactory one) establishing this or that particular truth — the existence of this or that fact which then and there did exist, or the non-existence of this or that fact which then and there did not exist

From the foregoing elucidations, the definition of an article of circumstantial, as distinguished from an article of direct evidence, may be deduced as follows, viz —

The principal fact being given, and being the same in both cases, the evidentiary fact, constituting the article of evidence — if it be of the nature of *direct* evidence (having for its source a person, to wit, a single person, and no more)—consists of an averment, statement, assertion, narration (all these mean the same thing,) made by that person, averring that, at a specified time and place, the principal fact in question came within the cognizance of his senses: such assertion being expressed either by words spoken, or by written discourse, or even by gestures (or modifications of deportment,) if such gestures were intended to convey an assertion to the effect in question, instead of its being conveyed by words

In the same case (as above,) the evidentiary fact in question, if it be of the nature of circumstantial evidence, may consist either of some physical fact, from a real source, or (if from a personal source) a psychological fact;* such psychological fact having necessarily for its index, some physical fact, issuing from the same personal source

CHAPTER II

OF PROBABILIZING, DISPROBABILIZING, AND INFIRMATIVE FACTS — EXAMPLES OF PRINCIPAL FACTS, WITH THE CORRESPONDING EVIDENTIARY FACTS — IMPROBABILITY AND IMPOSSIBILITY, HOW DISTINGUISHED FROM THE OTHER KINDS OF CIRCUMSTANTIAL EVIDENCE

When, of any principal fact in question, the existence is indicated by *direct* evidence (no objection presenting itself to the trustworthiness of the deponent by whom the existence of it is asserted,) it is said to be *proved*, and for the proof of every such fact by evidence of this description, a simple assertion, made by any one such person in the character of a deponent, is frequently (under English law at any rate) regarded as sufficient. The persuasion generated by it in the mind of the judge is of sufficient strength to give birth to a decision on his part; together with such acts of power, to which, on the occasion in question, a decision to the effect in question is in the habit of giving birth

When, of the existence of the principal fact in question, no other indication presents itself than what is afforded by circumstantial evidence, it is seldom, very seldom, that by any single article of evidence of that description the fact is considered as being *proved* it is seldom that by any one such article, standing by itself, a persuasion strong enough to constitute a ground for action is constituted in the mind of the judge

By some greater number of such lots of circumstantial evidence, taken together, the fact may be said to be *proved* Of the *probative force* of any one of them, taken by itself, the utmost that can be said is, that by means of it the fact is *probabilized* — rendered, in a greater or less degree, *probable*

As there are facts — evidentiary facts — by the force of which, a fact, considered in the character of a principal fact, is probabilized,— so it will generally happen that there are others by which the same fact may be *disprobabilized* —the existence of it rendered more or less improbable

When a principal fact is thus probabilized, it is by the probative force of the evidentiary fact by the strength of the inference by which the existence of the evidentiary fact being affirmed, the existence of the principal fact is *inferred* A fact being, in the character of an evidentiary fact, deposed to and considered as proved, and the principal fact in question considered as being thereby, in a certain degree, probabilized, —it will often happen, that, by the bare consideration of some other fact, which is not proved, nor so much as attempted to be proved, the principal fact will be considered as being, in a greater or less degree, *disprobabilized* Why? Because, if the existence of this disprobabilizing fact be supposed (it being itself, in the case in question, not impossible,) it will therefore be seen that, notwithstanding the existence of a probabilizing fact, the existence of the principal fact is not in so high a degree probable, as it would be if the existence of the disprobabilizing fact were impossible

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* Considered in respect of its *source*, all evidence flows either from persons or from things; —all evidentiary facts, as well as all principal facts, are afforded either by *persons* or by *things*

Considered in its nature, all psychological evidence cannot come under any other denomination than that of *personal* evidence.

The description of *real* evidence—of physical facts, whether considered as principal or as evidentiary—is not alike narrow Persons, being composed of matter as well as spirit, having their physical properties as well as their psychological properties, belong, in virtue and to the extent of their physical properties, to the class of things. Hence, real physical evidence may flow alike from a personal as from a real source: personal evidence cannot flow from any but a personal source.

Speaking with reference to the probabilizing fact in question, — any such disprobabilizing fact, thus contributing to *weaken*, to render *infirm*, the probative force of the probabilizing fact, may be termed an *infirmative* fact.

There are few, if any, probabilizing facts, in relation to which, one or more (commonly, if not constantly, more than one) infirmative facts would not, in case of an adequately diligent scrutiny, be found.

If, in one point of view, it be of importance that — in relation to all facts which, with reference to any of those principal facts on the credit of which a man's station in society is disposed of, are wont to be considered in the character of probabilizing facts — the probative force should be perceived and rightly estimated, — in another point of view, it is a matter of correspondent importance that the several facts, bearing upon such probabilizing facts in the character of infirmative facts, should also be perceived as capable of having place, and the probative force of them respectively, be rightly estimated.

Among the facts which will be brought to view in the character of principal facts, is *delinquency*. Among the facts which will be brought to view in the character of evidentiary facts, are various facts, the nature of which (supposing them proved) is to operate, with relation to any principal fact of that description, in the character of circumstantial evidence. Among the facts which will be brought to view in the character of infirmative, and thereby of disprobabilizing, facts, are various facts, the force of which applies itself to divers of the facts just mentioned in the character of probabilizing facts, operating in that character with relation to delinquency.

In the instance of a fact of either description, supposing it either unseen, or the probative or disprobative force of it undervalued, the effect of such oversight or error may be fatal, with reference to one or other of the direct ends of justice. If the fact overlooked be a probabilizing fact, in relation to delinquency, — a wrongdoer may escape the burthen of punishment or satisfaction to which it was the intention of the law to subject him. If it be, in relation to any such probabilizing fact, an infirmative fact, — an individual who is not a wrongdoer may be subjected to punishment or the burthen of satisfaction as if he were.

In the case of delinquency, as in the case of a principal fact of any other description, the *probabilizing* facts in question (be it observed) are, by the supposition, not only brought to view, but *proved;* so that, in regard to these, all that, for the instruction of the judge, can be done by human industry, is to give what little instruction can be given in relation to their respective degrees of probative force. But, of any regard paid to any of the *infirmative* facts that respectively apply to these several probabilizing facts, the nature of the case affords no such certainty: it is in this instance, therefore, that the need of instruction is the greatest: it is by bringing to view the facts of this description, that, by hands unclothed with authority, the greatest service may be rendered to justice under the head of circumstantial evidence.

Overlooked they are in many instances not unapt to be. Accordingly, in the instance of one of the most illustrious luminaries of English law, an example will be seen,* in which, for want of due notice taken of the *infirmative* facts that bore upon the case, delinquency of the deepest dye (viz. murder) was considered as certain, in circumstances in which, regard being paid to those infirmative facts, it will perhaps, to a discerning eye, appear not more probable than innocence, at any rate, not to a sufficient degree probable, to afford a just ground for a judgment of conviction †.

To exhibit every fact capable of being considered in the character of a principal fact, together with every fact capable of being, with reference to it, considered in the character of an evidentiary (*i. e.* either a probabilizing or a disprobabilizing) fact, — and, moreover, every fact capable of being considered (with reference to such evidentiary fact) in the character of an infirmative fact, — would be to exhaust the stores, not only of jurisprudence, but of everything else that has ever borne the name of science.

For the purpose of the present occasion, a selection must therefore necessarily be made, and this even among the cases liable to call for decision at the hands of judicature. for, in one way or other, to whatever branch of science it belongs, there is scarce an imaginable fact to which it may not happen to be

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* *Vide infra*, Chap. XVI. § 2.

† In speaking of evidentiary facts as having the effect of probabilizing the correspondent principal facts, some notice cannot but be taken of the opposite effect, *disprobabilization*. But, owing to the structure of language, in virtue of which, by so simple an expedient as the addition of a short particle (a particle expressive of negation,) the same expression may throughout be employed to designate facts and other objects of a directly opposite nature, — there will be little need for considering the probative force (the *disprobative* force it will here be to be held) in this latter point of view. To probabilize any given fact will be the same thing as to disprobabilize its opposite: to probabilize delinquency will be to disprobabilize innocence; to probabilize innocence will be to disprobabilize guilt.

But according as, in either instance (in the instance either of the principal fact or the evidentiary fact,) the fact, to the designation of which the expression in question is applied, is of the positive cast or the negative cast (expressive of motion, or not,) such a word as the word *probabilize*, or such a one as the word *disprobabilize*, will be the most directly and properly adapted to the nature of the case.

an object of research, for the purpose of a decision sought at the hands of judicature *Patents*, by which temporary monopolies are granted for the encouragement of inventions, suffice of themselves to subject to the dominion of judicature almost the whole practical department of the field of physical science *wagers* have power to subject to the cognizance of the same authority every proveable fact without distinction By a wager concerning the existence of phlogiston, the whole field of chemistry might have been laid at the feet of the judge.

In the selection here made, the object has been, to take such examples as, by the frequency of their occurrence, and the extent of the ground which they cover in the field of law, promise to be in a more particular degree serviceable towards the prevention of the erroneous conclusions to which the function of judication (so far as concerns the question of fact) is exposed

Here follow examples of facts, which, in the character of *principal* facts (facts on the belief of which judicial decision depends) are susceptible of being probabilized or disprobabilized by correspondent *evidentiary* facts or groups of evidentiary facts, constituting so many articles of circumstantial evidence, such as are in use to be deposed to, and considered as proved, in a course of judicial investigation.

I. Principal facts considered as *probabilized*:—

1. *Delinquency* in general, viz any act by which the ordinances or supposed ordinances of the *law* (*i e* of the supreme power in a state) are transgressed An enumeration of the several facts capable of serving, in the character of evidentiary facts, to probabilize a principal fact coming under this description (viz. the description of *delinquency*,) will be given in the sequel of this Book *

2. *Intention* of performing any individual act belonging to a modification of delinquency, *i e* to a species of acts forbidden by law, and thence (when the fact so intended to have place has taken place,) the existence of such physical acts, as, on the part of the

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* On contemplating the field of circumstantial evidence, an observation that will naturally present itself is, that it is to the penal branch of law that the topics apply, much more than to the non-penal branch The reason is, that, for the most part, they consist in certain modifications of human conduct on the part of the supposed agent, and that those modifications have their origin in one common circumstance—consciousness of delinquency; or rather (to use an expression at once more correct as well as more extensive) apprehension of punishment. I say more correct, for, though apprehension of punishment may, without danger of error, be regarded as a necessary consequence of consciousness of delinquency, that consciousness cannot, without danger of error, be regarded as a circumstance necessarily precedent to apprehension of punishment:—a proposition in itself obvious enough, but which is at the same time but too apt to be overlooked, and which will therefore be, on several occasions, exemplified as we advance.

Not but that, in a case not penal, these symptoms of alarm will most of them be found not altogether inapplicable; inasmuch as the loss of the cause (whatever be the nature of the cause, and on whichsoever of the two opposite sides of the cause it takes place, the defendant's or the plaintiff's) is in its nature a result of an unpleasant kind, and, as such, is the natural object of an apprehension similar (howsoever far from equal in degree) to that which has the fear of punishment for its cause.

When, by the vision of the terrific hand of law, the emotion of fear is generated in the human breast, what is the specific source and cause of that emotion? Not the word *penal*, not the difference between that and *non-penal*, not the name of *punishment*, but the quantum of mischief or inconvenience apprehended as about to flow from this terrific source under whatsoever name the infliction may stand designated

In some of the highest degrees of the scale, the distinction between penal cases and cases not penal is substantial and effective What then are those highest degrees? All those in which (with relation to the individual in question, and his idiosyncratical sensibility) the quantum of affliction would be superior to the utmost that could result from the total loss of all his property—property in expectancy included or not included, as the case may be Of the scale of legal suffering there is accordingly a certain part which is the peculiar production of the penal branch of law. It is the portion above delineated Below the mark at which that superior part of the scale ends, is the common domain of both branches. For a cause which imports no stain on reputation, I am adjudged to pay five shillings what matters it to me whether the cause is called a penal or a non-penal one?—whether it be under the name of a penalty, or of damages, or by loss of a matter in dispute to that amount?

Within the compass of the ground which (as above) belongs in common to both branches, penal and non-penal, of the law, whatever distinctions have been made, whether on the occasion of the rules of evidence, or on any other occasion, are thus evidently groundless and—so far as they are employed and relied on in practice—confusion and error (confusion in conception, error in practice) are the necessary consequences &c. The decisions of the legislator—of the friend of mankind holding the sceptre of legislation—are grounded on human feelings, regardless of everything else. The decisions of the man of law, regardless of human feelings, taking the habits and interests and language of his profession for the standard of right and wrong, are grounded on words and phrases

From the above considerations, many of the facts which will in the sequel be brought to view in the character of facts evidentiary of delinquency (with their respective trains of infirmative facts,) may be seen to apply not to penal cases alone, but moreover to non-penal cases: and, in both sorts of cases, not to the station of defendant only, but moreover to that of demandant; at least, in so far as a demandant has any personal suffering to apprehend from the decision if pronounced in favour of the other side.

person in question, were necessary to cause it to have place.

For the correspondent evidentiary facts, see Chap IV. of this Book.

3. *Unauthenticity* or unfairness (on one or both sides,) in the instance of a written instrument expressive of agreement or conveyance.

Correspondent evidentiary fact, *non-observance of formalities*; viz of the formalities the observance of which has been made by the law a condition to its binding force

By the laws by which these formalities have been appointed, the evidentiary fact here in question has in general been considered as *conclusive* evidence of the principal fact. Concerning the propriety of so peremptory a conclusion, see the book on Preappointed Evidence, and the book having for its subject the *exclusions* customarily put on various modifications of evidence

4 Unauthenticity (total or partial) of any instrument being, or purporting to be, of ancient date

For the circumstances capable of serving in the character of evidentiary facts to *probabilize* this principal fact, *unauthenticity*, — or (which is the same things in other words,) to *disprobabilize* the *authenticity* of the instrument, — see a table of evidentiary facts of this description, taken principally from *Le Clerc's Ars Critica* *

5 *Posteriora priorum* any supposed *antecedent* acts in a number of supposed successive acts (whether forbidden by law or not,) considered as following one another in a supposed naturally connected series for example, as being, or being supposed to be, conducive to one and the same end, such as, in a lawsuit, *success*, viz on either side of the suit.

Correspondent evidentiary facts, — any acts proved to have been performed, and considered as having been performed in consequence of such supposed antecedent acts, for example, in pursuit of the same end.

See a table of evidentiary facts of this description taken from Comyns's Digest of English Law †

6. *Priora posteriorum:* any supposed *consequent* acts in a number of supposed successive acts, considered as following one another in a supposed naturally connected series, as above.

Correspondent evidentiary facts, — any acts proved to have been performed, and considered as having been performed *antecedently* to, and with the intention of their being followed by, such supposed consequent acts, as being means conducive to the same end.

See a table of evidentiary facts of this description, also from Comyns

II Principal facts considered as *disprobabilized* —

7 (1.) Any supposed act of delinquency: any act made penal, or though but disreputable especially if in a high degree.

The correspondent disprobabilizing evidentiary facts, are *situations*: viz. situations in which the supposed delinquent is capable of being found placed In the sequel of this Book it will be seen, what situations can be considered to operate as circumstantial evidence *probabilizing* the existence of delinquency Now, whatsoever situation exhibits the supposed delinquent as in a certain degree exposed to the danger of falling into the species of guilt in question, — by a situation opposite to that seductive situation he will in a proportionable degree be guarded and fortified against that danger

8 (2.) Any supposed *physical* fact whatsoever.

Short and general expression for all supposed facts, considered in the character of disprobabilizing facts with relation to the supposed fact, — *physical impossibility* or *improbability* These disprobabilizing facts follow, in each instance, the nature of the supposed principal fact Any facts, considered as affording the indication in question, being supposed to be established, whether by special proof or by their own supposed notoriety, — there remains in each instance for consideration the question, whether the existence of the supposed principal fact is incompatible with the existence of the disprobabilizing facts?

The principal fact being considered as proved (viz by such special testimony as, if not opposed by counter evidence, would be regarded as sufficient for the proof of it;) the decision will in this case turn upon the supposed preponderance of probative force, as between *special* testimony (the testimony of the witness or witnesses by whom the supposed fact is deposed to,) and the supposed *general* testimony by which those facts which are regarded as incompatible with it are considered to be (as it were) deposed to: at any rate, as established on sufficient grounds.

Of the applications capable of being made of this modification of circumstantial evidence, the principal is that in which the extraordinary interposition of supernatural power is supposed: as in the case of sorcery, witchcraft, and such other operations, real or supposed, as have been designated under the general name of *miracles*.

* No such table is to be found in the MS. — *Editor.* —— [The portion of Le Clerc's work which was made use of, is evidently the 2d section of Part III. "De locis et scriptis spuriis à genuinis dignoscendis." *Vide* Ars Critica, Lond. 1698, vol. II. p. 367. — *Ed of this Collection.*]

† This table, as well as that which is subsequently mentioned, is also wanting. — *Editor.* — [But see the Addenda to Evidence, Tit. Testmoigne, Com. Dig. Hammond's Edit. — *Ed. of this Collection.*]

9. (3.) Any supposed *psychological* fact whatsoever; *i. e.* any supposed fact, the supposed seat of which is in the mind of this or that individual human being

Corresponding disprobabilizing facts shortly designated as above, *psychological improbability*

The term *impossibility* is in this case omitted. The reason is, the want of uniformity and consistency on the part of all psychological facts as compared with physical ones Correspondent and opposite to impossibility, is *certainty* But the case of *insanity* is of itself sufficient to prevent any state of the human mind from being considered in any instance as *certain* and of insanity there are gradations innumerable, many of them, at that end of the scale which is next to sanity, scarce distinguishable from it

The last-mentioned species of circumstantial evidence — improbability or impossibility — has in its nature something peculiar In all the other kinds of circumstantial evidence, the evidentiary fact (whatever it be—positive or negative) is at any rate something entirely distinct from, and independent of, the principal fact, the fact to be proved In the case of improbability or impossibility, the evidentiary fact is not another and a distinct fact it is no other than a property, or supposed property, of the principal fact itself, to wit (as will hereafter be seen,) the property of being contrary to the order of nature

Circumstantial evidence, therefore, may with propriety be distinguished into that which is afforded by other facts, and that which is afforded by the nature of the fact itself that is to be proved.

For the illustration of the first of these modifications of circumstantial evidence, — taking for the principal fact, *delinquency*, considered in a general point of view, — I shall bring to view the several classes of probabilizing facts bearing relation to it, accompanied with an indication of such facts as present themselves in the character of *infirmative* facts with relation to such of the above-mentioned probabilizing facts as are exhibited in a state particular enough to be susceptible of any such particular indications

This done, from the mass of particular considerations thus brought to view I shall deduce such considerations of a general nature as promise to be of use in the way of instruction, either to the legislator or the judge, for which purpose, the matter afforded by such of the circumstantial evidences as have for their principal fact *delinquency*, will, it is supposed, suffice.

I shall then pass to the consideration of that kind of circumstantial evidence which is afforded by the nature of the principal fact itself; viz. improbability and impossibility

CHAPTER III

OF REAL EVIDENCE, OR EVIDENCE FROM THINGS

§ 1 *Of the nature and extent of real evidence.* By *real* evidence, I understand all evidence of which any object belonging to the class of *things* is the source, *persons* also included, in respect of such properties as belong to them in common with things

The properties of things are the subject-matter of the different branches of physical science A work having for its subject any such branch of science, is, as to a great part of its contents, a treatise on circumstantial evidence In this point of view, this comparatively small portion of our field of inquiry is of itself infinite

On the present occasion, the inquiry is limited to the field of law Even after this limitation, however, there is scarce an imaginable distinction or observation, an indication of which could, with reference to the subject of the present work, be charged with being altogether irrelevant for, in one way or other, and even in each instance in various ways, there is not an imaginable fact, the existence of which is not capable of being taken for the subject of inquiry in a court of judicature No imaginable fact (for example,) the existence of which may not (unless in case of legal prohibition interposed for special reasons) have been taken for the subject of a wager on which occasion, whether the wager has been won or no by Titius, may become a question to be determined by a court of law. Add to this, the case of a premium offered for an invention or discovery, the case of a claim put in to the sort of temporary monopoly granted to inventors for the encouragement of inventions, and the case of a question whether a contract, respecting the practice of any branch of art, or the affording instruction in relation to any branch of science, has been properly fulfilled Of the evidence that on any of these occasions may come to be exhibited, a portion more or less considerable (if not the whole) will come under the notion of the species of evidence already distinguished under the appellation of scientific evidence but it is not the less true that the facts brought to view on such occasions respectively, are brought to view in the character of evidentiary facts, and are included in the field of legal evidence If, therefore, the whole Encyclopædia were to be crowded into the body of this work and into this part of it in particular, there is not a page of it, that (if relevant with reference to the particular branch of art or science of which it undertook to treat) would, strictly speaking, be irrelevant — could be justly chargeable with being altogether irrelevant — with reference to the sub-

ject of this work. But, as the duration of human life, as well as human powers (psychological and physical,) has its limits; it becomes matter not only of convenience but of necessity, to mark off and abandon to the labours of their respective professional and other appropriate cultivators, these several distinguished and pre-eminent portions of the field of evidence

Even in the more limited field opened by the penal branch of law, — a prodigiously ample and diversified demand, a demand scarce susceptible of limitation, will be seen to present itself. Cases of homicide and personal injury (not to mention at present a great variety of other cases,) are sufficient of themselves to draw deep upon the stores of medical science cases of monetary forgery upon the metallurgic branch of chemistry, cases of scriptural forgery, upon the arts of the engraver, the paper-maker, the letter-founder, the ink-maker, and (through one or other channel) upon the stores of chemistry.

Of all modifications of *real* evidence, the human body is that source which will serve best for exemplification the matter afforded by it being at the same time of the most interesting nature, susceptible of the greatest variety, and capable of being brought to view in the smallest compass, proportionally to the importance of the instruction conveyed by it The following table is a translation, nearly literal, of the heads offered in Plenk's *Elementa Medicina et Chirurgica Forensis*, Vienna, 1781 A few articles are omitted, some as not being applicable to the present design, others as referring to vulgar errors, which, at this time of day, no longer threaten to be productive of errors in judicature.*

Questions belonging to the cognizance of *criminal* tribunals —

I. Signs of homicide, by
  1 Wounds
  2 Contusion
  3 Hanging
  4. Drowning
  5. Suffocation
  6. Poison.
  7. Unskilful practice (medical or chirurgical.)
  8. Suicide.

II. Signs of infanticide, by
  1 Wounds.
  2. Contusion.
  3. Suffocation.
  4. Starving.
  5. Cold.
  6 Heat.
  7. Drowning.
  8. Omission to tie the navel-string.
  9 Omission to administer medical remedies against debility.
  10. Abortion purposely procured.

III. Signs indicative of ability or inability to endure divers corporal inflictions, for the purpose of punishment or compulsion.

IV. Grounds of exemption from punishment on the score of infirmity (bodily or mental) existing at the time of the act of delinquency.

Questions belonging to the cognizance of *civil* tribunals. —

1 Signs disproving alleged paternity.
2. Signs disproving alleged maternity.
3 Signs of a child's being born alive.
4. Signs of a child's being born dead.
5 Signs of a child's being born at full time
6 Signs of prematurity of birth to a degree not inconsistent with continuance of life.
7 Signs of prematurity of birth to a degree inconsistent with ditto.
8. Signs of birth at a period so late as to be incompatible with alleged paternity.
9 Signs of a supposititious child
10 Signs of a child conceived in the way of superfœtation,
11. Signs of the first born among twins, &c.
12. Signs of fictitious pregnancy.
13 Signs of concealed pregnancy.
14 Signs of real parturition.
15 Signs of fictitious parturition.
16 Signs of defloration.
17. Signs of rape.
18 Signs of particular ages
19 Signs of divers fictitious diseases.
20. Signs of divers concealed diseases.
21 Signs of false imputation of disease, in divers instances.

Questions belonging to the cognizance of *ecclesiastical* tribunals —

1. Signs of barrenness in females.
2 Signs of impotence in males.
3. Signs of monstrosity.
4. Signs of doubtfulness in regard to sex.

For the reasons already stated, the inquiry is in the present instance limited to the penal branch of law. The fact sought, and concerning which on each occasion the question is, whether it be evidenced or no, is delinquency the evidentiary facts are any and every fact, considered as capable of operating in that character with reference to the fact sought.

Division of *things*, considered as sources of real evidence: the source of the division being the nature of the relation they respec-

* In this table, the several articles consist of so many species of principal facts, facts supposed to be evidenced. The corresponding lists of evidentiary facts, expressed here by the word *signs*, are exhibited in the corresponding divisions of the book. To have transcribed them would have been to transcribe the whole work, consisting of 184 pages. Specimens, however, have been exhibited, in the case of *homicide* in general, and of *infanticide* in particular

tively bear to the fact of delinquency, considered as the fact *indicated*

I. Subject-matter of the offence itself — 1. The person killed or hurt 2 The thing stolen or otherwise taken in the way of depredation, or damaged, or destroyed 3 The instrument of contract fraudulently uttered or fabricated 4 The genuine money diminished; the counterfeit money fabricated

II. Fruits of the offence — In the case of depredation above mentioned, it is the goods taken in the way of depredation which constitute the immediate fruits of the offence In the case of forgery of written instruments, and monetary fabrication, it is the profit, in whatsoever shape obtained in the case of subduction by monetary forgery, it is the quantity of valuable matter subducted

III. Instruments of the offence — Examples — 1 In the case of homicide or other bodily injury,—the pistol, sword, club, knife, or other weapon in case of poisoning,—the poison 2 In case of depredation by housebreaking,—the picklock keys, the crow or chisel, the ladder 3 In case of incendiarism,—the combustibles 4 In case of forgery,—the engraved plates, the instruments for the fabrication of the appropriate papers 5 In case of monetary forgery,—the coining tools

IV Materials of the subject-matter of the offence, or of the instruments of the offence when they happen to have anything appropriate in their nature, exclusively or peculiarly fitting them for being converted into instruments of the offence — Examples — 1. Silver or gold, in plates, or other suspicious forms, where coining is the offence in question. 2 Laurel leaves for distillation, where poisoning is the fact in question 3 Drugs calculated for the purpose of adulteration, found in large quantities in the possession of a dealer in the article which such drugs are capable of being employed to adulterate

V Receptacles inclosing or having inclosed (as above) — 1 The subject-matter, 2 the fruits; or 3 the instruments, of the offence — Example. — 1 The clothing of the person killed or hurt, 2 the house, ship, room, closet, stable, waggon, chest of drawers, package, case, in which the goods stolen, damaged, or destroyed, or the instruments or materials of the offence, were contained

VI Circumjacent (detached) bodies Bodies circumjacent (though detached,) with reference to any of the objects above enumerated — Examples — The floor on which the person killed or wounded was standing, the chair on which he was sitting; the bed on which he was lying; the pathway spotted by his blood.

It is in virtue of some peculiarity in their *condition*, that the things in question are qualified to become sources of real evidence, evidentiary facts, with reference to the modification of delinquency in question — the fact indicated.

This condition may to the purpose in question be distinguished into relative and absolute relative, bearing to the person in question any such relation as has the effect of indicating him in the character of the delinquent, absolute, indicating (without any indication of the person) the existence of the obnoxious event (the death, the damage to property by fire or other cause,) coupled or not with the indication of its being referable to human delinquency as its cause

Physical *real* evidence, (whether issuing from a real or from a personal source) requires to be distinguished into *immediate*, and *reported* I call it *immediate*, in the case where the thing which is the source of the evidence is made present to the senses of the judge himself I call it *reported*, in the case where it is not made present to the senses of the judge himself,—but the state of it in respect of the evidence, the evidentiary facts, said to be afforded by it, is presented to the judge no otherwise than by the report made of it by a person, by whom (in the character of a percipient witness) the state and condition of it in respect of the evidentiary facts in question is reported by him to have been observed

In the case of immediate real evidence (as above described,) the evidence is of the circumstantial kind purely it is a case of purely real, purely circumstantial evidence In the case of reported evidence, it is of a compound or mixed kind, composed of supposed real evidence exhibited through the medium of personal, of circumstantial, exhibited through the medium of direct, evidence To the reporting witness indeed, if his report be true, it was so much immediate, so much pure real evidence but to the judge it is but reported real evidence

The distinction is far from being a purely speculative one practice requires to be directed by it Reported real evidence is analogous to hearsay evidence, and labours more or less under the infirmities which attach to that modification of personal evidence, compounded of circumstantial evidence and direct,—of real evidence, and ordinary personal evidence (evidence given in the way of discourse) it unites the infirmities of both. The lights afforded, or said to have been afforded, by the real evidence, are liable to be weakened in intensity, and altered in colour, by the medium through which it is transmitted a topic which will come to be considered in the Book which treats of *makeshift* evidence

From this infirmity results an obvious practical rule — viz not to receive real evidence in the form of reported real evidence, when, without preponderant inconvenience, it can be had in the form of immediate real evi-

dence: a rule exactly analogous to that which is alike obvious in the case of the analogous species of evidence called hearsay evidence. But of this elsewhere.

§ 2. *Infirmative facts applicable to real evidence.*

The evidentiary (*i. e.* the criminative or inculpative) facts belonging to this class being in so prodigious a degree multifarious,—in a correspondent degree multifarious must be the facts that apply to them respectively in the character of infirmative facts.

Yet, except in so far as the connexion between the principal fact and the evidentiary fact is *necessary*, there is not one such evidentiary fact but must have its correspondent infirmative facts, by the possibility of which its probative force is diminished.

Not that facts are altogether wanting, which (the evidentiary facts being by the nature of the principal fact so many *criminative* or *inculpative* facts) are applicable in common to all evidentiary facts belonging to the class of real evidence.

Of the infirmative facts of this description, five examples may be designated as follows, viz —

1. Accident. The appearance unquestionable, but not having for its cause any agency of the supposed delinquent, directed to the production of the forbidden result in question, being produced either by causes purely physical, or (if with the intervention of any human agent acting in pursuit of any end) produced either by some other person, or by himself in pursuit of some unforbidden end.

2. Self-exculpative forgery in relation to real evidence (viz. the evidence composed of the appearances in question,) committed by some other person, guilty either in respect of the offence in question or some other offence. See, further on, *Forgery in relation to Real Evidence*.

3. Like forgery committed by some other person, who—though not guilty in respect of the offence indicated by the real evidence in question in its genuine state—yet, under the apprehension of the indications it affords to his prejudice, alters the appearance in question, with a view to the doing away of those indications *

4. Like forgery committed by another person, in the view of subjecting the defendant to the imputation in question for a malicious purpose; *i. e.* for the purpose of causing him to suffer (either at the hand of the law or in the way of reputation) as if the offence in question had had him for the author of it or a partaker in it.

5. Like forgery committed in sport; *i. e.* without any design to subject the individual in question either to legal punishment or lasting dispute, but only to momentary alarm.†

§ 3. *On the circumstantial evidence of delinquency, afforded by the possession of an article of criminative real evidence.*

Nothing is more familiar than the word *possession*: nothing more variable and indistinct than the ideas which are wont to be attached to that word: but, in so far as on any occasion it is considered as being applicable in such sort that a thing considered as a source of criminative real evidence, being such in relation to the supposed delinquent in question, is considered as being in his possession,—in so far is the relation indicated by the word possession apt to be considered as evidentiary of delinquency in his instance. Of this species of criminative circumstantial evidence, possession of stolen goods affords the most obvious and frequently exemplified case.

Of possession of criminative evidence, the probative force will be liable to be varied according to a distinction expressible by the terms *actual* and *antecedent*: actual, when at the very time in question, the thing in question is supposed to be found in possession of the supposed delinquent; antecedent, when it is only supposed to have been in his possession at some antecedent point of time.

In the latter case, its *identity* is supposed, but is liable to become the matter of an additional question: in relation to which question, this or that supposed intrinsic mark of ownership, designed or undesigned, will frequently present itself in the character of an

* In a tale of the Arabian Nights' Entertainments (the Little Hunchback,) the body of a man who died by accident finds its way into the house of an innocent man, and from thence (under the apprehension inspired by the fear of its operation in the character of real evidence) into a series of other houses. Not many years ago, the story was introduced upon the English stage. So many transfers (as above;) so many exemplifications of real evidence; so many exemplifications of a forgery, and at the same time an innocent forgery, of real evidence.

The case of Captain Donnellan, who was hanged for the murder of Sir Theodosius Boughton, gave occasion to an anonymous treatise on the subject of circumstantial evidence. Under a system of penal procedure distinguished beyond all others for its favourableness to the defendant, instances (it thence appears) have been but too abundant, in which innocence has sunk under the weight of fallacious real evidence. In any of these instances, suppose the defendant, thus pressed, endeavouring to remove the pressure,—you have so many instances of forgery, and that innocent forgery, of real evidence. In the instances where the undue and irreparable punishment took place, the fault (let it be observed) lay not so much, if at all, in the system of procedure, as in the substantive branch: in the making use of a species of punishment, which, were it only because the mischief of it is irreparable, would be unfit for use.

† Example—story of Joseph and his brethren.

article of *real* evidence, serving to probabilize the supposed fact in question; viz. that the thing which is not now, was at some antecedent point of time, in the possession of the supposed delinquent

To possession of criminative real evidence, in its character of a fact evidentiary of delinquency, apply, in the character of infirmative facts, those five which we have seen applying to real evidence itself when considered as criminative

Additional infirmative facts applying to possession of criminative real evidence, and not to the real evidence itself, are—

6 (1.) *Unconsciousness* when, though the situation of the thing in question is or has been such as to warrant its being said to be or to have been in the possession of the supposed delinquent, he himself has never been conscious of its being so a state of things that may naturally enough have been brought into existence by any of the five causes enumerated (as above) under the head of real evidence.

7. (2.) *Clandestine introduction* Subsequently to the introduction of the thing into the place by its introduction into which it is put into his possession, he becomes conscious of its being there, but, of the operation by which it was introduced, he had not, while the operation was going forward, any knowledge

8. (3.) *Forcible introduction* when it was with his knowledge indeed, but against his declared or known will, that the thing in question was placed in that situation in which it is considered as being in his possession as, if by conspiracy among three men against one, one lays hold of both his hands, another puts into his pocket a stolen handkerchief, which the third, running up during the scuffle, finds there

By the circumstance of *force*, supposing it proved, the criminative effect of possession (as above) would be destroyed altogether but what may happen is, that the possession shall have been proved, when the force is not proved.

9. (4.) In case of supposed antecedent possession (as above) — *non-identity* of the thing in question The man is seen running, and, on the path which he has been taking, a handkerchief is seen lying A handkerchief resembling it had been seen in his hand, but though similar, it was not the same

10. (5.) *Furtherance of justice*. receipt or seizure of the thing in question, in the view of applying it to its use in the character of a source of criminative evidence as in the case of an official minister of justice so demeaning himself in the execution of his office, or an individual volunteering his services to the same effect.

Nothing can be more persuasive than the circumstance of possession commonly is, when corroborated by other criminative circumstances nothing more inconclusive, supposing it to stand alone Receptacles may be contained one within the other, as in the case of a nest of boxes the jewel in a case, the case in a box, the box in a bureau, the bureau in a closet, the closet in a room, the room in a house, the house in a field. Possession of the jewel, *actual* possession, may thus belong to half a dozen different persons at the same time and as to *antecedent* possession, the number of possible successive possessors is manifestly beyond all limit

Connected with this subject, is the consideration of the probative force of *possession of criminative written evidence*

When written evidence — such as (supposing it to have for its author the supposed delinquent) would, in the character of confessorial evidence, tend to induce a persuasion of his being guilty of the offence in question — is found in his possession,— the mere circumstance of its being in his possession will of itself, if separated from the circumstances that are so apt to be connected with it, scarce be capable of possessing criminative force sufficient to entitle it to the denomination of criminative evidence

If, indeed, possessing with regard to him this criminative tendency, and speaking in his own person, it appears upon the face of it to be written with his own hand (as in the case of a memorandum written for his own use, or a letter written by him and intended to be sent to the person to whom it is addressed, but not sent,) there is no doubt that —if, being spoken, it would have amounted to self-criminative (*i. e.* to confessorial) evidence — it will, being written, amount to no less But, in this case, its criminative force depends altogether upon what it contributes in the character of *confessorial* evidence, towards inducing a persuasion of his having been concerned in the forbidden act. From the circumstance of its being found in his possession, it can scarce be said to derive any probative force over and above what it would have possessed if found anywhere else if, for example, being a letter, it had been sent to the person for whom it was designed, and by him produced in evidence

It being still of such a nature as (had it for its author, as above, the supposed delinquent, and were it spoken in his person) would operate against him in the character of confessorial evidence, suppose it were to have for its author another individual, writing and speaking of the criminal transaction in question, whether in the character of an accomplice or an accuser With a probative force proportioned to the strength of the indication afforded by it, and to the trustworthiness of the writer, it would operate in the character

of the weak and makeshift species of evidence which will be brought to view in the next Book, under the name of *casually-written* or written casual evidence. But, from the circumstance of its being found in the possession of the supposed delinquent, it would scarcely derive any probative force, over and above what it would have possessed, if, in its way to his house, it had been intercepted — (for example, at a post-office.)

Addressed to him by word of mouth — or even, although not addressed to him, if spoken in his presence — a discourse of exactly the same tenor might have operated against him with a considerable degree of probative force. Why? Because — when the supposed delinquent and the virtual accuser were (at the time of uttering the virtual accusation) in presence of each other — not only the motive to contradict the accusation in case of its falsity, but the opportunity, the opportunity for immediate contradiction, exists. Non-contradiction of criminative discourse operates therefore as evidentiary of confession; though not without standing exposed to the debilitative force of various infirmative facts. But, where the form of the criminative discourse was in writing, and the parties not in presence — the opportunity of immediate contradiction not having place — the circumstance of the writing's being found in the possession of the individual so addressed by it, scarce affords, of itself, any the slightest inference.

In the case of real evidence, possession may indeed, and not unreasonably, be considered as operating in the character of a criminative circumstance. Why? Because, by possession of things fit for use, a most natural (though sometimes not an infallible) presumption is afforded of actual use and ownership: including under the head of use, in the case of a mercantile man, *sale*, as being a mode of using particularly adapted to his situation in life.

But, as in the case of real evidence a man's having possession of a thing of any sort affords of itself scarce any presumption of his having made it, — so, in the case of written evidence, mere possession of a manuscript of any kind, not being in his own handwriting, affords scarce any presumption of his having been the author of it. In regard to writings, as in regard to chairs and tables, possession is good evidence of ownership: but of the possessor's being the author of the writings, it is not much better evidence than of his having made the chairs and tables.

True it is, that, where the authorship has for its proof similitude of hands (which is a sort of real evidence,) possession adds probable force to it. Why? Because, if it be extraordinary that writing, bearing such a degree of resemblance to that of Reus, should not be his, it is still more extraordinary that writing bearing such a degree of resemblance to that of Reus, and moreover found in his possession, should not be his.

Taken by itself, so weak is the probative, the criminative force of written evidence (understand all along, such written evidence the tendency of which is to fix the imputation of the offence in question on the individual in whose possession it happens to be found,) that it is scarce susceptible of being rendered weaker by the consideration of any facts operating in the character of *infirmative* facts. But the infirmative facts capable of applying to it are of the same nature as those which have been seen applying to the case of possession of *real* evidence at large, when considered in respect of the criminative force with which it is capable of operating.

So far as concerns clandestine introduction (so it exceed not a certain magnitude,) a mass of written evidence possesses a means peculiar to itself for being introduced into a man's possession without his consent or privity. It may have come, for example, by the post, addressed to himself: it may have come by the post addressed to some inmate of his, and thus remain in his possession for any length of time without his knowledge.

"On such an occasion" (naming it,) "my dear friend, you failed in your enterprise;" an enterprise (describing it by allusion) of theft, robbery, murder, treason: "on such a day, do so and so, and you will succeed." In this way, so far as possession of criminative written evidence amounts to crimination, it is in the power of any one man to make circumstantial evidence of criminality in any shape, against any other.

It has perhaps very seldom happened that written evidence, tending to criminate a man in respect of the crimes in question, has been found in his possession, but there has been good and sufficient reason for regarding him as guilty. But, in these same cases, the principal reason has been constituted, not by this of possession, but by similitude of hands, or by other evidence.

Supposed facts that belong not to this head are apt to be urged in the character of infirmative facts, for the purpose of encountering the criminative circumstantial evidence constituted by possession of written evidence of the nature here in question. Such are —

1. Irrelevancy of the discourse, either with reference to delinquency in general, or with reference to the particular species of delinquency, or individual act of supposed delinquency, in question.

2. Unauthenticity of the script purporting to be in the handwriting of the supposed delinquent.*

* See Book VII. *Authentication.*

§ 4. *Of interrogation, as an instrument for supplying the deficiencies of real evidence.*

In the character of criminative evidences, besides the special and contingent infirmities to which they are respectively liable, the several mute evidences which compose the subject of this chapter have, as such, several infirmities in common —1. The indications they afford are particularly apt to be incomplete. By written evidence, to which it happens to be found in the possession of the supposed delinquent, the lights afforded may be to any degree broken, imperfect, inconclusive. 2. From the intrinsic nature of these mute evidences, by which their criminative force is exposed to the opposition of so many infirmative facts, arises the question — a question that forces itself upon every rational mind, — these several possible infirmative facts, in the individual case in question, have they, or any of them, actually had place?

For filling up the above-mentioned deficiencies, for clearing up these last-mentioned doubts, the nature of things has provided one and the same natural and naturally efficacious instrument — *interrogation*.

On this, as on all other occasions, the way to know is to inquire: a proposition that from the beginning of the world to the present day has never been a secret to any human being, unless it be to English lawyers. And of whom to inquire? Of whom, but of the one person in the world, who, if the fact be in existence, cannot fail to know of it? — the one person in the world, in comparison with whose evidence, every other imaginable species of evidence, direct or circumstantial (except in so far as this naturally best evidence happens, by the force of sinister motives, to be driven into mendacity,) is a miserable makeshift: insomuch that if, on the score of hardship to the person so interrogated, there were any rational objection capable of applying to the extraction of the evidence from this most direct, and (in case of confessorial responsion) most trustworthy, of all sources, — it would operate, and with augmented force, to the exclusion of all other evidence.

The case in which the written evidence is confessorial, as compared with the case in which it is extraneous, here presents a difference. In the case of confessorial written evidence, the author of the writing and the possessor of it are but one person: there is not, therefore, of necessity more than one person of whom to *inquire* concerning it. In the case of extraneous written evidence, there are at least two persons: the person in whose possession it is supposed to be, and the person whose writing it is supposed to be. These two at the least, add to whom (in the case of a script purporting or supposed to be a transcript, or written from dictation,) the original writer or dictator, on the one hand; the transcriber or amanuensis, on the other.

Of these two persons, the possessor and the writer (dismissing, for simplicity's sake, the accidental decomposition of the writer into the original and the derivative writer as above,) it may happen to the latter to be no longer forthcoming in such sort as to be subject to inquiry: death, imbecility, or expatriation, may have put him out of reach. In this case, the imperfect evidence, which to false science and blind prejudice has been the object of exclusive choice, is left by necessity of the character of the only receivable, because the only obtainable, evidence from that same source.

But, in the case of confessorial evidence, where the possessor of the evidence and the writer are one and the same person, if he be also the defendant, and in that character forthcoming, this first resource, the faculty of inquiring, remains accessible.

On this same occasion, there remains in both the above cases yet another sort of person, who, when the process of inquiry is going on, ought not to pass unheeded. This is the person, whosoever he may be (in the ordinary course of things, an official person,) by whose instrumentality the papers, which it was so much the interest of other persons to conceal, have been brought under the eye of justice. The papers produced in the character of criminative evidence, whether confessorial or extraneous, are all genuine. Be it so — but the papers which thus are produced, are they all the papers that, in the character of evidence in relation to this same supposed delinquency, could have been produced? These are criminative: but did the same possession, or any other within the reach of the searchers, afford no others that were exculpative? These are questions which common sense, in aid of common probity, cannot fail of pressing upon the minds of all parties concerned, but to which the system of English procedure affords no adequate and all-comprehensive means of obtaining answers.

In pursuance of one of the most mischievous conceits that ever entered into a lawyer's head — one of the most absurd if justice, one of the best imagined if injustice, were the object, — the above sources of necessary explanation have in great measure been cut off: and always to the prejudice of justice, on whichever side of the cause seated.

By the responsive testimony of the defendant, the existence of the *criminative* fact cannot be established, nor the clouds that hung over it be cleared up, because no man is to be compelled to accuse himself.

By the responsive judicial testimony of the same person, neither can the existence of any of the above-mentioned *infirmative* facts be established, nor the clouds that hung over it

be cleared up; because no man is to be a witness in his own cause.

If it were by a plaintiff in the cause that a mass of evidences — partly inculpative, partly infirmative with relation to the criminative facts, or in any other way exculpative — were discovered and made forthcoming, — he produces what he pleases, he suppresses what he pleases. master at the same time of an accusation and a defence, — he produces the accusation, he suppresses the defence. Why? — Because no man is, with or against his will, to be a witness in his own cause.

Of these mischievous maxims, the breach is as notorious, and perhaps as extensive, as the observance, but, broken as they are, there remains force in them to do mischief in deplorable abundance, as well by their application to this topic, as to a multitude of others.*

§ 5. *Forgery of real evidence.*

When the appearance of things leads to wrong conclusions, the deceit will sometimes be the pure work of nature, at other times the work of human artifice.

The former case is exemplified but seldom, when it is, its birth may, in the language in use among naturalists, be ascribed to the play of nature.

The irrational animals may be ranked, and to this purpose without injury, in the class of *things*. A case which, whether real or fictitious, is famous in the history of French jurisprudence, may serve for illustration to an English eye. There, as elsewhere, magpies have been remarked for a propensity to pick up and hide not food only, but other articles, though of a nature not applicable by these hoarders to any ascertainable use. An innocent person was accused of stealing from the house of a neighbour several pieces of gold, and, being convicted, suffered an ignominious death. The real thief was a magpie, which, without the privity of its master, had taken the money at different times, piece by piece, from the too accessible hoard of a neighbour, and deposited it in a place inaccessible to any other than the unfortunate person who suffered as for stealing it.

When the deceit is the work of art — has human artifice for its cause — it may be ranked with *forgery*: the act by which deceit is produced, or endeavoured to be produced, may be termed *forgery of real evidence* †.

In another, though a nearly related, point of view, forgery of real evidence is to real evidence what subornation is to personal: it is an attempt to pervert and corrupt the nature of things, of real objects, and thus force them to speak false. Of themselves the things are silent, or, if they speak, speak to the inculpation of the defendant: by the force he applies, a thing that was silent is made to depose falsely — a thing that was speaking against him is either made to speak in his favour, or at least put to silence.

As well in the case of real evidence as in the case of written evidence, forgery is susceptible of one main distinction — into *fabricative* and *obliterative*. The case where, in the employment of expedients of this kind, the endeavour of the criminal is simply to remove the imputation from himself, without seeking to fasten it on anybody else, is as common as the other case is rare. Whatever be the crime, a main object of the endeavour of the criminal is of course to expunge, as effectually as possible, all traces of the commission of it. The hands, the garments of the murderer, have they received a stain from the blood of the deceased? The most obvious reflection suggests the removing the stain from everything from which it can be removed, and the destroying or hiding anything from which it cannot be removed. To superinduce upon any object an appearance, the tendency of which shall be to disprove the commission of the crime, — whether by disproving the existence of the criminal act or some criminative circumstance, or by proving the existence of some justificative, or extenuative, or exemptive, circumstance, — an artifice of this tendency would suppose an ulterior degree of refinement, and would come under the denomination of *fabricative* forgery of real evidence.

As it is only through the medium of physical facts that psychological facts can be brought to view, it is, consequently, through the medium of physical facts alone, that any deceptitious representation of psychological facts can be conveyed. Physical facts alone, and not psychological facts, are the only one of the two sorts of facts upon and in respect of which forgery can, properly speaking, be committed — to which the operations indicated by the term forgery can bear any direct and immediate application.

As to physical facts; although, among the several modifications of which real evidence of the *evanescent* kind is susceptible — evidence consisting of motions, sounds, colours,

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* See Book IX. *Exclusion*; Part IV. *Vexation*; Chap. III. *Self-disserving Evidence*.

† In some cases, this species of fraud (the deceptitious fabrication, obliteration, or alteration, of the appearances presented by a natural body) constitutes a substantive independent offence of itself — forgery of which *writing* of any kind is the subject-matter or the object — forgery of which general *money* of any sort, the general medium of exchange, is the subject-matter or the object of these modifications of the more extensive species of deception — forgery in regard to real evidence in general — the subject-matter has been already touched upon under the head of Pre-appointed Real Evidence.

smells, tastes, and (if the word may be used) *touches*, — there is not perhaps a single article that has not, at one time or other, been taken for the subject of that sort of deceptitious operation which, applied to other subjects, has received the name of *forgery*, yet it is among the modifications of *permanent* real evidence that we are to look for that modification of forgery which is most in use, most readily apprehended, and most apt to present itself under that name

The beautiful history of the patriarch Joseph will afford us one exemplication of forgery respecting real evidence. Preparatory to the affectionate forgiveness he meditated to extend to his brethren, his plan required that an alarm should be raised in their guilty bosoms—an apprehension of being punished, not indeed for the barbarity of which he had formerly been the victim, but for a supposed offence of recent date, of which they were altogether innocent In this view it was, that, into one of the sacks that had been filled with the corn which they had been buying, he caused a cup to be introduced, which, not having bought it, they had never meant to take Here then we have an example of forgery of real evidence of theft—forgery of real evidence of the permanent kind — forgery of evidence presented by the permanent situation of a certain material object, a certain real body, principal object and subject-matter of the supposed theft, the imputation of which it was intended thus to fix upon them, though for a time only, and for a generous and friendly purpose.

Another example may be afforded by the modern case of Captain Donnellan The smell afforded by the laurel-water, the poison supposed to have been employed by him as the instrument of death, — this important phenomenon, susceptible of permanence in respect of the substance itself and its odorous power, evanescent when considered in respect of the sensations of which, on any given occasion, it might have been productive, — was, at any rate (so long as the phial continued impregnated with it,) a lot of real evidence—a lot of evidence indicative, at once, of the physical act by which the poison was applied to the organs of the patient, of the intention, the murderous intention, in pursuance of which these acts were performed, and of the criminal consciousness with which that intention was accompanied Conscious of all these facts, as well as of the punishment annexed by law to such crimes, Donnellan, on observing how the phial had become the subject of observation, took it up, and, with the apparent view of doing away the instructive smell, poured water into it, and rinsed it out The forgery thus actually committed was of the kind that has been distinguished by the name of *obliterative*. Suppose now that, instead of simply clearing the phial of the existing smell, it had been his plan, for further security, to superinduce another—the smell, for instance, of some highly-scented medicine, such as would have been suitable to the patient's case,— *fabricative* forgery would thus have been added to *obliterative*

In the case where guilt, guilt on the part of the forger, really exists, — the inculpative fact, of which the act in question operates as evidence, is a psychological fact — the existence of culpable consciousness—consciousness that the act, whereby the effect is intended to be produced, is of the number of those which stand proscribed by one at least of the two guardian sanctions, the political and the moral, if not by both

The presumption thus afforded by this species of circumstantial evidence — the presumption of correspondent delinquency — is obviously a strong one, it is, however, far from being a conclusive one Cases, supposable cases are not wanting, in which (supposing them realized) the failure of the presumption, the erroneousness of the inference, will be obvious and indisputable, nor are instances wanting in which these several supposable cases have been exemplified in real life

1 Forgery (exculpative) in self-defence against a false accusation, forgery having for its object the removal of appearances tending to fasten the imputation of delinquency upon an individual really innocent The party in question being innocent, — suppose at the same time a number of natural appearances tending to induce a persuasion of his being guilty Take away the pre-existing source of deception, the forgery in question is true evidence of guilt add the pre-existing source of deception, the forgery by which the deception from this source is endeavoured to be done away, is, in the character of evidence of guilt, fallacious

No system of established procedure is yet known that does not afford instances — instances in greater numbers than an eye of sensibility can contemplate without concern and apprehension — where individuals, really innocent, have sunk under a load of imputation heaped upon them by fallacious circumstantial evidence Suppose an article of this description, pregnant with false inferences, — an article exhibiting appearances susceptible of permanence — the dagger employed by a murderer, conveyed into the pocket of an innocent man, the garment of an innocent man stained, by design or accident, with blood from the body of a man who has been murdered Suppose the innocent man detected in his endeavours to rid himself of the dagger, to wash away the blood the dagger, the blood, fallacious as they are, are, notwithstanding, evidence these endeavours, innocent as they are,

will accordingly be, in appearance at any rate, and in a certain sense in reality, forgery of real evidence.

The case of the unfortunate Calas affords an exemplification of more than one of the incidents by which the conclusiveness of an inculpative presumption may be proved. A son of his had received a violent death from his own hands: the father was brought to trial on a charge of murdering the son. As far as the confusion of mind into which he was plunged permitted, he had obliterated or changed some of the appearances about the body of the deceased, and other circumjacent bodies: here was forgery of real evidence. On his examination, he denied some of the facts by which the non-naturality of the death was indicated: in this mode, as in the former, he concealed — not indeed the fatal act itself, the act by which the process of strangulation was effected (for in that he had neither part nor privity,) — but some of the evidentiary facts by which it was indicated here was clandestinity. To what end all these aberrations from the line of truth? — to cover guilt? — No; for there was none anywhere The object was to save the reputation of his departed child, and thereby the reputation of the family, from the ignominy which, had the direct truth been known, would (he was but too well assured) be stamped upon it by a most mischievous and endemial prejudice *

2. Forgery (inculpative) acted in sport forgery committed in endeavouring, for a sportive purpose, to fasten upon an innocent person the imputation of delinquency in this or that shape for a time †

In the story already referred to — the story of Joseph and his brethren — we may find an exemplification of this case, though the sport was there not of the mirthful, but of the serious and moral — not of the comic, but of the tragic kind. Suppose the patriarch, — minister as he was to an absolute king, — suppose him, notwithstanding, amenable to the ordinary dispensations of justice suppose his fraternal and generous project observed, and mistaken for a serious hostile one: — the ultimate innocence of intention would, when demonstrated, have been sufficient to repel the presumption afforded by the apparent indications of a design deceptitious and injurious, and to add to the instances by which it is proved that, in the character of inculpative evidence, this, any more than any other species of evidence, is never entirely exempt from the danger of proving fallacious.

Penal justice is not the only theatre of a fraud of this complexion: it is equally applicable to non-penal cases. It may have for its object the subjecting a man to punishment, or to the burthen of making satisfaction, when undue: it may have for its object the exempting a man from punishment when due: it may equally have for its object the causing a man to be put into possession of some right to which he has no just claim: it may have for its object the exempting a man from some obligation, which, as necessary to the collation of a correspondent right, some other person has a just claim to see imposed upon him.

The clandestine removal of a land-mark affords an example of a case of forgery of real evidence, having for its object the acquisition of a proprietary right. Considered in respect of its most obvious and most frequent motive and efficient cause, it is a contrivance for stealing land it is a succedaneum to the forgery of a deed, designed to serve as evidence of a title to land. Considered as the act of a person to whom the loss would not be productive of any profit, it would at any rate be a contrivance for injuring a person in his property, by *destroying* his title to land.

By the foregoing theoretic views, a few practical instructions are obviously suggested.

The first is, that it is an office incumbent on the legislator, and, under his authority and guidance, on the judge, — whenever any material objects present themselves as capable of affording real evidence in the cause (be it penal, be it non-penal,) — to take such measures as may be suitable to the nature of the case, for securing their continuance in that state in which they shall be *still* exhibitive of the evidence which they appeared to exhibit at the time of their being *first* observed; and to prevent them from either passing of themselves, or being purposely or accidentally brought, into any other state, in which the evidence exhibited by them might be in danger of proving fallacious.

The attention bestowed upon this object, is, in the French law, particularly conspicuous: more so than in the English. In the former, the judge has general explicit duties presented to him, and explicit rules for his guidance, with commensurate powers. In the English law, no special powers extensive enough to embrace the object are possessed

* Whether, in the case in question, the several above-distinguished modifications of innocent deception did actually take place, would be a scrutiny foreign to the purpose. Some, indisputably; not all, possibly: but the inquiry would be completely useless, since, correct or not correct, the statement answers, in equal degree, the purpose of illustration. What is material is — the circumstances in it (if any) that are false, are, in any future case, just as likely to be exemplified as it they had been true.

† If the endeavour be a serious one — an endeavour to cause an innocent person to suffer ultimately as for a delinquency, of which, to the knowledge of the forger, he is not guilty, — the act directed by this intention, and accompanied by this consciousness, constitutes a substantive offence, and the presumption of delinquency afforded by the forgery is by the supposition not fallacious.

by any magistrate; and in the exercise of his powers, so far as they happen to be adequate, he is left to his own unassisted discretion, without any instruction for his guidance

Before any suspicion has arisen — before any steps have been taken, in the view of bringing the delinquent to justice — the field for this species of forgery is open to him, and no provisions taken by the legislator can be of any use, the moment for making application of them not being yet come But as soon as suspicion has told her tale to justice, and the servants of justice have been put upon the search for evidence, then it is that things as well as persons may in this view be fit objects of their care.

2. Another subject for the consideration at least of the legislator, is, the putting (where practicable) this species of forgery, under its several applications, upon the same footing in respect of prohibition and punishment, as forgery of written evidence, when directed to the same ends.

By the compilers of the books of Romano-German law, Prussian* as well as Austrian,† removal of land-marks constitutes an independent species of delinquency, under a title by itself, not referred to fraud, the *crimen falsi*, or any other genus Under the same denomination, mention had been found to be made of it in the original books of ancient Roman law ‡ This, it is evident, is a case of forgery of real evidence, in which the obliterative and the fabricative species are combined. In so far as the designation that had been given of the real boundary is done away by it, it is *obliterative*, in so far as an indication of a false boundary is presented, by setting the mark down again in a wrong place, it is *fabricative*.

In this spot, and in this alone, the penal law of these two German states has covered a portion, important indeed in its nature, but comparatively minute in its extent, of the wide field of this modification of forgery

Neither the English nor the old French law have made so much as this small advance towards the comprehension of this fraud The French, in their adoption of the Roman law, seem somehow or other to have dropt what the more faithful Germans have copied

In French jurisprudence, however, instances are not wanting of the application, real as well as suspected, of this species of fraud, to the most mischievous and flagitious purposes

In the case of Le Brun,‖ who died of the torture that had been unjustly inflicted on him for his supposed participation in the murder of his mistress, the judicial officers, when possession had been taken of an old key that had been in his occupation, were charged by his advocates with having altered it into a master-key, for the purpose of his appearing to possess a facility, which in fact he did not possess, for the commission of the crime.

Under the Roman law, the word *stellionatus* served as a head to comprise a hodge-podge of offences, chiefly of the predatory class, bearing scarce any other resemblance to each other. Out of six, the third is *si quis imposturam faciet in necem alterius* — if any one shall have employed imposition in the view of depriving another of his life. Under this head, forgery of real evidence for that particular purpose may, probably have been meant to be comprised

A lizard is a cunning animal, and a *stellio* is the most cunning of all the lizards, as Pliny, the most accurate of natural historians, assures us It is upon the ground of this anecdote of natural history, that the Roman lawyers have jumbled together so many other offences which require no contrivance, under the name of *stellionatus Stellionatus* should, by this description of it, have been synonymous to fraud, or been used to express exclusively some modification of fraud.

CHAPTER IV.

OF PREPARATIONS, ATTEMPTS, DECLARATIONS OF INTENTION, AND THREATS, CONSIDERED AS AFFORDING EVIDENCE OF DELINQUENCY

§ 1 *Probative force of these circumstances considered in themselves*

1 PREPARATIONS, — viz acts done in the intention of giving birth to the act considered as the principal fact, the fact said to be evidenced.

The event having actually taken place, — if the acts considered as preparations with regard to that event were such as properly come under that name, their probative force with reference to it is out of dispute, and they are assumed to be conclusive

Of acts of this description, and those others that follow them under the same more extensive denomination of precedential acts, it may be of use at the outset to observe, that — although in point of time the acts themselves are essentially prior to the principal act or other fact — it will frequently happen, that the time when they are understood to be such, the time when their connexion with the principal fact is perceived, and even the time when they themselves come to light, is of later date * That it should be so is the more natural, inasmuch as — if the design, being of a criminal or in other respects an obnoxious nature, is *understood* (or though it be but *suspected*) — a natural though not a necessary

* Boehmer, § 2, Cap. 33.
† Bauma, § 464-471.
‡ Heineccii Elem. (ad Pand.) Pars. VII. § 140.
‖ Causes Célèbres (1737), III. 323.

* An example will be seen further on, in Donnellan's case.

result is, that it should be frustrated: that the obnoxious event should be prevented from taking place.

It is in the penal law that acts of this description have been most frequently brought to notice: the purchasing, the collecting, the fashioning, the instruments of mischief; the repairing to the spot destined to be the scene of it.

Not that the facts which are apt to come in question in a non-penal cause are in their nature by any means destitute of this species of circumstantial evidence. — 1. Preparations for the ceremony of interment have been brought forward as circumstantial evidence of expected, though more naturally of precedent, death, most commonly to prove a death which really took place: rarely, but not without example, to afford a fallacious proof of the death of a person at that time still in existence.* 2 Preparations for birth (*i. e.* for parturition) have been brought forward, sometimes to repel the charge or suspicion of the destruction of an illegitimate child by the mother, sometimes to afford proof of filiation, real or pretended. 3. Preparations for the marriage ceremony have been brought forward, sometimes as presumptive proof of the subsequent performance of the ceremony, sometimes as proof of an engagement to that effect, when satisfaction for the breach of it has been claimed †

When the act projected is of a criminal nature, or where on any other account the discovery of the design threatens to be followed either by the frustration of it, or by any other inconvenience, either to the agent in question, or to any other person or persons, whose welfare is regarded by him with an eye of sympathy, — the natural state of things is, that the preparations should be endeavoured to be concealed. Understand, the preparations for bringing about the event which is particularly and for its own sake endeavoured to be brought about. But in this main and direct design, are involved by accident a various and almost indeterminate multitude of incidental and collateral ones: 1 Preparations for giving birth to productive or facilitating causes, of all kinds and degrees of propinquity or remoteness; for removing obstructions of all kinds from all quarters, and, among others, for obviating suspicion of the design itself; 2. Preparations as it were of the second order, for preventing discovery or suspicion of the preparations of the first order, viz. of those which are pointed most immediately to the accomplishment of the principal design; 3. To these preparations of the second order, imagination will easily add preparations of the third and fourth order, and so on. For it is evident, that to this chain of preparations — to the chain of eventual or intended causes, capable of being thus spun out of the stores of wayward industry — there can be no certain limit.

The measures thus taken for concealment or illusion — for involving facts in darkness, or covering them with false colours — will sometimes appear in the form of *discourse*, oral or written; sometimes in the shape of *deportment*, — physical acts at large. Whatever a man does, he does either by his own hands, by his own immediate operative powers, or by the hands of others. When he gives motion to the hands of others, it will generally be by words. So, if the hands or the lips of others be prevented from raising up obstructions to his designs: and, among the persons thus wrought upon — the persons prevented from becoming or continuing to act in the character of opponents, or converted into co-adjutors — may be the intended sufferer himself.

On March 30th, 1781, at the assizes at Warwick, Captain Donnellan was convicted of murder, committed by poisoning Sir Theodosius Boughton, in whose estates he had an interest in right of his wife. Under the present, as well as several succeeding heads, this case will be found pregnant with a variety of instructive illustrations. The determination was formed, that, in some way or other, the death of the young man should take place. To shut the door against suspicion, a notion was to be propagated, that his state of health was desperate; that death — speedy death — was certain; that his imprudence was continually heaping up causes upon causes.‡ The poison employed was distilled laurel water. The plant was to be found of course in the garden; and the murderer, not to have poison to buy, had provided himself with a still for the fabrication of it. He practised distillation frequently; and the room in which he operated was kept by him locked up.‖ The young man had a trifling complaint, for which he was taking medicine. the contents of one of the phials were to be got rid of, and the poison substituted. The phials, as they came in, used to be placed by him in an inner room, which he had been in the habit of locking up. He happened once to forget to take his medicine. "Why" (says Donnellan) "don't you set it in your outer

* See Causes Célebres.

† In the cases where the act has not been intended, or the event not expected, the preparations, being employed as instruments of deception, have been tinctured with that species of fraud which has, on a former occasion, been distinguished by the name of *forgery of real evidence*: a deception which, though the object of it is to disguise or suppress genuine evidence, becomes itself evidence when discovered, but evidence on the other side. Every species of deception, which, if successful, would have produced evidence on the side of the deceiver, operates as evidence against him in case of ill success.

‡ Trial, pp. 18, 20. ‖ *Ib.* p. 41.

room? you would not then be so apt to forget it."—The fatal advice was taken. and thus the necessary opportunity was *prepared.*

Preparations capable of a specific description are frequently and properly made the subject of a separate prohibition;—converted into distinct offences.

Where the connexion between any such preparatory act and its correspondent principal act is looked upon as sufficiently intimate—where the existence of the former is looked upon as sufficiently *conclusive* with regard to the existence of the latter—the vigilance of the legislator has not uncommonly exercised itself in laying hold of the preparatory act, and converting it, by his prohibition and punishment, into a separate offence, instead of taking the chance of the judge being able to treat it upon the footing of an evidentiary act, with reference to the corresponding principal act, and so bringing it within the punishment already attached to such principal act Forgery, coining, but, above all, smuggling, afford so many instances of this line of legislative practice * Under the head of Indirect Legislation, it has been brought to notice in another place †

To an operation of this sort an objection presents itself, which, when it is not conclusive as a bar, may at any rate be useful as a caution. Such an operation, it may be said, will be either useless or mischievous useless, if the effect of it be not to cause a man to be convicted of the offence in a case where otherwise he could not have been convicted, mischievous, in the opposite case To the judge alone it belongs to be informed of the circumstances of each individual case, to the legislator not If, in any given instance, to him who is thus informed of those circumstances, the evidentiary act, even with the addition of whatever other evidence the case may happen to furnish, does not appear to afford a sufficient ground for pronouncing the existence of the principal act,—the operation of the legislator—the obligation which he lays on the judge to act as if the ground were sufficient—is an act of injustice it is productive of punishment where not due —and, in the only remaining case, justice, at any rate, does not gain by it.

To this objection three answers may be applied.

1. In the first place: the act of the legislator—the act whereby the prohibition is issued, together with its punishment—is (as such) prior in its date to the occasion by which any act in disobedience of it can be produced. The subject has complete and effectual warning of it (for, if not, the answer, it must be confessed, does not apply) the subject has complete warning of the prohibition put upon the newly-prohibited act, the formerly unprohibited and amply evidentiary act, and the abstaining from it is as much in his power as the abstaining from the principal act If indeed the law—instead of being a law precedent to the offence, a law issued with the ordinary precedent notice—were a law subsequent to the offence—were, in a word, in the language of English jurisprudence, and after the fashion of every decision of jurisprudence in a new case, that monster of iniquity an *ex post facto* law,—then, indeed, the objection would be not only applicable, but unanswerable But this is not supposed to be the case

2 In the next place the more effectually to secure innocence from the punishment levelled against guilt,—when an act that accidentally might now and then, in the character of an evidentiary act, have involved the agent in the punishment appertaining to the principal act,—when such an act is taken in hand by the legislator, and converted into a principal and independent offence, care ought to be, and commonly is, taken, to interweave in the description of the new-created offence, explanations, serving to limit it, and make sure of confining the application of the punishment to the case where the quondam evidentiary act, the supposed act of preparation, is really such—is really connected in the mind of the agent with the intention of committing the principal act

3 In the third and last place to the last-mentioned precaution may be, and not unfrequently is, added another,—viz the reducing to a degree below that of the original or principal offence, the punishment annexed to the evidentiary, the new-created offence Instances of this sort, in no inconsiderable number and variety, would probably be found in the laws of all countries relative to smuggling they certainly are to be found in the British laws relative to that multifariously-diversified species of offence.

What has been said of preparations may apply, with little variation, to *attempts;* since—with reference to the ultimate object of intention, the ultimate result—all attempts, all motions previous to consummation, may be considered as preparations. By attempt, we understand action, carried beyond mere preparation, but falling short of execution of the ultimate design, in any part of it.

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* On this principle, for the more effectual prevention of the crime which consists in the murder of an illegitimate child, a punishment has been imposed by English law upon the mere concealment of the birth—an act in itself nowise criminal, but considered in the light of evidence of a criminal intention.[a]

† Dumont, Traités de Législation (Ed. 1802,) iii. 119. See above, Vol. I. p. 559.

[a] Concealing or endeavouring to conceal the birth of a child, is made a misdemeanour by 9 Geo. IV. c. 31, § 14, and the offender is liable to be imprisoned for any term not exceeding two years.—*Ed.*

Between preparations and attempts, the distinction will (it is evident) be, in many cases, very indeterminate; and in different cases it will be widely different. In penal cases, it will be different according to the nature of the species of offence. in offences of the same species, it will be different again, according to the different circumstances in which, the different means by which, the individual offence in question is endeavoured to be committed. In case of homicide, for example, — according as the intended scene is laid on shipboard or by land, on the public way or in a private chamber; by drowning, fire-arms, or poison.

Fortunately, on the present occasion, these distinctions are as useless, as, on any occasion, they would be nice and intricate. So the ultimate design be evidenced, whether the act by which it is evidenced come under the denomination of an attempt, or only of an act of preparation, makes in this respect no difference.

II. Second example of circumstantial evidence decidedly precedent to the fact evidenced, *Declarations of Intention*. — of the intention to perform the act, the performance of which constitutes the principal fact, the fact evidenced, as above

This species of circumstantial evidence bears a close analogy to the foregoing Declarations of intention are expressions of intention purposely conveyed by words by preparations, purposely or not, the intention is expressed by acts The former belong to the head of personal evidence by discourse; the latter to that of personal evidence by deportment.

III. *Threatening*, or *Menacement*. A threat, an act of menacement, is a name given to a declaration of intention, in the case where the act declared to be intended is of the number of those of which it is supposed that the effects would be of a painful nature, with reference to the person to whom the declaration is addressed.

The reason for giving to a declaration of intention in this case a separate mention under a separate name, is, that it necessarily assumes a separate name in every system of penal law; inasmuch as, where the *act* declared to be intended is considered and treated as an offence, so is (or at any rate, in cases of a certain degree of importance, so ought to be) the *declaration* likewise.

A declaration to this effect may be expressed by any other signs as well as by words. Preparations, when open, may have for a collateral object this collateral result.

It matters not whether the threat be addressed immediately to the person on whose mind the unpleasant impression is intended (or declared to be intended) to be made, — or to any other person or persons, to the intent that, in one way or other, at some time or other, it may reach his notice. In a word, if it be in the shape of a discourse, oral or written, that the threat is meant to be conveyed, it matters not whether he be mentioned in the second person or the third.

For the reason given above, menacement is presumptive evidence of the act; *i. e.* that it was by or with the co-operation of the threatener that the act was done: but, for the reason also given above, the evidence is not of itself absolutely conclusive.

§ 2.—*Infirmative circumstances applicable.*

I. *Preparations* and *Attempts*:* infirmative circumstances applicable to them.

These circumstances have been already considered in the character of criminative circumstances, evidentiary of the part supposed to have been taken by the supposed delinquent in the production of the noxious result.

Remain to be brought to view the several possible facts by which, in the character of infirmative facts, their probative force, in regard to the part supposed to have been taken by him, is capable of being diminished.

1 *Intention different ab initio*,† in which case, the result intended to be produced may have been either—1 altogether innoxious;‡ 2. less noxious than the result that actually took place; or, 3. equally or more noxious.‖

* In some cases the *preparation* and the *attempt* will be clearly distinguishable, but in others they will not. To the present purpose, at any rate, they may be brought together under one head: in respect to the infirmative facts capable of applying to them, there will not be found any difference.

† In this case (it may be objected) the fact is not, properly speaking, an infirmative one. By pleading it, a man would not (as in the other cases that have been seen) *admit*—he would on the contrary *deny*, the existence of the inculpative fact in question. True: the preparation or attempt was not a preparation or attempt to produce exactly the same result that, in consequence, is understood to have taken place but it was, however, a preparation, an attempt, to do something; and a preparation or attempt of which the mischief in question has been the result. A man is killed by a bullet, shot out of a fowling-piece: whether the intention was to kill or not to kill, suppose the supposed delinquent were, a little before, seen putting a bullet into the fowling-piece, the preparation thus made would not be the less likely or the less fit to be considered in the light of an evidentary circumstance, probabilizing the intention of producing the mischievous result that actually took place.

‡ See Donnellan's case. Crime — murder, poisoning by water distilled from laurel leaves: criminative fact—preparation for distilling: infirmative supposition—it might have been for water from rose or other leaves; and such was the colour endeavoured to be given to it.

‖ It is only in the character of an infirmative supposition applicable to a criminative evidentiary circumstance, that the state of things here supposed applies to the present purpose. What,

2. *Intention overshot by the result.* But in this case the disprobabilizing, the infirmative force of the infirmative fact, applies, not to the whole of the result, but only to the excess of the result produced over the result intended.*

3. *The intention changed*, viz at a time posterior to the attempt or course of preparation, which, being proved, is exhibited in the character of a probabilizing circumstance, evidentiary (as against the supposed delinquent) of a participation in the production of the mischief Here, as above, it is only on the supposition of the fresh design's being less mischievous than the original one, that the possibility of the infirmative fact in question can have (or at least ought to have) any influence in practice

4. *Intention persisting, power failing* the result, though intended to be produced by the supposed delinquent, having in fact been produced, not by any act of his, but by other means †

5. Among co-delinquents, *the operation of the immediate criminal agent varying from the common design* agreed on This, a case frequently exemplified, includes the three first cases, being distinguished by no other circumstance than that of the number of the offenders.

Two or three engage in a plan of robbery: one of them, in prosecution of the design, commits a murder — on his part intentional, but not necessary to the design Whether, in the intention of committing the greater crime, the accomplices in the lesser did or did not take part, is among the questions which (in a case of homicide on the occasion of a design of robbery) have been passed over as not worth notice by the unfeeling negligence of English judges ‡

In an early and rude state of society, the attention of those on whose will the fate of their fellow-creatures depends, has everywhere been almost exclusively pointed to physical facts, regardless of psychological ones. In the instance of the Chinese lawyers, Englishmen being the eventual or intended victims of it, this barbarity has attracted notice. But if, on this score, the first stone be due to the head of the Chinese lawyer, the second is, on a multitude of similar accounts, due to those of his learned brothers on the English bench

II *Declarations* or other expressions *of intention* infirmative facts applicable

To the criminative force of discourse expressive of an intention to commit an offence of the nature of that eventually committed, the supposable facts that apply in the character of infirmative considerations, are, in species and denomination, the same that have been seen applying in the case of preparations and attempts But, forasmuch as words are apt to be uttered with less consideration than a course of preparation attended with labour and hazard is wont to be engaged and persevered in,—the probative force of the criminative circumstance seems in general less considerable, and at the same time the disprobative

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on the supposition that the consummation of the act of delinquency is sufficiently proved by the help of ulterior evidence, may be the proper relative quantity of punishment (relation being had to the more ordinary case of an exact conformity between the criminal intention and the noxious result,) is a question that belongs to another place. On this point, see *Introduction to Morals and Legislation* Vol I. p 35, *et seq.*

In the State Trials may be seen a trial for maiming, in which the defence was, that the maiming was unintentional, the design being manifestly to kill, for that maiming would not answer the purpose. Conviction took place notwithstanding; it is difficult to say whether properly or not. the indictment being grounded on unwritten law, under which neither right nor wrong can have any determinate place Under the statute law,—where the intention has been equally or more noxious than the result, there will be no difficulty in saying that the punishment allowed to be inflicted ought to be at least equally great, because, in resolving the mischief of the offence into its component elements (viz. into the mischief of the first order, viz. that which falls on the individual specially injured and his immediate connexions — and the mischief of the second order, viz. the alarm and the danger extending to the community,) it will be found that the aggregate mischief, and thence the demand for punishment, is not, in this anomalous and extraordinary case, inferior to what it is in the ordinary case. (See Dumont, and "Introduction," &c. *ut supra.*)

* Among a number of considerations, each of which would of itself be sufficient for the abolition of the savage practice of confounding homicide on the occasion of a duel in consequence of mutual consent, with homicide in the way of assassination, one is, that in general the result intended is not death, but only disablement; and the proof is, that no sooner has the disablement taken place, than hostility ceases.

† See Bradford's case, in a Treatise on Circumstantial Evidence, occasioned by Donnellan's trial * Bradford being an innkeeper, a traveller, seen to be well provided with money, put up at his house. The traveller was found weltering in his blood, Bradford in the room, armed as for the crime he had, however, been frustrated by another traveller, with whom he had had no intercourse on the subject, and who on his deathbed confessed the fact.

‡ Where a number of persons are engaged together in some unlawful pursuit, and one of them, on a sudden, in furtherance of their common purpose, commits a murder, they are all guilty of murder in the eye of the law Fost, 351 to 354; 2 Hawk, P. C. cap 29. §§ 8, 9.—*Ed.*

* There were various tracts on this subject. One will be found editorially quoted (*infra*, p. 182,) which does not appear, however, to be that referred to by the author.—*Ed.*

force of the infirmative consideration more considerable.

Being of the nature of confessorial evidence, viz. of that species of it which is extra-judicial and spontaneous, differing only in respect of relative time (the confessorial evidence being subsequent to the event, the evidence here in question antecedent,) it stands exposed to the disprobative force of the same infirmative considerations as confessorial evidence, which see.*

1. If the state of things expressed in the former instance by the words *intention different ab initio* be exemplified here, this is as much as to say, that the declarations that have place here (viz. the declarations of an intention to commit the crime that in fact was afterwards committed) were false. Supposing such to be the case, the inferences that may be drawn from them, and the infirmative considerations that apply to their probative force in the character of criminative circumstances, are the same as in the case of *false extra-judicial and spontaneous confessorial evidence*, or *false responsion*, which see †

The supposition that these declarations are false, may, at first view, be apt to appear inconsistent with the supposition all along made; viz. that the crime in question has actually been committed, and that *by whom* committed (or rather, whether committed by the supposed delinquent) is the only remaining subject of inquiry. But, whether the crime actually committed, by the supposition, had or had not the supposed delinquent for a sharer in it, — the declarations made of an intention to commit a crime of that or a similar description may, at the time when made, have been false and declarations of an intention to commit a crime are no less susceptible of being false, than declarations of the opposite cast, viz declarations of an intention to abstain from the commission of that or a similar crime

See Chapter VI., in which the various inducements by which a man may have been engaged to avow the commission of a crime, committed or not committed, are brought to view.

III. *Threats*. — infirmative considerations applicable.

To threaten to do a criminal act is to express an intention of committing it. The only difference is, that, when a man threatens to commit a crime, he not only expresses an intention of committing it, but declares this intention in the design that such his declaration should come to the knowledge, and be productive of fear in the mind, of some person in whose mind (if committed) he expects it would be productive of grief.

Of course, whatsoever infirmative considerations apply to declarations of intention taken at large (viz. declarations of an intention to commit the crime afterwards committed,) apply to threats; viz. to threats bearing relation to the same crime. But in the case of threats, these infirmative considerations seem in some instances to apply with superior disprobative force.

In the case of threats, very commonly the result really intended to be produced is, — not the mischief of the crime, nor, therefore, the crime itself, — but only the *apprehension* of it — the alarm, the terror naturally attendant on the *expectation* of it — on the contemplation of it in the character of a mischief likely to take place. If so, it is in this way that the state of things expressed by the words *intention different ab initio* is here verified.

The consideration that contributes to render the falsehood of the declaration in question in this case probable, and consequently to weaken the probative force of this circumstance in the character of a circumstantial evidence of the imputed delinquency, as against the supposed delinquent, is, the tendency of such a prediction to obstruct and frustrate its own accomplishment. By threatening a man, you put him upon his guard; and force him to have recourse to such means of protection, as the force of the law, or any extra-judicial powers which he may have at command, may be capable of affording to him.

Whatever may be the disprobative force with which in the character of an infirmative fact, this tendency on the part of an antecedent threat may operate in opposition to its probative (viz to its criminative) force, — the indication afforded by this infirmative consideration can never be peremptory and conclusive By the testimony of experience, criminal threats are but too often, sooner or later, realized. To the intention of producing the terror, and nothing but the terror, succeeds, under favour of some special opportunity, or under the spur of some fresh provocation, the intention of producing the mischief, and (in pursuance of that intention) the mischievous act.

Note, that among the tendencies of menacement is that of operating at the same time as an evidence of an ulterior and distinguishable evidentiary fact; viz. operation of corresponding motives, existence of corresponding dispositions: permanent sources of the delinquency in question, in the instance of the supposed delinquent. As to this point, see further in an ensuing chapter.‡

A question which may occasionally arise is, how far *mendacity* on the part of a witness may be considered as probabilized by evidence proving him to have previously *threatened* to prejudice by his testimony a party on a side opposite to that on which he is called: in particular, in a criminal case, to have threatened

* *Vide infra*, Chap. VI. † Chap. V. & VI.

‡ *Infra*, Chap. XIII.

to give such testimony as should render certain, or more or less probable, the conviction of the defendant.

In this supposed circumstantial evidence of mendacity may be seen a very frequent source of delusion, and a very useful instrument in the hands of delinquents and their advocates.

If the threat be conditional, next to nothing is proved by it: if absolute, still less "If you do not so and so as I would wish, I will testify against you" With superior and refined morality, it certainly is not consistent for a man thus to render dependent on a compliance with his personal wishes a service which he owes to justice. But does it follow that, because—out of court, and before you have been called upon for your testimony by the official ministers of justice—you reserve to yourself (or rather declare yourself to have reserved to yourself) the faculty of making or not making, as you think fit, the preliminary disclosure which may eventually lead to prosecution,—that therefore, if by the power of justice called upon for your testimony, you will perjure yourself?

A threat, however, of this kind—though, taken by itself, it operates with very little force in the way of presumptive evidence of mendacity—may be of considerable efficacy in corroboration of other circumstantial evidence to the same effect

CHAPTER V

OF NON-RESPONSION, AND FALSE, OR EVASIVE RESPONSION, CONSIDERED AS AFFORDING EVIDENCE OF DELINQUENCY

I. First article of that class of circumstantial evidence, the nature of which is to present itself at a period of time subsequent to that of the principal fact,—*non-responsion judicial*: silence on the part of an individual (being a party to the cause) at the time of his being subjected to examination in due form of law wilful forbearance to make answer, in the character of a deposing witness, to any relevant question put to him in the course of a judicial examination In this case is involved the supposition of the establishment of the practice in question, in the instance of both parties, plaintiff and defendant, in both sorts of causes, penal and non-penal and, in the supposition of the *establishment* of that practice, is again involved the supposition of the *propriety* of it—of the propriety of it, in the utmost latitude of which it is susceptible, as above Is it then proper, and to an extent thus unlimited? Yes and that for two sorts of reason. In the first place, because the notions by which, in one of the four cases (viz that of the defendant in a cause of a penal nature,) it stands condemned, are mere prejudices—groundless and utterly indefensible prejudices—conceits, founded not on the principle of utility, but solely on the principle of caprice. In the next place, because, in this case, as in the three others, the practice in question is the most powerful as well as the safest of all instruments that can be employed for the discovery of truth. The reasons in favour of the former of these positions will be exhibited under other heads * the reasons which the latter has for its ground will now appear as we advance.

The fact of which this sort of behaviour operates as evidence—the conclusion to which it tends, the inference which it appears to warrant—varies in its description, as already intimated, according to the quality of the cause, penal or non-penal, and the relation which the party, plaintiff or defendant, bears to it.

Case 1 —Let the cause be a penal one, and the person examined in the character of a witness, the defendant In this case the conclusion will naturally be, that he is guilty of the offence of which he stands charged. Thus stands the proposition. the proof will be exhibited further on

Case 2 —Let the cause be a non-penal one, and the party examined be the defendant, as before The conclusion is of the same kind, varying only with the nature of the cause. The predicament he stands in is of the number of those in which a man stands bound by law to take upon him the obligation sought to be imposed upon him by the plaintiff's claim.

Case 3 —Let the cause be a penal one, as before, but the party the plaintiff In this case, if it be a cause purely penal,—the demand made by the plaintiff being purely the infliction of punishment, and that a punishment not including any effect of a nature to afford personal satisfaction to himself, as is the case where the plaintiff prosecutes for the public merely, in which case he is a public officer, acting without personal interest; in this case it cannot fall to the share of the plaintiff to be examined. If by accident (and it could happen only by accident) it did fall to his lot to be examined, wilful forbearance to answer is a result that can scarcely be supposed, it being difficult to suppose a motive that should engage him to it and supposing it to take place, no conclusion can in the nature of the case be drawn from it. If the cause be of the mixed kind, in which a non-penal demand is combined with the penal one —a demand of satisfaction for the benefit of the individual, with the demand for punishment to be inflicted for the benefit of the public,—in this case, so far as concerns the non-penal part of the demand, the case com-

* *Vide* Book IX. *Exclusion.*

cides with the case next following. The conclusion turns to the prejudice of the plaintiff, in the same way as we saw it turn to the prejudice of the defendant in the preceding non-penal case.

Case 4. — Cause, non-penal; party, the plaintiff, as before. Conclusion, the plaintiff's claim ill-founded: the defendant not in fact in that situation which it is necessary he should be in, to give legality to the demand made upon him by the plaintiff — the demand that he shall be compelled to submit to the obligation sought to be imposed upon him at the instance of the plaintiff, the obligation correlative to the plaintiff's pretended right.

Now then as to the proof — the grounds, of the conclusion, that the party refusing to make answer to questions put to him by authority of justice, was in the wrong, in respect of the point in controversy in the cause. And, first, where the party in question is the defendant, and the cause a penal one.

1. Supposing him not guilty, such silence cannot but be detrimental to him: supposing him guilty, it cannot but be advantageous to him, that is to say, supposing the judge were to abstain from drawing the inference which no individual viewing the matter in the same point of view ever fails to draw, on the ground of the known principles of human nature and common sense.

To answer one way or other, cannot but be in his power. No question whatever to which a man, any man whatsoever, is not able to make an intelligible answer of some sort. *Quest.* What do you know about this business? *Ans.* So and so: or, I know nothing about the matter. Whatever be the question, whosoever be the individual to whom it is propounded, an answer to one effect or the other may in every case be given by him. The answer may be true or false: if false, the case belongs to the head next considered.

The party is exposed to suspicion — to a strong and serious suspicion, of having been really guilty of the offence of which he stands accused. Followed or not followed by punishment, — the persuasion entertained respecting the truth of the accusation — entertained by every man to whose cognizance the particulars of the examination present themselves, will be the same. The part that will be in general acted on such occasion by a man who feels himself guilty, being made known to all mankind by reason grounded on experience, — so sure as that part is acted by any man, so sure will he be looked upon as guilty by all who know of it: and, being so looked upon, the disrepute attendant upon the offence — the punishment attached to it by the popular, or say the moral sanction — the forfeiture of a correspondent portion of esteem, and consequent good-will, attaches upon him of course.

Supposing him not guilty, every fact and circumstance that he knows, will contribute (if known) to manifest his innocence: for, that he has not done the act charged upon him, is certain by the supposition. Between facts that are all true, there cannot be any incompatibility, any inconsistency: if, therefore, there be a single true fact with which the fact charged upon him is inconsistent, that fact cannot but be false. Speaking, therefore, from memory, and not from invention, — by every fact he discloses he gives himself an additional chance of manifesting the falsity of the imputation cast upon him. Forbearing to put in for this advantage, he makes manifest by as plain a token as it is possible for a man to display — as plain as he could by any the most direct confession that were to confine itself to general terms, — that the situation he is in, is of that sort that does not suffer a man to put in for that advantage: the situation of him whose memory holds up to him the picture of his own guilt.

Such are the grounds of the inference, spread out at full length. But where is the individual, male or female, high or low, rich or poor, who, being of ripe years and of a sound mind, is not in the habit of drawing the same inference with equal correctness and security, though by a shorter process, and without the trouble of clothing it in words? Where is the master or mistress of a family, who seeing reason to suspect a child or servant of any forbidden act, does not, for the confirmation or removal of such suspicion, employ this species of evidence, and with more confidence than any other? — *Silence is tantamount to confession*, is accordingly an observation, which, whether it may happen or not to have been yet received in any collection of proverbs, is repeated and acted upon with not less confidence and certainty, with not less safety, than the most familiar of the sayings which have been thus distinguished.

Could the existence of a set of human beings have been conceived, endowed with any particle of the attribute of rationality, in whom a conceit of any kind should to such a degree have extinguished the lights of reason and common sense, as to have disposed them to shut the door of justice against this surest, safest, and most satisfactory species of evidence? Yes: two have already been indicated — English lawyers, — and a people whose boast it is, with eyes hermetically closed, to be led by a hook put into their noses by the interested hands of English lawyers.

In the character, or at any rate the guise, of an objection or exception, one consideration has here a claim to notice. A case (it may be said) there is, in which, in the instance of a defendant under examination, the inference

from muteness to delinquency will not be just;—understand, the individual act of delinquency of which he stands suspected for it is relatively to that, and that alone, that decision pronouncing delinquency can be pertinent and just. His conduct will be just the same, if, instead of the motives furnished (as above) by appropriate delinquency, there be any others to which it can happen to bind him to silence with equal force And, without having been guilty in respect of the individual act of delinquency imputed to him, may it not happen to a man to be bound to silence by the pressure of other equally coercive, or even more than equally coercive, motives?

Yes, certainly it may but of what nature can be these hypothetical and just possible motives? Motives derived from delinquency, motives not derived from delinquency Under one or other of these divisions they cannot but be comprised

Say, in the first place, motives derived from delinquency The delinquency from which they are derived will then be of an order inferior, equal, or superior (understand, as indicated and measured by the degree of punishment,) with reference to the act of delinquency upon the carpet To motives derived from delinquency of an inferior order, it cannot happen to have produced this supposed equal pressure. sooner than expose himself to the superior punishment, as he would by silence, a man will make answer, though such answer be confession, and though the effect of such confession be to expose him to punishment, —such punishment being, by the supposition, inferior to that to which he would expose himself by silence

Put the case of equal delinquency and punishment, the silence will be quite natural put the case of superior delinquency and punishment, it will be still more so But what follows to the prejudice of the conclusion, at least in respect of the utility of the practical conduct proposed to be grounded on it? — Absolutely nothing

1 In the first place, a coincidence of this sort, though possible, is much too rare and too improbable to constitute a valid objection to the practical conduct to which the inference leads. If valid as an objection to conviction and execution in this case, it would be an objection at least equally valid to conviction and execution in every case it would be an objection more than equally valid to every other species of circumstantial evidence; in a word, to every other species of evidence. False testimony—even false criminative testimony—at least, false testimony amounting to mere incorrectness, and not accompanied with criminal consciousness,—is more common than the sort of coincidence here supposed. False testimony in cases non-penal is abundantly more so: in penal causes, false testimony on the exculpative side still more so Cases of this rare sort have now and then appeared; but as often as they have appeared, they have been cited, not for their probability, but for their extraordinariness.

A story I have often heard or read of (no matter which) may serve for illustration An entertainment was given by some great personage to a numerous and mixed company in the course of it a trinket was displayed, the value of which had, by I know not what operation of the principle of association, been raised in his imagination and affections above all ordinary estimation On a sudden, an alarm was given that the precious article was missing "Let every man of us be searched," said one of the company "Yes, let every man of us be searched," said all the rest One man alone refused the eyes of all were instantly upon him his dress betrayed symptoms of penury no doubt remained about the thief He entreated and obtained of the master of the house a moment's audience in a private room His pockets were turned inside out, when in one of them was found—not the lost trinket, but something eatable He had a wife who for such or such a time had gone without food

The story may be true or not true but supposing it ever so true, would it afford any valid objection against the universally-prevailing law which authorizes the making search about the persons, abodes, and other receptacles, in the occupation of suspected persons, for stolen goods? It would afford a better argument in such case against such search, than the possibility of the coincidence in question can afford against the examination of a defendant

2 Another consideration is, that—supposing the coincidence realized, the inference drawn (and that by the supposition an erroneous one,) and the decision followed by the practical measures which are the proper consequences,—still there is no harm done * A man suffers for an offence indeed of which he is not suspected or accused, but not for an offence of which he is not guilty. The consequence is good in all its shapes —prevention by example—prevention by incapacitation—reformation—compensation, if the case calls for it, and furnishes matter for it —the good, in all its shapes, that is looked for in penal justice, none of the alarm that reverberates from injustice.

Remains the case of the absence of all de-

* I say, for shortness, there is no harm done; for correctness, the expression will not serve. A harm there is done: the harm which consists of insufficient punishment—the harm which takes place when a man, having incurred a greater punishment, is, instead of it, subjected to a less.

linquency. But if the former case is so rare, how much rarer is this latter case! To a suffering, equal or superior to that which is fastened upon a man by the given delinquency with the punishment annexed to it, he would expose himself, were he to make his conduct known:—expose himself, without being justly chargeable with any act of delinquency — without having done any of those acts in virtue of which the punishment would be just. This, indeed, is possible, but still more improbable.

Innocent himself, a man chooses to be treated as if he were guilty, rather than to expose the secrets of a mistress or a friend:* an act of martyrdom perfectly heroical, and the more heroical, the fitter a subject for a play or a romance. But the more heroical, the more rare, and therefore the less fit a subject to constitute a ground for the steps of the legislator.

The secret protected at this price, the secret of the mistress or the friend, — was there any spice of delinquency mixed with it? The muteness, heroical or otherwise, is at any rate criminal: it is the common case of an unwilling witness, unwilling to expose a friend to the punishment which his delinquency has incurred: that sort of contumacy which, wheresoever it exists, it is incumbent on the law to get the better of at any price.

Without any the least guilt on any part — on the part of the examinant himself, on the part of his mistress or his friend, — of a true and full account of his own proceeding, out of his own mouth, will the effect be to subject them or him to punishment? Of a conduct which, not being tainted with delinquency, exposes a man to suffer as for delinquency, are any examples to be found? Not impossibly but, once more, the case is too extraordinary to afford any tolerable ground for the rejection of so instructive a species of evidence — a species by far less exceptionable, less liable to give birth to undue decision, than any other that can be named.

Appearances are against him (to borrow a phrase from the title to a play) appearances are against him, and, by the disclosure of these appearances, he subjects himself to punishment for an offence of which he was innocent. Appearances are against him? Yes, some of the appearances: but are there none that are for him? The same examination which calls upon him to disclose the one, calls upon him to disclose the other: of those which are against him he is called upon to give an explanation: the explanation, if favourable to himself, will, by the supposition, be conformable to truth: being conformable to truth, is the conclusion to be that it will be disbelieved? That by possibility it may be so, is not to be denied; but, once more, probabilities, and not improbabilities, constitute the true ground for legislative practice.

II. *Non-responsion extra-judicial:* in a penal case, the act (the negative act) of him who, understanding himself to be suspected of an offence, and being interrogated concerning it, forbears to make answer to such judicial questions as are put to him in relation to it.

The tendency of this case is evidently to afford an inference of the same nature as is afforded in the case just mentioned. In degree, however, the inference will most commonly be weaker, and is capable of existing in all degrees down to 0. The strength of it depends principally upon two circumstances: the strength of the appearances (understand, the strength they may naturally be supposed to possess, in the point of view in which they present themselves to the party interrogated) — the strength of the appearances, and the quality of the interrogator. Suppose him a person of ripe years, armed by the law with the authority of justice, authorized (as in offences of a certain magnitude persons in general commonly are, under every system of law) to take immediate measures for rendering the supposed delinquent forthcoming for the purposes of justice,† — authorized to take such measures, and to appearance having it in contemplation so to do; — in such case, silence instead of answer to a question put to the party by such a person, may afford an inference little (if at all) weaker than that which would be afforded by the like deportment in case of judicial interrogation before a magistrate. Suppose (on the other hand) a question put in relation to the subject, at a time distant from that in which the cause of suspicion has first manifested itself, — put at a time when no fresh incident leads to it, — put, therefore, without reflection, or in sport, by a child, from whom no such interposition can be apprehended, and to whose opinion no attention can be looked upon as due: in a case like this, the strength of the inference may vanish altogether.

In the three remaining cases (that of the plaintiff in a penal cause, that of the plaintiff and that of the defendant in a non-penal cause) — from what has been said it will be easy to deduce the nature and strength of the inference afforded by this same modification of circumstantial evidence. In all these cases, the evidentiary fact being non-responsion,

* Not many years ago, at a special commission in the south of England, a respectable farmer suffered himself to be found guilty of arson, in order to screen his son. As soon as the son was out of danger, the father's innocence was made manifest, and he was pardoned. — *Ed.*

† To conduct the party, for example, to a magistrate, or, at any rate, to give information to a magistrate, for the purpose of the party's being so conducted before him.

the fact evidenced will be want of right,—unfoundedness of the pretensions advanced by them in their respective situations. In all these cases, the relation — the connexion — between fact and fact, on which the presumption grounds itself, is the same the cases in which the presumption is liable to fail, are also much the same but the injury liable to result to the individual from a decision to his prejudice, in the case where such decision, in respect of its being grounded on such presumption, is undue, being by possibility not so great, — the inference will be drawn with so much the greater freedom in any of these three latter cases then in the case first mentioned.

III. *False responsion* The inference is of the same nature, and in point of strength, whenever in this respect there is any difference between this case and that of non-responsion, it is in this case that the inference (the probability of guilt) will be the strongest

In the case of judicial interrogation, the particular inference applying to the particular case will be strengthened by the general unfavourable inference, the shade thrown upon a man's character by the additional circumstance of falsehood supposing it always to have acquired the tinge of mendacity by the infusion of criminal consciousness

In the case of non-judicial interrogation, whatever counter-inference may be deduced from the topic of incompetency on the part of the interrogator, will, by the addiment here in question, generally speaking, be repelled.—A question, an idle question, put to me by a child? A question from such a quarter, — could I have conceived that it would be thought to have any claim to notice? In justification of simple silence, the defence might be pertinent, and even convincing to false responsion, the application of it could scarce extend Of the claim it had to notice, you yourself have borne sufficient testimony so far from grudging the trouble of a true answer, you bestowed upon it the greater trouble of a lie.

False answers are, naturally enough, interspersed more or less with self-contradictory ones. The case is no otherwise varied by the intermixture than by this, viz that in the case of self-contradiction the falsehood is more palpable and incontestable. Of any two contradictory propositions, the one or the other will of necessity be false. Take away this internal and irrefragable proof, the detection of the falsehood must rest upon the basis — the more or less precarious basis, of other evidence.

IV. *Evasive responsion*, is responsion in words and appearances, non-responsion in effect: it may be termed *virtual non-responsion*. Under this head may be comprised all answers, in so far as they are irrelevant to the interrogatories: all answers in which nothing is contained that has in any respect the effect of a compliance with the requisition (or say command) which every interrogatory, as such, involves in its very nature *

Responsion is either relevant or irrelevant. If irrelevant, and after admonition persisted in, it is evasive: if evasive, it is tantamount to silence; or rather, in the case of evasion (if there be any difference) the inference is stronger. Silence may be ascribed to stupidity evasion is the work of art — the natural resource of self-condemning consciousness.

But evasion,—to what circumstance, when successful, does it owe its capacity of having the effect of silence, that is, the desired effect without the undesired? To *indistinctness*. everything is referable to this cause.

In some instances it will now and then happen that indistinctness, designed or undesigned, shall have the effect of false statement, affirmative or negative In that case, upon a first view, and for the advantage of his design, he is taken to have said something, — while, upon a second view, and to the disadvantage of his design, he is not found to have said anything as against punishment or other burdensome infliction, he is secure, when, perhaps, by means of some false and fallacious conceptions conveyed by these same words to the mind of the judge, he has produced the same desired effect that would not have been produced if any assertion had been hazarded by him in express words

But the most common deceptitious effect and use of indistinct language (understand, to the deceitful deponent,) is to operate as a succedaneum to silence to prevent the judge, or whoever on this occasion stands in the situation of the judge, from observing, among the several points to which a man could not have spoken truly without speaking in the way of confession, what there may be, to which he has forborne to speak.

Evasion is a sort of middle course between non-responsion, false exculpative responsion, and confessorial responsion Compelled to say something, on pain of the consequence which cannot fail to attach upon his virtual refusal to say anything, a man keeps saying what amounts to nothing, partly in the hope that the imposition may pass undetected, and the insignificant discourse be accepted as if it were significant, partly to give himself time to consider into which of the two other paths — confessorial truth or exculpative falsehood — he shall betake himself.

The effect of indistinct language, in the character of an advantageous substitute to false statement or silence, depends greatly upon the magnitude of the mass — the *volu-*

* *Where were you at such a time?* is as much as to say — *My will is, that you name to me the place at which you were at such a time.*

minousness of it, in the case of written language. Take a single short proposition, — be the language of it ever so indistinct, it will commonly be seen to be so: the insignificance of it, and (in case of *mala fides*) the evasiveness, will be seen through. But, in psychological as in physical objects, as the mass increases, the transparency diminishes: and since, along with the indistinctness of the object, the exertion of the mind in its endeavour to see through it increases, it will not unfrequently happen that the sinister purpose of the manufacturer of the chaos shall be effected, by the mere lassitude of the eye which has the misfortune to stand engaged to look into it.

Order — method — is among the instruments which intellectual vigour has to construct for the assistance of intellectual weakness, and which, when made, intellectual weakness assists itself by, in its endeavours to surmount the difficulties it has to contend with. But as, on one hand, the labour and difficulty of producing order, so, on the other hand, the demand for it, increases with the magnitude of the mass — with the multitude of the elementary particles which compose it. Order — meaning good order — order the best adapted to the purpose — consists in the selecting, out of the whole number of changes capable of being rung upon the number of elementary parts in question, that one of the whole number that will place the aggregate mass in the most intelligible point of view. The number of changes capable of being rung upon an assemblage of elementary parts, increases with the number of those parts. — increases with that rapidity of increase which is so familiarly and precisely known to mathematicians, and which is matter of so much astonishment to persons altogether unconversant with the first rudiments of that science But, with the number of changes capable of being rung upon the elementary parts of the mass in question, increases the chance in favour of disorder and confusion, — the difficulty of producing order, — the difficulty of detecting the want of it, — the difficulty of pointing out the remedy for the want of it, for the purpose of insisting on the application of the remedy, — the facility of producing that sort and degree of disorder which shall weary out the energies of the inspecting eye, and force it to withdraw from the subject altogether, to save itself from the labour (perhaps the fruitless labour) of persevering in the endeavour to discover what has and what has not been said and done.

It is in written language alone that the art of evasion finds a favourable field for its operations. Let the deposition be delivered *vivâ voce*, any attempt of this sort is soon rendered abortive. Though accepted in such abundant instances in the ready-written form, in masses of any magnitude, — testimony is never accepted in the spontaneous mode, in the form of *vivâ voce* testimony, in a mass of any considerable magnitude. Delivered in the *vivâ voce* form, and thence in the presence of the judge; if indistinct, and by law not capable of being subjected to interrogation (for to this pitch of opposition to common sense has legal usage soared,) — no better purpose — none more favourable to the design of the *malâ fide* deponent — will be answered by it, than would have been answered by silence. But, if subject to interrogation, by interrogation it would immediately be clarified, and reduced either to false statement or to verbal silence. Delivered in the shape of written language, a mass of indistinct matter runs on to any number of pages or volumes: delivered *vivâ voce*, in the presence of a person having power to interpose at any time by interrogation, it is stopped at the first indistinct word.

CHAPTER VI.

OF SPONTANEOUS* SELF-INCULPATIVE TESTIMONY, CONSIDERED AS AFFORDING EVIDENCE OF DELINQUENCY.

§ 1. *Confession, and confessorial evidence, what — distinction between them.*

WHEN the supposed delinquent is really guilty — the offence the subject of discourse between himself and another person — and he himself the speaker, — in the natural course of things, the composition of the discourse will be a mixture of falsehood and truth: fear of detection, and the view of the criminative force with which (in so far as followed by detection) falsehood never fails to act, being sufficient to prevent it from being willingly recurred to in any other case than where, to repel suspicion, it seems altogether indispensable. But, though in the discourse itself these elements will generally be found in a state of combination, yet, for the purpose of explanation, it will be neither useless nor impracticable, to separate them in idea, and examine them apart.

Moreover, on the occasion of any such discourse, — howsoever it should have happened that the discourse was begun by the supposed delinquent, whose conduct, by the supposition, is the subject of it, — yet it will seldom happen but that, in the view taken of it by the hearer or hearers (say, for simplicity's

* By *spontaneous* self-inculpative testimony, is here meant, as will hereafter be seen, not self-inculpative testimony which is voluntary, and intended to be self-inculpative, in contradistinction to that which is not so intended; but merely that which *is not*, as distinguished from that which *is*, extracted by interrogation. *Spontaneous* is here, as in the book on EXTRACTION, employed as synonymous with *uninterrogated*.

sake, the hearer,) it will in this or that part appear obscure, ambiguous, or (if not incorrect) at any rate more or less imperfect; in every one of which cases,—if, on the part of the hearer, discourse as well as thought is free,—interrogation on that part, responsion on the other, will, in some shape or other, take place of course.

In the ordinary colloquial intercourse between man and man, it is, however, not less natural for the discourse to take its commencement without interrogation than by interrogation: having been thus begun, it may happen to it to continue upon that same footing for any length of time and, so long as upon that same footing it does continue, it will be conducive to distinctness of conception to consider in what shape the sort of evidence in question—self-disserving and self-criminative verbal evidence — is capable of presenting itself by itself, and without any admixture of that sort of evidence in the extraction of which interrogation has been the instrument employed

When, on the part of a supposed delinquent, discourse of the self-regarding kind, and (with relation to the offence in question) of a self-disserving, and thence (it being a case of supposed delinquency) of a self-criminative or self-inculpative tendency, is considered as sufficient of itself to justify a judgment of conviction, declaring him convicted of that offence, — such discourse is, when taken in the aggregate, styled in judicial practice a *confession*

In regard to the two modifications of evidence distinguished from each other by the denominations of *direct* and *circumstantial*, it has already been remarked how intimate the connexion is — how faint, and oftentimes scarce determinative, the boundary line which separates them.

A *confession*, if so it really be that it is particular enough to form a sufficient ground for conviction, cannot fail to contain more or less of that sort of evidence which, requiring no ulterior inference to be drawn from it, may with propriety be considered as being of the nature of *direct* evidence. But, moreover, what can scarcely happen is, that it should not contain any admixture of circumstantial evidence, viz of propositions, each of which (coming as they do from the supposed delinquent,) supposing it to have stood by itself, might have operated with more or less probative force towards conviction, by means of some inference for which it would afford a ground, — by means of some such inference, and not otherwise.

When it amounts to a *confession*, the mass of discourse in question is full and satisfactory, as above. But even when, so far as it goes, the tendency of it is disserving, and, in respect of the occasion, self-criminative, yet, when delivered in loose and casual fragments, it may happen to it to possess this tendency in any the slightest degree imaginable, operating with any degree of probative force, from the highest to the lowest.

In the case where the whole mass, being complete, would have amounted to a confession, if any fragment is broken off, the remaining force may be styled a mass or article of confessorial evidence.*

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* The word *confession* is apt to suggest the idea of a voluntary acknowledgment made by the defendant of his having committed the offence with which he is charged. The confession, however, may be either voluntary or involuntary; and it may have for its subject, not the offence itself, but some fact or facts evidentiary of it.

The fact which is the subject-matter of the confessorial evidence, may be either a fact of the number of the principal facts by which, taken together, the complex fact of the defendant's criminality is composed, or it may belong to any one of those classes of evidentiary facts which have been or will hereafter be brought to view in the character of so many species or modifications of circumstantial evidence — Preparations, attempts, declarations of intention, threats: physical and involuntary symptoms of fear, betrayed by the confessionalist upon an occasion specified: the care taken by him to conceal the obnoxious event, the criminal act—or his person while engaged in it, to keep out of the way all persons whose presence might have been dangerous in the character of percipient witnesses of it the language held by him, before the act and after it, in the view of quieting suspicion, or preventing it from coming into existence the exertions employed by him upon a variety of objects, of the class of *things*, in the view of preventing them from assuming appearances capable of testifying against him in the character of real evidence the exertions employed by him in the view of giving to any of those objects delusive appearances, tending to bring to view the obnoxious event as being the work of mere accident, or of some other agent the labour employed by him upon the apprehended witnesses, whose observations, in the character of percipient witnesses, he could not prevent from coming into existence: the exertions made by him to keep them out of the way by direct threats or promises, by deceitful representations, or by downright force—or, in the event of their appearance, to suppress the facts indicative of his guilt, or even substitute to them pretended facts indicative of his innocence: the exertions made by him for the purpose of operating in the like manner upon persons who had begun, or were expected by him, to act against him, in the character of prosecutors. the exertions made by him for withdrawing his person and property out of the reach of justice, and in the meantime for concealing himself: the motives by which he was stimulated to the commission of the offence: the length of time during which these motives had been operating on his mind, and the turn which this disposition of mind had, on different occasions, given to his conduct: the language which it had occurred to him to hold to different persons on different occasions, whose questions or observations he had to encounter in

This, it will be seen presently, is far from being the only species of imperfect self-disserving, and thereby self-criminative or self-inculpative, evidence, exemplified in practice. It is, however, one species of self-disserving evidence: and forasmuch as a mass of simply confessorial evidence (*i. e.* a mass of confessorial evidence not amounting to a confession) does not of itself form a sufficient ground for conviction, while a mass of confessorial evidence amounting to a confession does of itself form a sufficient ground for conviction,— it would be of no small utility in practice, if a criterion was established, whereby, without danger of dispute or misconception, it might upon every occasion be pronounced of a mass of self-disserving and self-inculpative evidence, whether it was a complete confession, or nothing more than a mass more or less considerable of confessorial evidence.

Let this criterion be constituted by the application of the process of *interrogation*. interrogation, oral or epistolary (as shall be determined,) but at any rate judicially performed. insomuch that, — be the mass of confessorial evidence, upon the face of it, ever so correct as well as complete, — yet, until and unless, for the assurance of its correctness as well as completeness, it has had that security which it is not in the power of anything but the process of interrogation to afford, let it not be considered as amounting in any case to a confession, for any such practical purpose as that of conviction, as above mentioned.

Short of a confession — although (so far as it goes) confessorial — it may of course be, after and notwithstanding interrogation; but without interrogation let it never be considered as amounting to a confession, in what degree soever, upon the face of it, ample and instructive.

Another condition which it might, perhaps, be proper to add to the description of a confession, is this. viz. that, to amount to a confession, although extracted by judicial interrogation, it ought to be such as would have been sufficient to warrant a conviction had it been delivered by an extraneous witness.

Self-regarding evidence, as has been observed in a former chapter, is the only species of direct testimonial evidence which, with reference to a complex act of the description in question (a criminal act,) can be complete, without comprehending any article whatever of circumstantial evidence — without leaving any fact to be made out by inference. When it is thus complete — mention being made in it of every fact (psychological as well as physical) which is necessary to complete the de-

relation to the principal facts of the offence, or any other facts whose connexion with it might, to his apprehension, be discovered or suspected: the silence he ventured or was forced to maintain on some occasions; the false or evasive answers it occurred to him to give on other occasions; with the self-contradictions which, on some of those occasions, he fell into in consequence: the memoranda he had made of some of the facts connected, in one way or other, with the criminal enterprise; the letters he had written to or received from associates; and his alarm under the apprehension that some of these documents had fallen into the adversary's hands: his fears under the apprehension that among his consultations with his confederates there were some that might have been overheard by persons, through the evidence of whose discourse they would not fail to be conveyed to the notice of the adversary: his fears that among his associates there were some who either already had been, or soon would be, unfaithful to their trust.

Not only so, but a fact that in itself has no perceptible connexion with any criminative fact, may, by accident, operate to the prejudice of the defendant; and in that respect the discourse, by which the existence of that fact has been stated by him, may operate against him in the character of confessorial evidence.

An extraneous witness, speaking to a supposed confessorial discourse supposed to have been held in his presence by the confessionalist, mentions a variety of facts as having on that occasion been stated by the confessionalist — facts, of the existence of which, but for such confessorial discourse, such reporting witness could not have been apprised. A number of facts — (suppose) transactions of the confessionalist himself, connected or not connected with the criminal enterprise — are thus reported as having, on the occasion in question, been reported to the witness by the confessionalist; the existence of these several facts is put out of doubt by other witnesses coming forward, and deposing, in the character of percipient witnesses, as to such facts as, in the character of evidentiary facts, point directly at the defendant's criminality: — the report made of them by the confessionalist to the reporting witness assumes directly and obviously the character of confessorial evidence. But even those which have no such operation serve to confirm the veracity of the statement by which the reporting witness reports the tenor or the purport of the already-described portion of the defendant's confessorial evidence. Moreover, in the same proportion in which it tends to demonstrate the trustworthiness of the evidence of the reporting witness — of the whole body of it taken together — in that same proportion it evidently operates in prejudice of the defendant's cause. It therefore comes, as incontestably as the other branch, though not so obviously, under the character of confessorial evidence.

In the trial of John the painter, the incendiary who in 1777 burnt the rope-house at Portsmouth, the conviction was grounded principally on the defendant's confessorial evidence, as reported by an extraneous witness, Baldwin; and, of the evidence given by other witnesses, a great part consisted in confirmatory statements of other facts, in themselves immaterial, but stated by the defendant in the confessorial narrative given by him to that reporting witness. Yet on this occasion the advocate for the prosecution boasted much, and not without reason, of the probative force — of the conclusiveness, of his evidence.

scription of the offence (this deponent, the person whose testimony it is, being the defendant, the person who stands accused or suspected of that offence,) such body of evidence may be termed *plenary confession* If there be any one such fact, of which express mention is not contained in the mass of evidence so denominated, the confession, whether satisfactory or not, is, at any rate, short of *plenary*. In practice it may very well happen that in this or that instance it may, without being strictly speaking plenary, be considered as being equivalent to plenary, and as satisfactory as if it were so As, for instance, if Reus, being accused of the murder of Occisus, on being interrogated, says, "Yes; it was indeed I who struck the fatal blow" In this example, nothing more is necessarily deposed to than the physical act but, from the confession thus made of the physical act, the existence of the correspondent intention (a psychological fact) will naturally enough be inferred of course *

There is no imaginable lot of testimonial evidence which may not (as hath already been observed) operate in the character of direct as well as in that of circumstantial evidence. As this is the case with extraneous, so is it, and more particularly, with self-regarding evidence Direct with reference to one fact (the fact asserted by it,) it may be circumstantial with regard to another fact, a fact inferred from the assertion But its being capable of operating in the character of direct evidence, does not lessen the force of the demand which calls upon us to consider it in the character of circumstantial evidence. There is, therefore, no possible modification of confessorial evidence, that will not require to be considered here under the head of circumstantial evidence In truth, it is only in its character of confessorial evidence — in respect of its capacity of affording inferences, meant or not meant by the party to be drawn from it — that it admits so great a variety of modifications Consider it purely and simply in the character of direct evidence — consider the asertion as evidentiary of the fact asserted by it, and nothing more, — all these distinctions vanish. By the assertion in question, the fact asserted is proved, or not proved, — that fact, and that fact alone, — according as the testimony is regarded as true or false.

In considering whether a given lot of self-regarding evidence belongs or not to the head of confessorial evidence, regard must be had, not to the conception entertained or not by the confessionalist himself, in regard to the consequences of it (whether to himself or others,) but merely to the use eventually made of it when exhibited in the course of the cause The application of which it is regarded as susceptible being considered, the idea of reluctance on the part of the confessionalist will naturally enough be presented by the term *confession*, and its several conjugates But if reluctance were looked upon as a necessary component circumstance, the extent of the idea thus annexed to the term would be found to fall far short of the extent that will be found necessary to be given to it on many of the occasions on which the demand for it presents itself These occasions will be distinctly brought to view, when we come to speak of the different modifications of confessorial evidence The case where the utterance of it is attended with reluctance, is but one out of many distinguishable modifications

§ 2 *Of spontaneous confessorial evidence extra-judicially delivered*

Of this species of evidence it being one characteristic property that the tendency of it is prejudicial, and that in any degree up to the highest, to him to whom it owes its birth, and another, that it comes out spontaneously, and without any application of the instrument, with the help of which, evidence of the same tendency is capable of being extracted from the unwilling mind by the hand of power, two doubts naturally present themselves as seeking for satisfaction, viz to what causes it is capable of owing its birth? and to what others its introduction to the theatre of justice?

To the first of these questions an answer may be conveyed by so many specific denominations, each of them having the effect of indicating the cause (the psychological cause) to which the species so denominated owes its birth To the other, an answer will be afforded by an indication given in each instance of the *causes of transpiration*, incidents, by the force of which it has been found in practice that evidence of the species in question has made its way to the theatre of justice.

1 First species of self-inculpative or self-criminative evidence, *conspiratorial* evidence. Discourse held amongst delinquents as to the time, place, means, and other circumstances, of the offence, whether already committed, or as yet but meditated.

Examples of the causes of transpiration: — 1. Over-hearing; 2. Loss of papers by accident, by interception, by seizure; 3. Disclosure, with or without treachery, on the part of one or more of the co-delinquents.

* Confessorial evidence, when not plenary *per se* — in itself — may yet be so by *relation*. It is so by relation when it refers to some other discourse in which whatever is wanting to make it plenary is contained.

Thus, when, in the form of English law, at the opening of the trial, the question is put to the defendant, How say you, guilty, or not guilty? — if the answer be, *Guilty*, the confession is plenary by relation; for it refers to the full description of the offence, as contained in the instrument of accusation called the *indictment*.

2. Simply *confidential.* A disclosure made (whether from any interested view, or merely in expectation of sympathy) by one or more of the co-delinquents, before or after the commission of the offence, to an individual who either was or was expected to be a partaker in it.

Transpiration causes, the same in this second case as in the first.

3. *Jactitantial* — directly or *purposely jactitantial.* The supposed offender, taking a pride in the offence, or in the reputation of having committed it, makes an intentional and unreserved statement of it, in a manner more or less circumstantiated, to one on whose part he expects on that account esteem or sympathy.*

Transpiration causes still the same.

4. *Jactitantial through unadvisedness.* In the view of conciliating esteem or sympathy, a man relates some act of his, in itself not criminal or otherwise obnoxious, but which (in one way or other) becomes evidentiary of the principal act — the act of delinquency in question.

Transpiration causes, still the same.

5. *Simply unadvised*, or *unadvisedly colloquial.* In the way of ordinary conversation, without any design of boasting, a man speaks either of some act of his own, or of any other incident, any other matter of fact, which — in virtue of some connexion, that he is not aware of, with the principal fact in question, the fact of his delinquency — operates in the character of an evidentiary fact in relation to it. for example, his having been in such a place at such a time.

Transpiration causes, still the same, except that there is no place for treachery, no confidence having been placed.

6 *Unadvisedly exculpative.* Finding or apprehending himself exposed to the imputation of the act of delinquency in question, — the supposed delinquent, in the view of wiping off the imputation, or screening himself from it, mentions in discourse some matter of fact, which, without his being aware of such its tendency, contributes to the contrary effect, as above.

Transpiration causes, as per last; no room for treachery.

7. *Penitential*, or penitentially confessorial. Though, by the supposition, the occasion on which it is delivered is here extra-judicial, it may happen to it to have been delivered in contemplation of its being judicially produced in evidence. If so, — here, as in the case of a confession or confessorial evidence judicially delivered, transpiration is out of the question. If so it were that the communication was made in confidence, it then, in respect of transpiration causes, coincides with simply confidential self-disserving evidence, as above. But, in this case, as in that other, it remains for inquiry, by what causes a course so repugnant to the universally-prevalent principle of self-preservation was produced.

8 *Superior-benefit-seeking.* By the pursuit of some benefit, it may happen to a man to make known some fact, which — without his being aware of it, or even though he be aware — may happen to contribute, in the character of an evidentiary fact, towards his being convicted of the offence in question. Probability and nearness, as well as magnitude, considered on both sides, it may happen that the value of the benefit shall be in his eyes so great, as to more than compensate for the risk of the whole mass of evil, punishment included, which he beholds attached to the offence.

The infirmative considerations applicable to the probative force of criminative circumstantial evidence of this class, seem capable of being designated in general terms by three words viz 1 Misinterpretation; 2. Incompleteness, 3 Mendacity.

1 Misinterpretation has in this case the effect that incorrectness on the part of the evidence itself has, if not misinterpreted: inasmuch as, though the evidence itself be not incorrect, yet the conception produced by it (either in the mind of the judge, or in the mind of the extra-judicially percipient witness, the ear-witness of the discourse, and through him in the mind of the judge) is incorrect and deceptitious; causing the supposed delinquent to be believed to have committed an act of delinquency which in truth he did not commit.

2. As to incompleteness; it depends upon the manner in which it is incomplete, whether the effect of it shall, to the prejudice of the supposed delinquent, be the same as that of incorrectness, or whether it shall amount to nothing more than the rendering the probative, the criminative, force of it, less considerable than if it had been nearer to the being complete.

3. By mendacity (here as elsewhere) is to be understood wilful and purposed incorrectness, where the evidence thus delivered, the discourse thus used, is incorrect, being rendered so wilfully, and on purpose.

1. *Misinterpretation.* By misinterpretation on the part of the judge, the deceptitious effect produced by circumstantial evidence of this description is susceptible of modifications,

* In the case of John the painter, who (anno 1777) was hanged for setting fire to a public storehouse at Portsmouth, under the notion of rendering service to the American states on the occasion of the war which terminated in their independence, the principal part of the evidence was of this complexion.

So in the case of Crossfield, who was tried on a charge of being concerned in a plot for the assassination of his late Majesty by means of an air-gun.

analogous to that already mentioned as producible by misinterpretation of preparations and attempts, directed in appearance, but (as in the case supposed it happened) not in reality, to the act of delinquency eventually committed. Instead of the act which, by means of the misinterpretation, is supposed and concluded to have been committed — under the supposition of its having been virtually acknowledged to have been committed, — the act really performed may have been — 1 Blameless, though seeking secrecy, 2 Blameless, and not so much as seeking secrecy; 3. Imaginary. as, if the intimation given of it, whether directly or in the way of allusion or insinuation, was meant in the way only of sport or jest, or, if the act committed by the supposed delinquent, and meant by him on the occasion in question to be spoken of, was an act which, though culpable, was culpable in a different manner, or in less a degree, than the act which, from the consideration of such his discourse, is inferred from it, and believed to have been committed

Many cases may be put, in which that which really is not a confession might be taken for and acted upon as such

A paper is found, in the defendant's handwriting, charging him, the defendant, with a crime. Though written by the defendant's hand, it may have been the discourse of another person, and all of it false simple curiosity, or even the intention of refuting it, in a private way, or with the assistance of justice, might have been his motive for copying it.

The poet Jean Baptiste Rousseau wrote a virulent libel, aspersing a multitude of respectable characters, Saurin's among the rest, and circulated it in manuscript Saurin, having borrowed one of these manuscripts, copied it with his own hand, for the purpose of answering it, or instituting a prosecution on the ground of it. Rousseau, hearing of this, or suspecting it, got possession of Saurin's copy, and on the ground of it, with the help of some false evidence for the explanation of it, instituted a prosecution against Saurin, charging him with being the author of it The truth was discovered by the *vivâ voce* examination of the false witnesses and this, too, without the benefit of that sort of examination which, under the name of cross-examination, they would have undergone had it been in England.*

The confession may have been given in the way of jest: the whole of it, or any part, devoid of truth: neither, in fact, conformable to the truth of things, nor so much as meant to be taken for such.

A case of this description happened, if I have been rightly informed, not many years ago in England From I know not what circumstances, a person, whom I will call Juraturus, was expected to be put upon the jury, in a cause of public expectation, in which the affections of political parties took an interest. A letter was written to him by Jocosus, conjuring him to see the defendant convicted, right or wrong For this letter Jocosus was prosecuted, as for *embracing* (the name given by the English law to the act of extra-judicial *solicitation*, where the sort of ephemeral judge, called a juryman, is the subject of it.) The matter being somehow explained, Jocosus escaped conviction, or at least punishment administered under that name, but the costs of prosecution were in effect a punishment, and a very severe one Had the testimony of the defendant been receivable in law, and known to be so, the prosecution would hardly have been instituted

2 *Incompleteness* It is evident that an extra-judicial confession may be incomplete to any imaginable degree For — 1 In the shape in which the discourse flows from the lips of the confessionalist, it may be loose and imperfect up to every conceivable degree of imperfection 2 The interlocutor — who may be sensible, or to the highest conceivable degree insensible, of such its deficiency — may accordingly let it pass in such its imperfect state, without applying himself in any way to render it more complete 3 Though he possessed, in ever so high a degree, the requisite inclination, the power, the effective power, of commanding and producing the requisite explanations, may on his part be deficient, in any conceivable degree

3 The case of *mendacity* requires more explanation To a first view, nothing can be more paradoxical than the case of a man's having recourse to falsehood for the purpose of subjecting himself, perhaps to the punishment, at least to the disrepute, attached to a supposed act of delinquency which in fact he has not committed. In the relation between the sexes may be found the source of the most natural exemplifications of this as of so many other eccentric flights. The female unmarried, — punishment as for seduction hazarded, the imputation invited and submitted to, for the purpose of keeping off rivals, and reconciling parents to the alliance. The female unmarried, — the like imputation, even though unmerited, invited, with a view to marriage, through divorce. Even without view either to marriage, or to possession without marriage, — vanity, without the aid of any

* There is a well-known (though not very well authenticated) anecdote of Rabelais, in which it is narrated, that being anxious to visit Paris, and not being possessed of sufficient funds to gratify his wish, he forged a plot against the life of the King, the Queen, and the Duke of Orleans, and provided self-inculpative testimony against himself, sufficiently strong to occasion his being sent to Paris at the expense of the government. — *Ed.*

other motive, has been known (the force of the moral sanction being in these cases divided against itself) to afford an interest strong enough to engage a man to sink himself in the good opinion of one part of mankind, under the notion of raising himself in that of another.*

False confessions, from the same motive, are equally within the range of possibility, in regard to all acts regarded in opposite points of view by persons of different descriptions. I insulted such or such a man: I wrote such or such a party-pamphlet, regarded by the ruling party as a libel, by mine as a meritorious exertion in the cause of truth: I wrote such or such a religious tract, defending opinions regarded as heretical by the established church, regarded as orthodox by my sect.

In many cases, probably in most, the infirmative facts above brought to view will be seen to have no place: the import of the discourse, and its applicability to the purpose for which it is adduced, will be out of dispute. Though not complete (for it is seldom that a lot of extra-judicial evidence will be endowed with that completeness with which it is the object of judicial examination to endow it,) it will, as far as it goes, be thus far complete, that it will be sufficiently manifest that no addition which it could have received could have been of a nature to destroy, or materially to change, the inference. The act, to the imputation of which the confessionalist was exposing himself by this his discourse, was really his act — really done by him; nor was he, on the occasion of holding such discourse, acting in prosecution of any such eccentric and perilous a design as that of subjecting himself to an imputation known by himself not to be merited.

A distinction requires here to be noted, between the case where the evidence may be said to be designedly furnished, and that in which it may be said to be undesignedly furnished, having been obtained, as it were, surreptitiously, by the party by whom it is produced or offered to be produced, without the consent of the party whose confession is contained in it.

In the former case, it partakes, in a great measure, of the nature of judicial confessorial evidence: the person to whom it is delivered, though not a magistrate, yet, by the relation he bears (casual and momentary as it is,) may be considered as standing, in many respects, in the situation of a magistrate. The proprietor of stolen goods, having, by a train of indicative evidence, been led to the discovery of the thief, makes up to him, and charges him with the theft: the delinquent, through remorse, confusion of mind, or hope of favour, confesses the offence in all its circumstances, in a degree more or less particular. To extend the illustration, substitute for the case of theft the case of any other offence, of that class which supposes the existence of an individual exposed to special injury; and to the case of the proprietor of the stolen goods substitute that of the individual so injured.

The reason and use of the distinction is, that when, as here, the confessorial evidence is furnished *ex proposito confitentis*, the same causes that are capable of giving birth to false confession, when judicially exhibited, are capable of producing the same effect in the case where it is furnished extra-judicially, as here: —confusion of mind,—hope of commuting a severer punishment for a less severe one,—hope of obtaining mercy,—despair of acquittal, produced by prospect of false evidence.

* A story current enough, but of which the source cannot be distinctly recollected, may serve as an exemplification of the field of enterprise in this line, which has been laid open by nature (too well seconded, as will be seen, by the blundering hand of English law) to unprincipled speculators. A man wishes to secure to himself, in the way of marriage, a hand, of which, by direct and honourable means, he has no sufficient hope. His object is, by destroying the reputation of his intended victim, to deprive her of all hopes that do not centre in himself. He takes the requisite measures: he bribes servants; he provides himself with the requisite equipment: in the costume of a happy lover, he shows himself to observers, casual or posted, through the window of her bedchamber, as Galatea showed herself:—*Et fugit ad latebras, et se cupit ante videri.*[a]

The outline thus delineated, the particular object, and the details of the plan, will (as already hinted) admit of considerable diversification. As to the value of the prize obtainable at the price in question, there are evidently no determinate limits; and this, whether pecuniary profit (to the amount of which there is also no limit) be or be not taken into the account.

As to the price in the way of punishment; few, if any are the existing systems of legislation that have, with any sufficient degree of consistency and uniformity, raised it to a pitch too high to find bidders. For seduction, under English law at least (which, in everything that concerns marriage, indicates for its author some old woman in her dotage,) for seduction, the maximum would be but a flea-bite: punishment as for capital violence, the charge being of the adventurer's own framing, he will know better than to subject himself to.

To any bosom in which either love or money has infused the spirit of enterprise, the Chancellor (who fancies himself, or pretends to fancy himself, the guardian of female orphans — who fancies, or pretends to fancy, his authority the bar to ill-assorted marriages, the protector against deception or imprudence) is but a laughing-stock. Ever ready to punish, he is ever impotent to prevent: powerful to do mischief, he is impotent to do good; that good always excepted, of which his professional brethren are the sharers, and which consists in distributing among them, in due form of practice, a portion of the orphan's substance.

[a] This act is said to have been perpetrated by the Earl of Stair, and to have occurred in Edinburgh. — *Ed.*

The opposite case, the case where the confession was obtained *imprudentiâ confitentis*, is the case which, on the former occasions referred to, was principally in view. The party, the confessionalist, has made a memorandum in relation to the fact, for his own use; this falls into the hands of the adverse party, who thereupon produces or offers it in evidence. In terms more or less particular, either direct or more or less indirect, the confessionalist has mentioned the fact in a letter to an accomplice or a friend the letter falls into the hands of the adverse party, who produces it, or offers it, in evidence The confessionalist has been overheard to mention the matter in conversation with an accomplice, a friend, or even (for no species or degree of imprudence is altogether without example) an utter stranger: through the medium of the extra-judicially audient witness, it comes round to the adverse party, who (with or without his good will) engages him to come forward with the information, in the character of a judicially-deposing witness

From the differences that exist in respect of the mode in which the evidence was obtained in the two cases, result several other differences When of a nature approaching to judicial, the extra-judicial confession (having conviction, or, at least, full information, for its object, either on the part of him who delivers it, or on the part of him to whom it is delivered) will naturally be more or less effectually shaped and adapted to that purpose. When obtained, as above explained, in a manner by surprise, neither the confessionalist, nor (in the case of hearsay evidence) his interlocutor or auditor, has any such object, nor has the interlocutor or auditor, generally speaking, any means of shaping the evidence to that object The shape in which it presents itself will naturally be that of some broken scrap, variable *ad infinitum* in respect of form, and quantity of information.

In the case where, as above, it is furnished by a man as it were with a halter about his neck, the language will necessarily be direct and explicit; and in that respect, whatsoever it may be in point of precision (for precision will depend as much upon the party receiving the information as upon the party furnishing it,) nearly upon a par with that which it assumes when extracted by an official hand In the case where it is furnished without apprehension of the use eventually made of it, it may indeed happen to the language of it to be equally direct and explicit (as is apt to be the case with libels;) but it is equally capable of existing in a form to any degree mysterious and indirect. It may consist of nothing but mere allusion; and, in any case, to find out a key to it, and apply it to the proof of the fact endeavoured to be proved from it, may be the task of argumentation and conjecture.

§ 3. *Of spontaneous confessorial evidence, judicially delivered.*

For the advantage of viewing objects one at a time, the species of criminative evidence in question has hitherto been considered as being delivered as well without the intervention of interrogation, as without the intervention of the authority of a judge, present at the time Of the intervention of these two circumstances, the consequences will be seen to be material

If the self-criminative discourse be conceived to be held in the presence of the judge, it is not natural that (adequate power not being wanting) the use of so efficient a security for correctness as well as completeness should be foregone But that which, in respect of its manifest mischievousness and absurdity, will be apt to appear most unnatural, is, under the influence of the sinister interest which gave birth to the technical system of procedure, but too frequently realized. for example, under English law, in the case of all those modifications of delinquency in relation to which the evidence is delivered in no other shape than that of *affidavit* evidence

The scene of intercourse being now removed from the closet to the theatre of justice,—one consequence is, that, of the eight modifications of self-disserving evidence above brought to view, five stand excluded, as being incapable of finding entrance into a place so defended These are—1 *conspiratorial*, 2 *simply confidential*, 3 *purposely jactitantial*, 4 *unadvisedly jactitantial*, and, 5 *simply and unadvisedly colloquial Superior-benefit-seeking*, a modification under all circumstances rare and eccentric, is, by the authority of a present (though mute and inactive) judge, rendered still more unlikely to be hazarded, still more so by the presence of an interrogating judge

Remain, as the only two modifications of self-disserving evidence natural to the spot now in question,—1. *unadvisedly self-exculpative* evidence, and, 2 *penitential* or penitentially confessorial evidence

To ground conviction, confession (it has been said) ought to be perfectly free, not produced either by hope or fear Such is the language we frequently meet with in English law books Reason is here obscured by a covering of absurdity. Accused or suspected of a crime, guilty or innocent,—what but hope or fear should induce a man to speak? Guilty, in particular, what but hope or fear should induce a man to confess? Confession without hope or fear, is an action without a motive, an effect without a cause. It is more: it is an action without an inciting motive, overcoming a force (and that a mighty one) of restraining

motives. It is as if, on a level billiard-table, a ball should run into one of the pockets, not merely without being struck with the mace or cue, but in spite of the impulse of the instrument striking it in a direction exactly opposite.

What there is of reason in the rule amounts to this. — A judge, in examining an accused or suspected person, should be upon his guard against the sinister inducements, to the action of which a man in such a situation is exposed.

The causes which may be capable of giving birth to evidence of the description in question, when it is not true, come now to be enumerated.

I. Causes capable of giving birth to untrue confessorial evidence, even when plenary

1. Guilty of a greater crime (*i. e.* a crime more severely punished than the crime now charged,) a man makes a confession of the crime now charged, in order to avoid the severer punishment: or, being charged with two crimes, he confesses the less, to avoid being punished as for the greater. and so in regard to facts subjecting a man to non-penal damage, or otherwise to an obligation of an unpleasant cast.

2. Not guilty of the crime charged, nor, consequently, being justly subjectable to the punishment annexed to it, — but exposed, or conceiving himself exposed, to undergo some severer suffering (whether on the score of criminality or any other) at the hands of the prosecutor, or some other man in power, to whom it would be acceptable that he should suffer as for the offence in question, — he makes confession of it accordingly, in the hope of thereby escaping such severer suffering.

Various is the description of the person by whose power (*i. e.* by the hopes and fears that point to it) a man may be drawn into a false confession. It will depend in a considerable degree upon the nature of the offence: an ordinary offence, or a political offence. It may, accordingly, be a private individual; it may be, in a monarchy, the monarch, or one or more of his ministers, in a commonwealth, some officer or some individual invested by law or influence with appropriate power; it may be (though without atrocious abuse of judicial power it cannot be) even the judge.

3. If, in the case above supposed — hoping, as above, to mollify the enmity of his too potent adversary — he regards the stream of the evidence as likely to run against him, and with a force sufficient for conviction (though this be what, by the supposition, cannot take place without falsehood somewhere,) an adequate motive — a cause adequate to the production of the supposed effect, viz. that of a false confession — will in this way too be exemplified.

4. Lastly, the same effect is capable of being produced by mere confusion of mind; the state of mind producible in a man by terror — by the contemplation of his impending fate.

The case of false confession is a case which, in the present state of jurisprudence among civilized nations (including a century or so under the notion of present time,) has seldom been exemplified: so at least one wishes and hopes to be able to believe, for the honour of governments and of human nature. The only instance in which it has been in any degree frequent, even for some centuries past — and in this instance it has been but too frequent — is that of a case in which the fact was not only false, but impossible. I speak of the case of witchcraft. Turn which way we will — to France, to England, to North America — we shall find wretched women not only convicted, but confessing themselves guilty, of that imaginary crime. So at least say the accounts that have been transmitted to us. In these deplorable instances, in what shape has the confession been conceived? To produce a frantic cry of guilty — to produce the mark of a trembling hand to a paper full of calumnious lies, contents known or unknown — these are effects to the production of which confusion of mind may be fully adequate, in the instance of the weakest and most ignorant certainly not less than in that of the strongest and best-informed minds. But to produce, and produce extempore, a circumstantial and consistent account of intercourses and conversations with an imaginary being, — this would be scarce possible even to the strongest, and, if possible, where should be the inducement, when the consequence was the being hanged or burnt?

To guard against false confessions, therefore, the two following rules ought to be observed —

1. One is, that, to operate in the character of direct evidence, confession cannot be too particular. In respect of all material circumstances, it should be as particular, as, by dint of interrogation, it can be made to be. Why so? Because (supposing it false) the more particular it is, the more distinguishable facts it will exhibit, the truth of which (supposing them false) will be liable to be disproved by their incompatibility with any facts, the truth of which may have come to be established by other evidence. The greater the particularity required on the part of the confession, the greater is the care taken of the confessionalist, — the greater the care taken to guard him against undue conviction, brought on upon him by his own imbecility and imprudence.

2. The other rule is, that, in respect of all material facts (especially the act which constitutes the physical part of the offence,) it ought to comprehend a particular designation

in respect of the circumstances of *time* and *place*. For what reason? For the reason already mentioned: to the end that, in the event of its proving false (a case not impossible, though in a high degree rare and improbable,) facts may be found by which it may be proved to be so. "I killed such a man" (says the confessionalist, mentioning him,) "on such a day, at such a place" "Impossible" (says the judge, speaking from other evidence) "on that day neither you nor the deceased were at that place"

But time and place are both infinitely divisible. To what degree of minuteness shall the division be endeavoured to be carried for this purpose? A particular answer, that shall suit all cases, cannot be given. The end in view, as above stated, must be considered, and compared with the particular circumstances of the case, in regard to either species of extension, ere the degree of particularity proper to be aimed at by the interrogatories can be marked out. Under the head of time, the English law, in the instrument of accusation, admits of no other latitude than what is included in the compass of a day. The nature of things did not, in this instance, render uniformity impossible: the parts into which *time* is divided are uniform and determinate. Place — relative space — is not equally obsequious: the house? yes, if the supposed scene of the supposed transaction be a house: the street? yes, if the scene were in a street: but a field, a road, a common, a forest, a lake, a sea, the ocean, any of these may have been the scene.

The question therefore still recurs upon us, and at the same time the difficulty of finding a general answer for it recurs undiminished. Supposing the confession — the narration — false, — will the intimation which it has been made to include of time and place be sufficiently particular to enable the judge, supposing it to be false, to extract sufficient proof of the falsity of it from other evidence?

Between the degree of particularity to be looked for in the article of *place*, and the degree of particularity to be looked for in the article of *time*, there will be a mutual dependence. Supposing it clear from other evidence, that, on a given day, the confessionalist and the deceased were upwards of two days' journey distant from one another, — the specification of the day on which, in the false confession, the murder is stated to have been committed, will be sufficient to prove the falsity of the confession — to prove the non-delinquency of the confessionalist. But suppose the distance no more than two hours' journey, — the specification of the day will, it is evident, not be sufficient for the same purpose: he should be called upon to fix the very hour: the hour becomes as material in this second case, as the day was on the first.

In the wording of the instrument of accusation, particularity in respect of both species of extension is insisted upon, and evidently for the reasons above given, by the English law. But, between the case of an indictment (a statement of the offence, as drawn up by an accuser,) and a confession, whereby the defendant himself becomes as it were his own accuser, there is in this respect a great difference. In the case of the instrument of accusation, compliance with this requisition, however desirable, may, in respect of this or that degree of particularity, be impossible. Why? Because, antecedently to the exhibition of the whole mass of obtainable evidence (though ultimately that evidence should prove ever so satisfactory,) it is but natural that an accuser should be in the dark, while (supposing the charge true, and the defendant willing to confess the fact,) that same degree of particularity which it was altogether out of the power of the accuser to give to the relation, may be exhibited in the confession of the defendant without any difficulty. For from whom can so precise an account of a man's acts be expected as from the man himself (especially acts of such moment to himself,) so he be but disposed to give it?*

* That a certain degree of particularity in these respects is desirable — desirable for the reason above given, — has been sufficiently observed by the founders of this part of the English law. They therefore required, that, in the instrument of accusation, it should be observed; and so serious were they in the requisition, as to determine, that where the requisition to that effect is not complied with, the defendant, guilty or not guilty, shall be acquitted. That cases will often happen in which, though delinquency may be capable of being established, and by abundantly sufficient evidence, that same degree of particularity cannot possibly be exhibited, — was another observation which, true as it is, yet, at the time of establishing that requisition, they failed to make. Compliance with the requisition was impossible; but the impossibility of complying with it was no bar to the establishment of it. The requisition had not been long enforced, before the impossibility of complying with it, consistently with the conviction of the guilty, was discovered. A remedy was accordingly applied. What was that remedy? — Converting a court of penal justice into a school of necessary falsehood — a school in which the scholars were not merely taught and invited, but by main force compelled, to defile themselves with that vice: no falsehood, no justice. A day must be specified; but it need not be the true one.[a] A day must be specified; but that the fact happened on that day, is not necessary to be proved: another, any other, will do as well. You must say you know the day, and say what that day is: you must so know it, when you know it; you must say you know it, when you know nothing of the matter. But, provided you utter this falsehood, you shall not be prejudiced by it: from falsehood, nothing — it is from

[a] Kelyng, 10. 2 Inst. 318. R. v. Aylett, 1 T. R. 70-71.

CHAPTER VII.

OF CONFESSORIAL AND OTHERWISE SELF-DISSERVING EVIDENCE, EXTRACTED BY INTERROGATION.

§ 1. *Of interrogation in general, as a means of extracting self-disserving evidence.*

INTERROGATION has already been mentioned* as the most efficient, and (in case of doubt) the indispensable, instrument for the extraction of truth—complete truth—in favour of whichsoever side of the suit it militates.

On both sides, its property is to clear up all doubts—all doubts produced or left by other evidence—doubts which without its aid can never be cleared up. Possessing this property, it is not less favourable to innocence than adverse to delinquency. All suspected persons who are not guilty, court it, none but the guilty shrink from it.

Antecedently to the application of this test, the mind of the judge remaining in doubt as between innocence and delinquency (viz in which of the two opposite states the mind of the defendant shall be considered as placed,) the process is directed indistinctly to the production of the one or the other of two opposite results—in the case of non-delinquency, self-exculpative testimony, in the case of delinquency, confessorial testimony, ending in confession

But confessorial testimony, having punishment, or evil in some other shape, for its visibly impending consequence, does not, in the ordinary course of things, come willingly, or singly, or in the first instance The instrument being applied, some course, on the part of the proposed respondent, cannot but be taken. Instead of this most visibly dangerous course, he betakes himself (if not definitively, at any rate in the first instance) to all other possible courses, no other course presenting to view the image of punishment as following with a step so sure But, of all these possible courses, if the proposed respondent be really delinquent, there is not one that will not (if the judge be at the same time willing and at liberty to follow the manifest dictates of justice and common sense) operate, with a degree of probative force more or less persuasive, towards conviction. because that which is visible to common sense, as being consonant to constant and universal experience, is, that there is not one of them all that a man ever betakes himself to and persists in, in case of veracity and innocence.

True self-exculpative testimony being by the supposition incapable of being delivered, —his constant resource (were it not for the inferences which, on such an occasion, every man, as is visible to him, would draw from it) would be *silence*. But silence being in such a case, by common sense, at the report of universal experience, certified to be tantamount to confession, though by a mode of expression as general as possible—tantamount, at any rate, to the purpose of disrepute, if not to the purpose of legal punishment,—this is (excepting confession in particular and explicit terms) his last resource.

Thus repelled from that which would otherwise be the easiest as well as safest course, his next endeavour is to tax his invention for such statements of an exculpative tendency, as, though false, shall present the fairest prospect of being taken, from first to last, for true. But, besides the difficulty, a defence of this kind is attended with constant and manifest peril, for no sooner does any statement present itself, which by its inconsistency with other statements of his own already delivered on the same occasion, or with facts understood from other sources of information to be true, is understood to be false, and believed at the same time to be wilfully false,—than another evidence of delinquency is afforded, still more probative and impressive, because more particular, than mere silence.

True self-exculpative discourse is not to be had. Silence would operate as confession. Of a course of false responsion, if understood to be false, and the falsehood wilful, the effect would be still worse than that of silence. False responsion of an exculpative tendency, in any shape that promises security against detection, not being to be found,—his next endeavour is to find, and to obtain acceptance for, such discourse as, at the same time that it affords no inculpative evidence, shall not be liable to be taxed with being false. Discourse of this description is that which, in respect of its object, is termed *evasive*, and in respect of its nature is either *irrelevant* or *indistinct;* for being relevant, and at the same time distinct, it could not fail to be either true or false.

If nothing of this cast be to be found, or if his employable stock of it be exhausted, he has then left but one alternative, which is either silence, as above, or confessorial evidence; which (in so far as true) it depends upon the interrogator to draw on till it terminates in *confession*.

But, after interrogation—which (coming from a person whose station, by office or by the occasion, is that of a superior) is, in other

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truth alone that you have anything, to fear: speak falsely, you are safe; speak truth, you lose your cause.

This is but one instance out of a multitude, in which, by aiming at a degree of precision beyond what the nature of the case admits of, they lost the benefit of such degree of precision as the subject does admit of: they lost precision altogether: they threw away precision, and embraced falsehood in the room of it.

* Book II. Chap. IX

words, an order requiring a man to speak — silence is an act of disobedience. Confessorial discourse is the result of submission — of compliance. Of non-compliance with his will it is the property to call forth ill-will on the part of him towards whom it is manifested, especially of the man in power, of compliance, good-will. Silence, therefore, on the part of the affrighted culprit, seems to his ear to call for vengeance; confession holds out a chance for indulgence.

While devising and pursuing a plan of self-exculpative misrepresentation, the discourse held by the delinquent will naturally be of a motley cast, presenting a mixture of falsehood, evasion, and truth Falsehood, under the apprehension of the discredit which attaches instantly upon detection, will be hazarded then, and then only, when evasion seems no longer practicable, and the response, if true, could not be otherwise than manifestly confessorial Truth, then, will almost always form, and that in no inconsiderable proportion, a part of the delinquent's self-exculpative tale. But such and so visible is the connexion between truth and truth — between the fact of delinquency and all the several facts that have accompanied or led to it, — that, of the admixture of truth thus unwillingly inserted, a portion more or less considerable (in one way or other, with or without his knowledge,) though designed to operate in a way opposite to confession, will operate in effect in the character of confessorial evidence

And thus it is, that — by one and the same process, the process of interrogation (where the respondent who is suspected to be a delinquent is really so) — in spite of, and in consequence of, the endeavours used by him to impress the persuasion of his innocence, — silence or non-responsion, evasive responsion, false responsion, confessorial responsion (one or all of them, in infinitely diversifiable proportions,) will be extracted each of them contributing to conviction, each of them evidentiary of delinquency, — operating in the common character of self-disserving, to wit, self-inculpative, or self-criminative, evidence.

In species and denomination, the infirmative considerations applicable to self-disserving evidence thus extracted by interrogation, are the same as those applicable to evidence from the same source and of the same tendency, when delivered without interrogation.

But, in respect of force, they are, in every instance, decidedly inferior. Why? Because, in every instance, the infirmative considerations are mere suppositions — suggestions of states of things neither proved nor so much as probabilized, but merely brought to view as being at the same time possible, not glaringly improbable, and not disproved, in whatsoever degree disprobabilized.

But, of the process of interrogation, by whomsoever performed (if performed with an impartial view, or, what comes to the same thing, with partial views on both sides,) it is the known object and effect, by the most efficient means, to clear up all such uncertainties.*

* Of the mode of signifying *will*, denoted by the word *interrogation*, the object is to obtain, at the hands of the person interrogated, some token, such as, in relation to the particular object on the carpet, shall serve to express and make known the state of his mind. But interrogation — interrogation in mood and figure — is not the only mode of communication, is not the only form of discourse, by which an effect of that description is capable of being accomplished.

When, two other persons being present, Titius hears (being at the same time known to hear) one of them, in discourse with the other, speak of him (Titius) as having done such or such an act, in relation to which it concerns him in point of interest to be thought to have done it or not to have done it, — to have engaged, for example, in a plan of delinquency, in this or that shape, or (delinquency out of the question) to have made a promise — a deliberate promise — intended to be binding, to such or such an effect; — if it be material to him not to be believed to have done that which he is so stated to have done, he feels himself of course called upon to contradict the assertion — called upon with a force neither greater nor less than if an interrogatory to the same effect had been addressed to him

On a former occasion (that of suggestive interrogation,) we have seen interrogation involving in it a proposition of the assertive kind (Book III. *Extraction*, Chapter III;) here we see an assertion standing in the place, and performing the function, of an interrogatory; so variable and interchangeable are the different forms of language

It is not, however, to any such oblique and uncertain modes of signifying will, that the mouth of authority — judicial authority — will naturally, or even consistently, have recourse. Accordingly, where, in the character of a security (a judicial security) for correctness and completeness in a mass of evidence, *interrogation* was brought to view, no mention of any such oblique mode of interrogation as is here denoted by the term *quasi-interrogation*, was *there* made.

In a sort of cases the description of which in general terms may not be easy, but which are little exposed to misconception in any individual instance, silence is to a proverbial degree recognised to be equivalent to consent or assent: to consent, if the effect of the quasi-interrogation be to call for an expression of will; to assent, if it be to call for an expression of the state of the intellectual faculty.

To produce on the part of the person in question a call for a declaration of the state of the will, or of the understanding, as the case may be — a call no less imperious than that which would have been produced by interrogation, — it is not necessary that the quasi-interrogative discourses should have been directly addressed to him; or that, on the part of the quasi-interrogator, there should have existed so much as a desire to obtain an answer, express or virtual, from the person thus indirectly interrogated. What is material to him, is to be believed, or not to be believed, to

§ 2. *Difference, in point of effect, between extra-judicial and judicial interrogation.*

Compared with each other, self-inculpative evidence extracted from a supposed delinquent by extra-judicial interrogation, and evidence of the like denomination extracted by judicial interrogation, have their natural points of advantage and disadvantage, the observation of which is pregnant with instruction of practical use. —

1. To extra-judicial interrogation, considered as an instrument for the extraction of truth from unwilling lips, belong naturally two disadvantages: comparative deficiency in respect of coercive power, and comparative deficiency in point of intellectual skill.

Of these disadvantages, however, neither is constant in point of existence, or uniform in degree.

The interrogator is not indeed himself the judge, — the judge by whom the decision, grounded on the evidence so extracted, is to be pronounced. But on this head (unless where, in virtue of some particular connexion, the supposed delinquent is, by sympathy or any other cause, assured of concealment on the part of his interrogator) the difference will not be very considerable, inasmuch as every question will naturally present itself as if backed by the authority of the judge.

2. In the process of interrogation, the casual interrogator will not in general possess experience, nor (so far as depends upon experience) skill, equal to what may be naturally expected on the part of the judge. But, in this respect, the father or other head of a considerably numerous family, will not in general be much behind even an official judge: and whatsoever superiority in point of acquired skill may be expected to have place on the part of the official judge, the superior interest and zeal that may no less reasonably be looked for on the part of the domestic interrogator may be considered as forming in general no inadequate compensation.

On the other hand, in the circumstance of surprise may be seen a circumstance from which the situation of the domestic interrogator will be apt to derive a considerable advantage. From the domestic inquirer may come a question, or string of questions, at a time when no thoroughly-considered plan of mendacious defence can as yet have been adjusted; whereas the interval between arrestation and judicial interrogation will afford for the purpose of mendacious invention (not to speak of mendacious suggestion in case of concert amongst co-delinquents) a quantity of time over and above whatsoever in the same individual case the delinquent could have applied to the purpose of his defence against the casual inquisitiveness of extra-judicial interrogators.

One great, and, as it should seem in general, decisive, advantage, attaches beyond dispute to the side of the judicial interrogator. It rests with him to continue the process of interrogation (that is, to keep the supposed delinquent in a state of subjection to it) for whatever length of time appears to him to be necessary and sufficient for the purpose — for the extraction of whatever mass of evidence the proposed respondent is looked upon as capable of yielding — for the extraction of it in all its plenitude.

On this occasion, there are four distinguishable objects with which self-disserving evidence, extracted by judicial *vivâ voce* interrogation, will require to be compared; the evidence being in all four cases supposed to issue from the same source (*i. e.* from the same individual,) and to be of the same tendency, — viz. 1. Evidence delivered extra-judicially, and without interrogation, by word of mouth; 2. Evidence delivered extra-judicially, and without interrogation, in a written form, for instance, in the form of a private memorandum, or of a letter, sent or not sent; 3. Evidence delivered extra-judicially, in consequence of interrogation by word of mouth; 4. Evidence delivered extra-judicially, in consequence of interrogation in a written form.

Expressed in the written form, the evidence, taken in itself, is more apt to be incomplete; and in such a way incomplete, as, in respect of partiality, to be deceptitious. Why? Because, on the occasion of writing, the writer (the supposed delinquent) has in general more time at command for the purpose of mendacious invention; nor are the workings of his invention in a situation to receive that disturbance which it is natural they should receive, from the presence of a person at whose hand hostile suspicion (or at any rate prying curiosity) and consequent interrogation, whether eventually applied or not, will naturally be apprehended.

When delivered in the form of a letter, the person to whom the statement is addressed must, for a length of time at least, take it as it comes. Delivered orally, no sooner are gaps discovered in the texture of it, than comes a question requiring them to be filled up; — no sooner ambiguity or obscurity, than the clearing of them up. Self-regarding evidence, delivered by a delinquent in the written form,

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have done, or to be doing, or to be about to do, what by the discourses in question it is supposed and assumed that he has done, is doing, or is about to do. Whether, on the part of the author of that discourse, there exists any desire to be *informed* in relation to such his supposed conduct, past, present, or future, may to him be a matter of indifference: the interest which he has in being believed so to have done, or not to have done, — the call made upon him accordingly in point of interest to declare yes or no, — is not varied by any such difference.

will, therefore, be more likely to be deceptitious, *i. e.* guarded against detection, and so effectually as to produce the deception aimed at by it; viz. where deception was an object which it had in view. But in some cases it has no such object; as when the cast of it is conspiratorial, simply confidential, or jactitantial.

At the same time, such as it was delivered — delivered from the mind of the writer, — such, and without alteration, without being exposed to be *misreported*, it is sure to be presented to the mind of the judge whereas, if delivered in the oral form, it will always be liable to alteration — liable to be misreported by the deposing witness, through the channel of whose lips (it being extra-judicially delivered in the first instance) it cannot but have passed

As to interrogation in the written form (as when statements which have been extra-judicially delivered have eventually been made use of as evidence, and thereupon have assumed that responsive form of which interrogation, when submitted to, is naturally productive;) — it is a possible case, but a case not by any means likely to be frequently exemplified, rarely indeed, when compared with the form which discourse so readily assumes under the process of interrogation when performed by word of mouth Why? Because, out of the presence of the interrogator, compliance with the command expressed by interrogation is, if irksome, refused without difficulty. evasive responsion, if responsion be resorted to, is more easy silence, beinge liable to be accounted for by so many other causes besides delinquency, is resorted to with less reserve A plan of self-exculpative mendacity is pursued with more time for the continuance of it, and with better promise of success; and, from amongst the truths which, to guard against detection, it may be necessary to intermix, a selection is made with greater facility and safety, of those which (for fear of their being found to operate with a self-disserving, a self-inculpative tendency) require, and may (it is supposed) bear, to be omitted.

Of discourse orally delivered it is moreover the nature, when the apprehended tendency of it is (as here) self-criminative, to bring with it another species of criminative circumstantial evidence (which will be brought more particularly to view in another chapter,) viz. *fear*, as indicated by deportment, more particularly passive deportment; and from an accompaniment thus treacherous it is a characteristic property of written discourse to be altogether free.

Meantime, howsoever (being orally delivered) the evidentiary self-criminative discourse may have been accompanied with any such symptoms, in the state in which on the extra-judicial occasion it was delivered to the percipient witness (interrogating or not interrogating,) by whom, in the character of a deposing witness, it is reported to the judge, — yet, when thus reported to the judge, it comes accompanied, not by the symptoms themselves, but only by the report so made of them to which report it may happen to be in any degree incorrect or incomplete, or both

Of the comparative view thus taken, what is the practical result? Not preference, followed by adoption and rejection, but conjunction Each mode and form is marked by its peculiar advantages, counteracted by its peculiar disadvantages both, therefore, should be called in to the assistance of justice

Expressed originally, whether in writing or in conversation, the probability is, that the evidence in question (especially being, as it is, self-regarding, and subject to the risk of being found self-criminative) will abound with gaps, with dark passages, with broken hints All these imperfections, the judge, and he alone, is competent to do what can be done towards remedying In his hands alone is reposed adequate power, and whatsoever time, in his view of it, the occasion needs

Self-inculpative discourse, when it is uttered extra-judicially (designedly or undesignedly, with or without a view to its being employed as evidence,) can never be an adequate succedaneum to judicial confession, the plenitude of which is secured by judicial examination In the former case it is not itself the proper evidence, it is no more than indicative of the source from whence conclusive evidence may by the proper process be obtained, and of a sample of what may be expected from that source It is not the best — the most satisfactory, evidence that the case furnishes, it shows where better, where still more satisfactory evidence, is to be had and it may require completion and explanation (not to speak of opposition and confutation,) not only for the benefit of the party by whom it is produced, but even for the benefit of the party whose confession it is, and *against* whom it is produced

But although it be thus indicative of a lot of evidence more satisfactory than itself, the use of the inferior is not always superseded by the superior evidence.

1 A case that happens not unfrequently, is this — after a true confession more or less full, delivered extra-judicially, — when the confessionalist comes to be examined in a judicial mode, he repents, and, instead of confirming the truths he has disclosed, betakes himself to falsehood. When the extra-judicial confession was suffered to escape from his lips, the debt thus paid to truth had the confusion of mind he had been thrown into for

its cause: his presence of mind regained, he endeavours to avail himself of it, and attempts to take back the lights that had transpired from him when off his guard. As one man is confronted with another, the interests of truth and justice require that, in such a state of things, a man should be confronted with himself. The extra-judicial confession may be consistent with facts established from other sources: the judicial retractation may be alike inconsistent with the extra-judicial confession and with these established facts. The extra-judicial confession may obtain credence, the judicial retractation may with reason be disbelieved.

2. Even when the two lots of information accord — when the extra-judicial confession, instead of being contradicted by a judicial retractation, is confirmed by a judicial confession — the extra-judicial confession may be not altogether without its use. The first confession giving confirmation to the second, as well as receiving confirmation from it, may serve to render more complete the satisfaction of the judge.

3. Where the judicial confession accords with the extra-judicial, the utility of it will be still more apparent, in the case where both of them happen to stand contradicted by other evidence. How should this happen? (it may be said.) The defendant has himself acknowledged the offence — acknowledged it once and again: what hope can remain to him to overthrow the effect of this double acknowledgment by inferior evidence? of the two acknowledgments, by evidence that is not a match for either? — To him, to the same man, not. But a case that may happen, and does happen not unfrequently, is — the evidence that a man gives against himself applies with equal pertinency to the case of another man; say, as in a criminal case, an *accomplice*.* The confessionalist acquiesces, as he cannot but acquiesce, in the consequences of his confession thus repeated and confirmed. But the second accomplice, having his separate plans of defence, having hopes where his confederate has none, denies the truth of the confession, and seeks to combat it by other evidence.

4. Lastly: Another case that may happen, and which will on another occasion† be brought to view is, — after furnishing the extra-judicial evidence, and before there has been time or opportunity for following up the indication by judicial examination, the confessionalist dies, or ceases to be forthcoming. By his death, the possibility of inflicting punishment (punishment rightly seated) ends; and therefore, so far as punishment is concerned, there the cause ends; and therefore the demand for other evidence, for judicially-extracted oral evidence, along with it. As to punishment, yes; and therefore as to causes in which punishment, and nothing but punishment, is or ought to be demanded.‡ But as to satisfaction, the demand for decision may remain, and therefore (for the purpose of a decision on that ground) the demand for evidence. While the confessionalist was alive, his extra-judicial confession was, in comparison with his judicial deposition (if subsequently taken,) but an inferior kind of evidence. The source, however, of the superior evidence being dried up by death, the inferior, the extra-judicially confessorial evidence, takes its place, — a species of evidence which, howsoever inferior to the confessorial part of the judicial evidence from the same source, is, as far as it goes, superior (as we have seen) to every other species of evidence.

Thus far as to penal cases. In cases not penal, the necessity of employing it is still more evident.

The necessity of treasuring up and employing this species of extra-judicial evidence will be equally evident, where the completion of the confession, by the judicial examination of the confessionalist, has been rendered impracticable for a period, determinable or indeterminable, but not known to be perpetual, such as absconsion or expatriation.

So much for the importance of interrogation, as applied to the extraction of self-disserving evidence from the suspected delinquent.

No supposition surely can be more unnatural than this, — viz. that, if discovery of truth, and consequent rendering of justice, had been the object, the use of an operation so necessary to the discovery, so obviously and indispensably subservient to the purposes of justice, would ever have been rejected. But, under the technical system, the interests and ends of judicature being, from first to last, opposite and hostile to the interests and ends of justice, — whatever exertion and ingenuity has been bestowed, is applied, not to the discovery of truth, but to the finding of pretences for not discovering it: not to the administering of justice, but to the finding of occasions and pretences for administering injustice in its stead.

* What one man says of another in his absence is not evidence against that other, whether he be his accomplice or not. But if a criminal makes a confession, and implicates another party as an accomplice, who is present at the time, then the confession is evidence against the accomplice; because he has an opportunity of denying the truth of the statement as far as he is concerned, or of explaining it. However, in cases of conspiracy, any act done or statement made by one of the conspirators, in pursuance of their common object, is evidence against all the conspirators, whether present or not. 2 Russ. 570. 1. Phil. Evid. 76. 1 East. P.C. c. 2, § 37. 2 Stark. 401. R. *v.* Stone, 6 T. R. 527. 24 Howell's St. Tr. 437, 451.—*Ed.*

† See Book VI. *Makeshift*, Chapters on *Casually-written* Evidence and *Hearsay* Evidence.

‡ That is to say, in cases which afford no individual specially injured.

Governed, if not by sinister reason, by blind caprice under the mask of tenderness, English lawyers, admitting self-disserving evidence when supposed to have been extra-judicially delivered or extracted, forbid it to be judicially extracted or received—extracted by the judge by whom the decision is to be formed. Receiving it in an incomplete state, they will not suffer it to be completed Receiving it in the state of hearsay evidence, they refuse to receive it in the state of immediate unaltered evidence Receiving it in a variety of bad shapes, they refuse to receive it in what, by their own uniform acknowledgment, is the best *

Tenderness! — to whom? To the innocent individual, maliciously or erroneously accused? No what it does for him is, where misrepresentations have taken place tending to his unjust conviction, to refuse him an opportunity of clearing them up

To the guilty? No, not even to the guilty, considered in the aggregate By the promise it gives of escape, it augments the number the number being so great, thence comes the pretended necessity, the factitious demand, for excessive punishment — the deficiencies in certainty must be made up in magnitude Death is the English judge's universal remedy· higher he cannot screw up the exertions of blind barbarity To this point the labour of every session adds at this a stop is made, because there is nothing beyond it

It is the part of the same man, the same natural and implacable enemy of justice — on the one hand, to keep watch and ward in favour of the murderer, charging him not to let drop any the least hint from which justice may receive assistance, not to say anything by which his guilt may be brought to light, and, on the other hand, to be no less active in his exertions to extend the demesnes of death. To the profit of cold barbarity, he adds the praise of tenderness The manly dictates of public utility are sacrificed to the cant of hypocritical or childish sentimentalism. The excess of the punishment becomes a sufficient warrant for not executing it. Extending the demesnes of death, he thus extends the mass of his own despotism of that preposterous state of things by which, every year, the lives of men, by dozens and by scores, are laid at the feet of every English judge †

CHAPTER VIII.

OF CONFUSION OF MIND, CONSIDERED AS AFFORDING EVIDENCE OF DELINQUENCY

ANOTHER modification of subsequential circumstantial evidence is *confusion* of mind, — confusion, as expressed and betrayed whether by countenance, by discourse, by conduct, or by all three. This may also be considered as a sort of sub-modification of circumstantial evidence, a modification of confessorial evidence with this difference only —Confessorial evidence is personal evidence; confusion of mind is *real* evidence — The presumed state of mind, the state of mind evidenced by the external indications, is *psychological* real evidence, the indications themselves, *physical* real evidence

Hesitation alone — hesitation without confusion — would be misinterpreted if it were looked upon as an indication of falsehood; much more if of wilful falsehood Hesitation has for its cause — its most natural and frequent cause — anxiety to shape the narrative by the exact line of truth, accompanied with a difficulty a man experiences in his endeavours to accomplish it Correct memory, and adequate expression, are both necessary to this end by the consciousness, or even mere apprehension, of failure in either article, hesitation may be produced

The most careless and least scrupulous of witnesses are frequently among the most fluent

Suspicion, indeed, is not altogether without ground, when, to hesitation, confusion is added Confusion is the result of consciousness of manifested inconsistency, of inconsistency with itself or with indubitable truths, —a repugnancy which is among the surest indications and proofs of falsehood but, of any such inconsistency, a man who means nothing but the truth is not in much danger of labouring under any serious apprehension The truth, and nothing but the truth, is what, by the supposition, he means to hold up to view. Truth cannot be inconsistent with itself. two truths, parts of one and the same complex truth, cannot be inconsistent with each other Truth, in all its parts, is the one thing, and the only thing, his memory is in search of. In regard to some parts, at any rate, he is singularly unfortunate if he cannot make sure to himself of possessing it these parts he will at any rate adhere to Others, of which his hold is not so strong, he will adhere to no otherwise than upon the supposition of their being compatible and consistent with those fundamental stronger ones. Should any inconsistency display itself, he will abandon these weaker points, without difficulty and without confusion, that is, without shame or other fear having nothing to suffer from the temporary mistake — no point of his own to lose by it.

Confusion affords a presumption, more or less strong, of the fact contested by the party, but not absolutely a conclusive one. It proves alarm; and, in the case in question, the most natural cause of alarm is the apprehension of seeing the contested fact taken for true. But

* See Book IX. *Exclusion.*
† See Vol. VI. p. 382, note 14.

this, though in the sort of case in question the most frequent and natural cause of the alarm, is by no means the only one.

1. It may be, that, — although the fact in question, the fact contested by the party, was not true, — yet some other fact, the declaration of which would in some other way be prejudicial to him, was true: and that the alarm was produced by the apprehension of seeing this other fact brought to light *

2. It may be, that, in respect of the fact in question (the offence in question,) appearances are against him, notwithstanding his perfect innocence, and the consciousness of this circumstance may be the cause of his confusion.

CHAPTER IX.

OF FEAR, IN SO FAR AS INDICATED BY PASSIVE DEPORTMENT, CONSIDERED AS AFFORDING EVIDENCE OF DELINQUENCY.

A CLASS of cases has already been brought to view,† in which the principal fact in question (viz. *delinquency* in this or that shape) cannot be probabilized by the evidentiary fact deposed to before the judge, without the intervention of some other fact or facts, constituting, together with the principal fact and the evidentiary fact, an evidential chain of a peculiar nature. The case where fear, howsoever supposed to be manifested, is the fact considered as evidentiary of delinquency, belongs to this class.

In a chain of this sort, the number of links will be different, according as it is to the perceptions of the judge himself, or to those of some other person by whom, in the character of a deposing witness, it is reported to the judge, that the fact here considered in the character of an evidentiary fact (viz. *fear*) presents itself.

First, suppose the judge himself the person to whose senses the fear (*i. e.* the appearance of fear) manifests itself. The links of the evidentiary chain will then succeed one another in the manner following, viz.:—

1. Link the first (group of evidentiary facts immediately presented to the senses of the judge,) — symptoms of fear. These, being objects of sense, must all of them be such as come under the description of *physical* facts.‡

2. Link the second, — the emotion of *fear*: a psychological supposed fact, inferred and supposed to be probabilized by these physical appearances; — fear, having for its supposed cause the expectation of the evil consequences (legal punishment included) considered as attached to the offence in question, by means of the ensuing links.

3 Link the third, — self-inculpative recollection. the memory of the supposed delinquent presenting to him the wrongful act as having been committed by him; viz. the physical act, positive or negative, accompanied with its criminative circumstances.

4. Link the fourth, — the criminal act itself, as above.

In an evidentiary chain of this sort, it has

* Bolingbroke, after his partial pardon and return to England, being suspected of harbouring a person accused of a state crime, his house, and even his bed-chamber, as he was lying in his bed, were searched by the ministers of justice. Traitorous bedfellow with him he had none: a bedfellow, however, he had — a female, whose reputation would have been ruined by the disclosure. Confusion, more or less, he could not but have betrayed. Had the search ended there, this confusion would naturally and properly have been regarded as circumstantial evidence of the crime he was suspected of. His presence of mind saved him from that mischance. Uncovering enough of her person to indicate the sex, without betraying the individual, he preserved himself as well from the imputation of the crime of which he was not guilty, as from the collateral misfortune which that imputation was so near bringing on his head.

† Chapter I.

‡ The physical symptoms with which the emotion of fear has been known to be accompanied, and of which it may be considered as productive, may be thus enumerated. But amongst them are some which seem indicative of a degree of emotion so high as to be seldom, if ever, produced by the fear of an evil so distant, and so far from being certain, as the evil of a punishment which for its infliction depends on the hand of law.

In some of these instances, the individual is purely passive; no voluntary action, no exertion of the will being necessary, nor, in some of the instances, so much as competent, to the production of the physical symptom.

1. Blushing.	1. Sweating.	1. Weeping.
2. Paleness.	2. Involuntary evacuations.	2. Sighing.
3. Trembling.		3. Distortions of the countenance.
4. Fainting.		4. Sobbing.
1. Starting.	1. Exclamation.	
2. Pacing.	2. Hesitation.	
	3. Stammering.	
	4. Faultering of the voice.	

In some of the above instances the physical symptom is altogether independent of the will, it being altogether out of the power of the will to give birth to it. In other instances, though the production of it is not altogether out of the power of the will (and is accordingly effected without the existence of the emotion, in theatrical imitations,) it either takes place without the action of the will, or becomes the cause of the action of the will before it becomes the effect of it.

Of these symptoms, several will be seen to be common to the three emotions of fear, grief, and anger: some of them to result more naturally from either of those other emotions than from fear.

Physical phenomena of this kind, in so far as they point whether to fear or any other emotion as their psychological cause, may be distinguished by the common appellation of *pathological* evidence.

been already mentioned as the principal use of, and reason for, the operation of distinguishing link from link, that to each link belongs a distinct set of infirmative considerations, capable of operating in diminution of its probative force. The truth of that observation will be found exemplified in the present instance.

In this case, the chain of inference by which these four distinguishable links are connected stands thus:—1 From the physical appearances, regarded as symptoms of fear, the existence of that emotion is inferred, 2 From the supposed existence of that emotion, the existence of the criminative recollection above mentioned; 3 From the existence (viz the present existence) of that recollection, the existence (viz. the past existence) of the criminative fact itself

In relation to the second of the above three inferences, what must be observed is, that, for the purpose of forming the inference, the nature of the *occasion* is an object that must indispensably be called in; since, but for this, even supposing *fear* to be the emotion sufficiently established by the symptoms, this emotion might have had any other cause than the particular cause thus ascribed to it

But for the *occasion*, the probative force of this circumstance would scarce amount to anything. add the occasion, and of itself it cannot but be very considerable Infirmative considerations there are, as will be seen, to the disprobabilizing force of which it stands exposed; but of these—of all these taken together, the disprobablizing force (it will be seen) will not in general be very considerable.

The *occasion* here in question is the circumstance of the supposed delinquent's being taxed with, or being supposed by himself to be suspected of, the particular act of delinquency in question. the existence of which occasion is always part of the case

The second link is constituted, therefore, properly speaking, not of the fear alone, but of the fear combined with the occasion, since it is by the occasion that the existence and operation of those other possible causes, which will be brought to view in the character of infirmative possibilities, will be rendered improbable.

It is with this psychological sort of chain, as with a physical one the chain is the weaker, the greater the number of links which enter into the composition of it. Why? Because each link brings with it its particular infirmative possibilities.

I. Inference forming the joint or connexion between link the first, viz physical supposed symptoms of fear—and link the second, viz. the emotion of fear itself.

Infirmative possibilities applying to this joint:—

1. The cause of the appearances different: a purely *physical* fact, viz. bodily indisposition.

2 The cause of the appearances different: a psychological fact, indeed, and that an emotion, but a different emotion, such as grief or anger: grief or anger produced, for example, by the consideration of the wound inflicted on reputation, notwithstanding innocence.

II Inference forming the connexion between link the second, viz. the existence of the emotion of fear—and link the third, viz. the existence of a criminative recollection, having for its subject the particular offence of which the supposed delinquent understands himself to be accused or suspected.

Infirmative possibilities applying to this inference —

1 Recollection criminative indeed, but not in the way in question recollection of an offence committed, but an offence different from that of which the supposed delinquent stands accused or suspected

2 Recollection of an offence committed, not by the individual himself, but by some other individual connected with him by some tie of sympathy, and in whose instance the inquiry, it is apprehended, may be productive of conviction or suspicion

3 Recollection of a fact by means of which, without any delinquency on his part, vexation has been, or appears likely to be, produced, in this or that shape, to himself,

4 —or to another person, or even a class of persons, more or less extensive, connected with him by some tie of sympathy *

5 Apprehension of punishment, notwithstanding innocence. Of this infirmative probability the disprobative force will depend, it is evident, in a considerable degree, upon the general complexion and character of the system of procedure under which the inquiry is made

6 Contemplation, prospect, of the vexation attached to prosecution, notwithstanding innocence another circumstance the infirmative force of which will be seen to depend, more or less, on the system of procedure

III Inference forming the connexion between link the third, viz. supposed recollection of the criminative fact in question as committed by him—and link the fourth, viz. the actual commission of the act so supposed to be recollected

Infirmative possibility —

Falsity of the supposed self-criminative recollection.

The error here supposed will present itself as being of a nature not very apt to be realized. It is capable, however, of taking place,

* "Infandum, Regina, jubes renovare dolorem."
Æneas was not upon his trial: but the emotion here was not fear, but grief.
"——— Quis talia fando
"Temperet à lacrymis?"

not only in case of mental derangement, but in the case of habitual delinquency; especially if the time of the supposed offence be very remote.

Apprehended and examined, though for a theft in which he had no part, an habitual thief will naturally enough exhibit symptoms of fear; and, confounding one of his exploits with another, may suppose himself to recollect a theft in which in truth he bore no part.

Such are the conceivable facts which, in the character of infirmative probabilities, apply to the criminative force of fear, when the symptoms of it apply themselves without the intervention of any other medium to the senses of the person by whom, in the character of judge, the conclusion is to be formed —the decision grounded on them formed and pronounced.

If, instead of the phenomena themselves being presented to his senses, what is presented to him is but a report made concerning them by some other person, by whom they are stated as having been presented to his senses,—the probative force of them stands, in that case, subject to the infirmative operation which attaches upon supposed *unoriginal* evidence, as compared with the original evidence itself, an infirmative circumstance of the same nature as that by which (according to a distinction already noticed) supposed real evidence *reported*, is distinguished from the real evidence itself, and of which a more detailed view will be given in the next succeeding Book.

To the additional joint added to the evidentiary chain by the presence of this fifth link, the following circumstances present themselves as applying in the character of infirmative possibilities —

1. Possible untrustworthiness (whether in respect of moral or intellectual qualifications) on the part of the reporting witness; viz. the supposed precipient witness, speaking in the character of a deposing witness.

2. Impropriety of the shape in which his testimony was received or extracted.

If to the deciding judge this testimony be presented not in the oral but ready-written form, —3. Inaptitude, whether in respect of moral or intellectual qualifications, on the part of the receiving or extracting judge.

CHAPTER X.

OF CLANDESTINITY, CONSIDERED AS AFFORDING EVIDENCE OF DELINQUENCY.

UNDER this class of criminative circumstantial evidence, may be noted the following distinctions, viz.:—

1. Clandestinity, by concealment of the forbidden act or principal fact itself: for example, by doing in the dark what, but for the criminal design in question, would naturally have been done in the day; or choosing a spot which is supposed to be out of the view of everybody, for doing that which, but for the criminal design, would naturally have been done in a place open to observation.

2. Clandestinity by concealment of the *person* of the supposed delinquent while occupied in the act: as in the case of disguise.

3. Clandestinity by concealment of the *part* taken by the supposed delinquent in the commission of the act—in the production of the mischievous result: concealment, for example, of the *purpose* for which the act, viz. the physical act, is performed; as, in the case of murder by poison, the several acts by which the poison is prepared, or put into the hands of, or recommended to be taken by, the person intended to be poisoned.

4. Clandestinity, by *elongment* or deception of witnesses to the act: exertions employed for removing this or that person from the scene of the intended unlawful action; under the supposed apprehension of his becoming (in relation to the forbidden act, its accompaniments, or consequences) a percipient, and thence eventually a deposing witness.

5. Clandestinity, by elongment or concealment or destruction of criminative *real* evidence. Concerning the modifications of real evidence, see above Ch. III.

6. Forgery in relation to real evidence; viz. either by fabrication of exculpative appearances, or by alteration of inculpative into neutral or exculpative. The modifications of which it is susceptible correspond of course with those of real evidence.

Disguise of the person—a mode of clandestinity already brought to view—may be considered as a modification of forgery in relation to real evidence.

On the preceding occasion,* forgery in relation to real evidence was considered as capable of being practised by others, to the prejudice of the supposed delinquent: here, it is considered as practised by him. There, it was an infirmative, an exculpative probability: here, it is an inculpative fact.

Being a mode of deception, effected or attempted—a species of falsehood,—and, as such (no less than forgery in relation to written evidence) a modification of the *crimen falsi* of the Roman school—falsehood uttered by deportment,—it is in that respect closely allied to falsehood in the same intention uttered by discourse.

It may be moreover considered as being, in relation to real evidence, that which *subornation* is to personal. As in the one case, so in the other, objects of the class of *things* are thus pressed into the service of delinquency.

7. Opposition to search made for real evidence. See the next chapter.

* Chap. III. § 5.

Clandestinity, in what manner soever aimed at, may be considered as evidentiary of fear: and in that way, and that way alone (through the chain of inferences of which that emotion constitutes, as above, the principal link,) constituting a circumstantial evidence of delinquency in this or that shape, as explained by the occasion, as above.

In the case of *fear*, as above explained, the emotion itself, the psychological (and that a pathological) fact, constitutes but the second link in the evidentiary chain the first link was constituted by the physical symptoms from which that psychological fact is inferred In the case of *clandestinity*, under the several modifications as above enumerated, the positive voluntary physical acts by which the concealment is effected or endeavoured at, stand in the place of the involuntary appearances, the pathological symptoms, by which, in the other case, the emotion is betrayed

1. Intention or design, differently, but equally, or more, culpable, 2 Intention or design less culpable; 3 Intention or design blameless, though requiring secrecy * These are among the infirmative counter-probabilities which have just been seen, in the case of fear, applying to and weakening the probative and criminative force of that emotion they may here be seen applying with equal force to the criminative force of clandestinity, in these its several shapes

To the probative force of the inference, which, in the case of *fear*, binds together the two first links (viz the aggregate of the physical or pathological symptoms, and the psychological emotion,) two infirmative counter-probabilities were seen applying themselves, viz. 1. The emotion different (for example, grief, or anger,) and 2 The cause of the physical symptoms, not psychological, but purely physical, viz. bodily indisposition

In the case of clandestinity, in the place of those infirmative counter-probabilities stands another, characterizable by the word *sport* the clandestinity having for its object and its cause, desire of producing sport, merriment, pastime; and not delinquency in any shape †

At the end of a judicial investigation, it does not often happen that, in a case of clandestinity, the decision, as between sport and criminality, can be attended with much difficulty. But, for want of timely explanation, sport indiscreetly pursued has every now and then been itself an object of pursuit, when thus enveloped in the livery of guilt A man who endeavours to pass for a ghost, risks the being taken for a thief, or something worse ‡

Forgery, in relation to real evidence, has an infirmative counter-probability peculiar to itself; viz. self-defence:—the individual innocent, exertions made to remove physical appearances, which (whether produced by nature or by human malice, viz in the way of forgery) tend to fix a criminative imputation on him, in the circumstances in which he happens to be placed

In the view of removing the imputation from himself, a murderer has been known secretly to deposit in the apparent possession of an innocent person the blood-stained instrument or garment, or some other such article, so circumstanced as to operate in the character of a source of criminative real evidence * In this case, were it the lot of the innocent man to be observed in the right time retransferring the articles to the place from whence they came, it is to him, instead of the murderer, that the artifice might thus come to be imputed †

CHAPTER XI

OF SUPPRESSION OR FABRICATION OF EVIDENCE, CONSIDERED AS AFFORDING EVIDENCE OF DELINQUENCY

SUPPOSING the whole mass of evidence actually suppressed, no such discussion (it is evident) can have place, as the inquiry concerning the probative force belonging to any part of it, or the circumstances, by the con-

* Love, as well as criminality, seeking clandestinity, servants' lovers are apt to be taken for thieves: thieves, on their part, endeavour to pass for lovers.

† See, once more, the story of Joseph and his brethren (*supra*, pp. 16, 17.)

‡ In the vicinity of London, not many years ago, a ghost of this sort was shot dead, and the shooter tried for his life [This was in 1804 The neighbourhood of Hammersmith had been alarmed by the appearance of a ghost, and Francis Smith, an exciseman, determined to shoot him While he was on the watch, an unhappy miller passed by, and mistaking him, from the whiteness of his apparel, for the person who was playing the ghost, he unfortunately shot him dead Smith was tried at the Old Bailey Sessions for murder, and the jury, in the first instance, found a verdict of manslaughter; upon which the judges said, that the facts proved amounted in law to murder, and sent the jury back to reconsider their verdict They ultimately found Smith guilty of murder, and sentence of death was passed upon him by the recorder. This sentence was afterwards commuted to one year's imprisonment, on the application of the Lord Chief-Baron to the Home-Office. (See Sessions Papers, and European Magazine.)—*Ed.*]

* London pickpockets have been known at places of public amusement, to put the empty purses of the persons they have been robbing into the pockets of innocent persons near them, in order that they might accuse them of being the thieves, in case they themselves were taken into custody.—*Ed.*

† See, again, the story of the Little Hunchback (p. 11, note *.) A body, supposed to be dead, is transferred from neighbour to neighbour, always with the utmost secrecy, under the apprehension of the suspicion that might be produced by it, in the event of a visit from the officers of justice.

sideration of which, that force may be diminished.

But, under the head of these several modifications of criminative circumstantial evidence considered as deducible from active deportment, the attempt, successful or unsuccessful, is to be understood. for it is by the attempt, successful or unsuccessful, that the state of the mind is indicated; and it is from the state of the mind, that the criminative inference is (not less properly than naturally) deduced.

Preventing as it were the *birth* of evidence, by preventing from becoming witnesses (*i. e.* *percipient* witnesses) those by whom that character might otherwise have been acquired, is a criminative circumstance already brought to view, viz. under the head of clandestinity The circumstances in view under the present head, are such as are capable of taking place at a more advanced stage of the business, viz. at any point within the length of time intervening between the moment in which the offence is considered as having been committed, and the moment at which the evidence produced in consequence of prosecution comes to be delivered The mal-practice here in question is, therefore, any act whereby a person who, in relation to any criminative fact in question, has already been in the condition of a percipient witness, is prevented, or is endeavoured to be prevented, from appearing in the character of a deposing witness. But to draw, for the separation of the two objects, a clear line of distinction applicable to all cases, would be found impossible

Under one or other of the two general heads here mentioned, the following specific modifications of circumstantial criminative evidence seem comprisable: —

1. Destruction, concealment, eloignment,* or falsification of any already existing source of real or written evidence, tending or supposed to tend to the inculpation of the supposed delinquent.

2. Interception of evidence, oral, real, or written. Measures taken to prevent the forthcomingness or delivery of the evidence of a person whose testimony, in the character of a deposing witness, would tend, as supposed, to the inculpation of the supposed delinquent; or the evidence deducible from the written document, or other thing capable of operating in the character of a source of written or real evidence. *ex gr.* by obstacles thrown in the way of whatever antecedent operations may be necessary to the delivery of it.†

3. Subornation causing a person to deliver false testimony, tending to the exculpation of the supposed delinquent.

4. Fabricating, or causing to be fabricated, evidence, real or written, tending to the exculpation of the supposed delinquent.—*N.B.* This is one out of several modifications of forgery in relation to real or written evidence.

As to infirmative counter-probabilities, considered as applicable to the criminative circumstances comprehended in this class, — the generally applicable ones already mentioned may perhaps be found, some of them, to be applicable upon occasion here, though in general with but a slight degree of probative (or rather disprobative) force.

The infirmative counter-probability peculiar to this class may be thus designated: *apprehension of similar mal-practice* on the other side.

The supposition that, in the character of an infirmative counter-probability opposed to any of the criminative circumstances in question, this consideration can operate with any such degree of disprobative force as to render it worth employing, involves the supposition of no ordinary degree of depravity on the part of the national character at the time.

English law affords a story, which, whether meant for truth or jest, may alike serve for exemplification. Pressed for payment on a forged bond, a man applies to his attorney.

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* *Eloignment*, a word adopted from the French into English law language, is wanted, together with its conjugates *eloigner*, to *eloign*, in current language. For *eloigning* a man, the general stock of the language has no better expression than *getting him out of the way*

Tampering — viz. with evidence — is a term applied as well to the endeavour to intercept oral testimony, with the consent of him who should have delivered it, as to the endeavour to procure by subornation false testimony, from one who otherwise would not (it is supposed) have delivered any testimony at all, or would not have delivered other testimony than what was true.

Labouring and *embracing* are words used in law language as synonymous with *tampering*, but only where the persons tampered with are considered as invested, or about to be invested, with the character of jurymen.

By *tampering* seems to be meant, an endeavour to cause the person in question to act, on the occasion in question, any part contrary to what is considered as being his duty with reference to the ends of justice. In this sense, it seems applicable with equal propriety to the situation of any person whose duty it is considered to be, in virtue of any function (permanent or occasional,) to render his services in any way conducive to these ends: to the situation consequently of *judge* (permanent judge,) *juryman*, or *subordinate* minister of justice; or in the case of any officer considered in the light of a public officer, *prosecutor* as well as witness.

As to the means whereby a man may be caused to swerve from the line of his duty, whether by *eloigning* him (getting him out of the way) or otherwise, they seem comprisable under three heads, viz. *corruption*, *deception*, and *force*: including under the notion of *force*, as well psychological (*i. e.* fear of evil) as physical.

† For a list of these operations, see *Scotch Reform* (Vol. V.) Table I. Col. iii.

Client. "What is to be done?"—*Attorney.* "Forge a release." On looking back, one cannot say exactly how far, it might not be impossible to find, even in English history, a period in which a story of this sort might have had a foundation in truth.

In some countries there have been said to exist a sort of houses of call, or register offices, for a sort of witnesses of all work, as in London for domestic servants and workmen in different lines, and in some parts of Italy for assassins

Ireland, whether in jest or in earnest, was at one time noted for breeding a class of witnesses, known for trading ones by a symbol of their trade, straws sticking out of their shoes.

Under the Turkish government, it seems generally understood that the trade of testimony exists upon a footing at least as flourishing as that of any other branch of trade

CHAPTER XII.

OF AVOIDANCE OF JUSTICIABILITY, CONSIDERED AS AFFORDING EVIDENCE OF DELINQUENCY.

On the part of the supposed delinquent, the acts or modes of conduct immediately directed to the production of this effect may be thus enumerated · —

1. *Expatriation* · migration into the dominion of some foreign state, viz. of some foreign state in which, at the instance of the judicatory in question, justiciability on the part of the supposed delinquent will not (it is supposed) in the case in question be enforced.

2. *Exprovinciation* migration into another juridical district within the dominion of the same state; viz in so far as such change of place is regarded as being, definitively or for a time, productive of the like effect *

3. *Latency:* the supposed delinquent being so circumstanced as that means whereby he may be found, as well as the spot where he is, are unknown; viz to him who, in the character of judge, or in that of prosecutor, is desirous of causing his person to be forthcoming, for the purpose of his being justiciable

4. *Latitancy* i. e. where the non-forthcomingness of the supposed delinquent is clearly understood to have the avoidance of justiciability for its cause.

5 *Eloignment of property* i. e. by expatriation, exprovinciation, transfer into other hands, or concealment

6 *Tampering* with any person, on whom, in whatever character, *ex gr* in that of minister of justice, permanent or occasional,

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* Considered as a means of avoiding justiciability, the effect of exprovinciation will be the greater, the greater the obstruction offered by it to the power of justice, whether by means of local distance, or by means of independency of jurisdiction.

Of the mode and degree of the obstruction thus capable of being opposed, the diversifications are infinite: particularly in modern times, since it has been a fashion among the powers of Europe to comprise each of them within its grasp the most distant parts of the globe.

The obstruction opposed by independency of jurisdiction, being a psychological cause, is removable: the obstruction opposed by local distance, a physical cause, is inexorable.

Accordingly, though in general the obstruction opposed by *expatriation* will be greater than by *exprovinciation*, yet, in some instances, that which is opposed by *exprovinciation* will be the greater. In the instance of some offences (forgery in particular, in which public credit all over the globe beholds an enemy,) the great European states, Britain not excepted, have surrendered each to the justice of the other its supposed delinquents In so far as this disposition prevails, the obstruction given to the course of justice by expatriation—for example, from London to Calais, or even to Paris—may not be so great as that opposed by exprovinciation from London to the Orkneys, or though it were no further than to Edinburgh; not to speak of the West or East Indies.

Person and *property* are not the only objects on which, for the purpose of securing effective justiciability, the law has it in its power to take hold Over and above these corporeal objects, there remain two incorporeal ones, viz. *reputation* and *condition in life*, by means of which the feelings of individuals are exposed to be wrought upon by the force of the law, as well as by that of lawless injury.

But *person* and *property* are the only objects which it is ever in the power of an individual, in case of delinquency on his part, to withdraw out of the power of the law. in spite of his utmost efforts, reputation and condition in life continue subject to it.

Even in regard to property, the extent of the power which it depends on the individual to exercise over it, in spite of the law, or without its assistance, is subject to very extensive limitations. To immoveables it does not extend: nor even to money or moveables in any case where, his power depending upon the consent of other persons, that consent is withholden or refused. Hence the influence, in some cases irresistible, in others no more than ideal, of the judgment of *outlawry;*[a] by which, amongst other penal consequences, the defendant stands deprived in a considerable degree of that security for his property, which depends upon the protection that would be otherwise afforded him by the law.

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[a] If a defendant absconds after a writ of *capias* has been awarded, and certain formalities observed, he is proclaimed an outlaw, and is incapable of bringing actions: formerly his life was unprotected by the law, and he might have been killed with impunity by any one who met him. 4 Black. Com. 319. Judgment of outlawry for treason or felony, renders a man an incompetent witness in a court of justice; but outlawry in a personal action does not. 3 Inst. 212. Celier's Case, Sir T. Raym, 369. Co. Lit. 6. b.

superordinate or subordinate (prosecutor, in the case of an offence considered as being of a public nature, included,) his justiciability may depend.*

The several special inculpative circumstances comprised under this more general head being all of them indicative of fear—fear having its source and object in the power of the law,—the infirmative counter-probabilities applying to this case are *pro tanto* the same as those which apply to that.

In the case of the four that consist in so many expedients employed or supposed for the avoidance of personal forthcomingness, the infirmative consideration already above designated by the phrase *contemplation of juridical vexation notwithstanding innocence*, operates with peculiar force.

A circumstance that demands attention, with an immediate view to practice, is, that this force will of course undergo variation, according to the nature of the system of procedure—according to the mode and the degree in which it is subservient or adverse to the several ends of justice.

The exculpative force of this infirmative counter-probability will be the greater—in other words, the probative force of the criminative circumstance constituted by *avoidance of justiciability by elongment or concealment of person* will be the less—the greater (for example) the vexatiousness or the length of the imprisonment to which, by accusation or suspicion of the offence in question, a man stands exposed: understand provisional imprisonment (in technical language imprisonment on mesne process,) so circumstanced that the innocent as well as the guilty stand exposed to it†.

Other differences might be cited, by which the determination, whether to abide or not to abide the course of penal procedure, could not but be more or less affected: the severity of punishment, and the severity of the pro-

* Note here, that if, instead of any of the specific modes of designation here employed, the general expression (*avoidance of justiciability*) taken to serve as a title to this chapter, be employed, the inference in question is considered as already established.

In the case of each of these criminative circumstances, fear (viz. fear of the power of the law) is the relatively principal fact immediately indicated. Were they respectively present to the senses of the judge,—as are, in case of oral interrogation, the physical modifications of passive deportment which constitute the pathological evidence of that emotion, and the modifications of self-disserving testimony extractible by interrogation,—they would occupy the same station in the chain of suppositions. But, scarcely being in any instance so present, they cannot come to his cognizance but through the lips or pen of some deposing witness: by which means a fifth link is added to the evidentiary chain, as in case of any other inculpative fact considered as having been extra-judicially observed.

In this case, *fear*, and *avoidance of justiciability*, may, though not synonymous, be employed indiscriminately to represent the link in question in the chain of suppositions. It is only in so far as it is indicative of fear (fear of evil as about to be suffered from the hand of law,) that avoidance of justiciability can operate as a criminative circumstance: and, to weaken the inference thus drawn, [illegible] other infirmatives seem applicable than what have been already brought to view as serving to weaken the probative force of fear itself, considered in the light of a criminative circumstance.

† Under the penal procedure of the Roman law, or, to speak more accurately, of the system which, before the Revolution, existed in France, the probative force of the inculpative circumstances of this class should accordingly, it should seem, be less than under the English.

For the purpose of computing the average duration of a penal suit, the collection of trials entitled *Causes Celebres* (thirty volumes in closely-printed 12mo) was examined. It was not in every instance that the duration of the suit could be ascertained: in the instance of those in which it was capable of being ascertained, the average duration turned out to be near six years. In these, it is true, the intricacy of the cause was above the ordinary pitch. But under English procedure it would be difficult, perhaps impossible, to find a penal cause, on the occasion of which, down to definitive judgment, the provisional imprisonment had lasted a fourth part of that time.

In penal cases, the procedure of the Roman school does not admit of discharge on bail with near so much facility as the English.

In England, in a case not bailable, the criminative force of the circumstance in question may be calculated, and with some degree of precision, from geographical data. In the class of causes most highly penal, in London and Middlesex, justice is administered in about forty-eight days out of the three hundred and sixty-five; in the other counties, with the exception of the four northern ones, in about four out of the three hundred and sixty-five; and in these northern ones, in about two out of the three hundred and sixty-five.[a]

A supposed duellist, for example, who has killed his man, is in a state of expatriation, latency, or even latitancy. In London and Middlesex, the criminative force of any one of these symptoms of fear (the possible chance of being let out upon bail by the Court of King's Bench, being laid out of the case as not capable of being brought into calculation) will be a little less than four times as great as in any other of the southern counties, a little less than eight times as great as in any one of those four northern counties.

[a] Some improvement has taken place in this matter since the above was written. The central criminal court, which has jurisdiction over London, Middlesex, and part of Surrey Kent and Essex, sits twelve times a-year; each session lasting, on an average, for about seven or eight days. The four northern counties are now placed in the same situation as the other counties;—that is, they are all visited twice a-year by the judges for the purpose of trying the class of causes referred to by the author, as well as civil actions. *Ed*

cess employed for the extraction of evidence In France, while breaking on the wheel and other excruciating modes of capital punishment were in use, the hazard attending such abidance could not but present itself as considerably greater, and consequently the inference from flight to delinquency considerably less cogent, than at present, when simple death is the highest degree in the scale and another, and perhaps still greater, difference, could not but be attached to the useless barbarity of preparatory torture *

Health — business — pleasure, — by any one of these objects of pursuit may a man be engaged in a plan of expatriation, exprovinciation, or eloignment of property by pursuit of pleasure, possibly even by pursuit of business, he may be engaged in a plan of latency here there are so many infirmative counter-probabilities operating in diminution of the probative force of the four circumstances in question, in the character of evidences of fear of the hand of law, and thence as evidences of delinquency.

In a word, under one or other of these three modifications the ordinary pursuits of mankind in general being comprehended, the consequence in regard to the circumstances in question is, that, considered in themselves, and independently of every other circumstance of a criminative tendency, they can scarcely be considered, even putting all of them together, as operating with any perceptible degree of criminative force

The presumption afforded of delinquency by any one of these changes will be the stronger, the greater the deviation it makes from the course of life habitually pursued by the supposed delinquent

In the case of a mariner, a carrier, an itinerant vender, or an itinerant handicraft, it may amount to nothing in other words, the disprobative force of the infirmative counter-probability denoted by the expression *pursuit of business*, may be so great as to reduce to nothing the probative force of the criminative circumstance or circumstances in question, — viz. expatriation, exprovinciation, eloignment of property, or latency, — any one or more of them

In case of real delinquency, — expatriation, exprovinciation, or eloignment of property, one or more of them, are apt to be accompanied with the circumstance of clandestinity; and (for the purpose of clandestinity) with mendacious extra-judicial discourse, having for its object the preventing or removing, on the part of any persons on whose part inculpative testimony is apprehended, all suspicion of the true cause

'That, by the concurrence of any such other criminative circumstances, the criminative force of the circumstances here in question cannot but receive considerable increase, is altogether obvious

But it does not follow that, by the mere non-appearance of these confirmative circumstances, the criminative force of the circumstances here in question must be altogether destroyed, since it may happen, that — the change of place in question having been already determined upon, in pursuit of business, health, or pleasure — advantage may have been taken of the means thus afforded for the avoidance of justiciability, and, under favour of the promise of impunity thus entertained, the crime in question may have been committed

As to *tampering* with prosecutors and other ministers of justice, to an act of this description, considered in the light of a criminative circumstance, the same suppositions apply in the character of infirmative counter-probabilities, as have been seen applying in the case where the persons thus practised upon are considered in the character of witnesses

Expatriation, exprovinciation, and eloignment of property, involve in each instance the necessary supposition of intentional agency, positive or negative, but in general positive, on the part of the supposed delinquent himself In latency, on the other hand, no such supposition is necessarily involved what it designates is the effect — not any act by or by the help of which the effect is produced.

Latency — though it does not necessarily import, on the part of the supposed delinquent, any act done by him in the view of producing the effects designated by it — is, in respect of its criminative force, subject to the operation of the same counter-probabilities as those which apply to the other criminative circumstances which do, on his part, import action since, like any of them, it may be the result of a man's ordinary and blameless pursuits

By the word *latency*, nothing more can be designated than the state of him in whose instance no means of communicating with him, either through the medium of his place of abode or otherwise, is known to those to whom such knowledge is necessary to enable them to insure his forthcomingness for the purpose of justiciability.

But in whose conduct is the cause of this want of knowledge to be found?

Till this point be settled, the condition denoted by the word *latency* can scarcely, with

* How acutely sensible must a celebrated French lawyer have been to the defects of the system of procedure established in his country, when he said — "*Je furais, si l'on m'accusait d'avoir volé les cloches de Notre Dame!*" In such a state of things, it is evident, the infirmative force of the counter-probability which we have termed *contemplation of judicial vexation notwithstanding innocence*, is so strong as entirely to destroy the probative force of the circumstance of latitancy, considered as evidentiary of delinquency.

propriety, be placed upon the list of criminative circumstances.

The means of communicating with an individual (*i. e.* the means the best adapted to that purpose) can scarcely be brought under any general description: they will in every case be dependent on the individual circumstances in which, at the individual point of time, he happens to be placed. But it does not often happen that the means are deficient, or prove ineffectual, when, to the real desire, the power is added,—such power as it depends on the law to give.*

If it be really my wish to communicate with a man, to hear from him, and make him hear from me, what course do I take? The answer is almost too obvious to be called for I make inquiry among his friends. Such is the course which everybody takes whose wish it is to succeed, and such is the course which it has been the care of English judges not to take.

Supposing powers adequate to the purpose given by the law, those powers accompanied with the correspondent obligations, and those obligations duly fulfilled, then it is, and not till then, that latency becomes presumptive evidence of *latitancy*, and through that of criminality latitancy being understood to designate *voluntary latency*, having for its object the avoiding forthcomingness, for the purpose of avoiding justiciability.

Supposing the fact of latency established, and the fact of latitancy justly inferred from it, still, under the existing institutions, there exists a counter-probability by which its probative force in the character of a criminative circumstance is weakened. Fear, and fear of the law, would indeed be indicated, but the real evil apprehended at the hands of law might be, not the evil of punishment, inflicted under that name, on the score of criminality in any shape, but the evil of imprisonment, on the score of satisfaction for money due on an account not penal

In so far as non-discharge of pecuniary debts, or other non-penal obligations, is considered as an offence, and non-surrender of a man's person to imprisonment in satisfaction for the wrong done by the non-fulfilment of those obligations, is considered as an ulterior offence grounded on the former,—the engaging in a course of latitancy for the purpose of voiding such imprisonment may be considered as constituting the matter of the infirmative supposition above indicated under the title of *design less culpable.*

Suppose a prosecution actually commenced, and notice of its being so actually received by the supposed delinquent: on this supposition latency is actually converted into latitancy.

Notoriety of the obnoxious event, coupled with notoriety of popular suspicion fixing upon the supposed delinquent as having been concerned in the production of it;—these circumstances together will operate, of course, in the character of evidentiary facts, affording presumptive evidence of the information's having reached his ears.

By habitual occupation, or by accident, he was in an itinerant state. He is illiterate, and the advertisements, if any have issued from the press, have not reached his eyes. The country is of the number of those which are not yet far enough advanced in the arts of life to render communications in that mode customary or easy These may serve as examples of a variety of circumstances by which the probative force of simple latency, as evidentiary of latitancy, may be more or less impaired.

CHAPTER XIII

OF THE SITUATION OF THE SUPPOSED DELINQUENT IN RESPECT OF MOTIVES,* MEANS, DISPOSITION, CHARACTER, AND STATION IN LIFE, CONSIDERED AS AFFORDING EVIDENCE OF DELINQUENCY.

§ 1. *Of the situation of the supposed delinquent in respect of* motives *and* means, *considered as probabilizing or disprobabilizing delinquency.*

BETWEEN these several objects the connexion is so intimate, that they can scarcely be spoken of, any of them, without reference to the rest. But, with regard to delinquency, the indications they will be seen to afford, are, with reference to one another (though all material) very various, and even discordant; being not uniformly inculpative, but in some respects exculpative—in others directly inculpative,—in others again inculpative, but not so much directly as indirectly, by serving to weaken the force of an exculpative circumstance. and, as such, not admitting any infirmative supposition.

The psychological object designated by the

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* Unfortunately, under English law, no such suppositions are realized; a system of sham notices being among the devices whereby the ends of judicature are pursued, under the pretence of pursuing the ends of justice. On this as on so many other occasions, the inquiries which common sense would dictate, and common honesty pursue, legal policy forbids. Without any expense of thought, from latency latitancy is inferred, and from latitancy delinquency; and, though not absolutely without other evidence, yet, without any evidence of the nature of which it is possible for the supposed delinquent to be apprized. If a bill of indictment, after evidence heard thereon, is found true by a grand jury sworn to secrecy, a writ called a *capias* issues thereupon; and, in consequence of that writ, after a series of sham notices read by a man to himself in a private chamber, judgment of outlawry, in which conviction is included, is pronounced of course. [See p. 50, sub-note ^.]

word *motive*, is, as it were, the basis of all the rest.

The existence of a motive, by which the supposed delinquent might have been led (it is supposed) to the commission of the offence in question, is a fact which, in criminal cases more especially, is very frequently made the subject of proof Is there any use in doing so? In certain cases, no and in those, I believe, it never is done in other cases, yes: and in these, I believe, at the suggestion of common sense, it commonly is done In what cases, and in what sense of the word *motive*, it is worth while and practicable to have recourse to evidence or argument for this purpose, seems very generally understood in practice.

Motive is a term applied to the indiscriminate designation of divers objects, which require to be distinguished

It is applied to designate any *desire*, when considered as the cause of action call this the interior or *internal* motive.

It is applied to designate any corporeal thing, or mass of things, considered as the object of any such desire call the object by which such desire is considered as excited, or capable of being excited, the exterior or *external* motive.

Thus, when a hungry man knocks down a baker, for the purpose of stealing a loaf of bread, — hunger is the *internal* motive of this criminal act, a loaf of bread the *external*

A mischievous event being supposed to have been produced, and Titius suspected of having been concerned in the production of it, — *What could have been his motive?* says a question, the pertinency of which will never be matter of dispute.

The following seem to be the circumstances to which it owes its pertinence —

Every act which, in the force of any one or more of the tutelary sanctions, finds a source of restraint — every penal, every disreputable, in a religious community every irreligious, act — is on that account rendered more or less improbable, by the consideration of the penal or other evil consequences attached to it. Unless this restrictive force finds an impulsive force, and that stronger than itself, in opposition to it, the culpable act is not merely *improbable*, but, psychologically speaking,* *impossible*

To ask, *What*, in this case, *could have been the motive?* is to ask, not what could have been the interior, but what could have been the exterior motive, and that adequate in point of force to the production of such an effect. Not the interior motive, because, without any exception worth noting to the present purpose, all sorts of desires are common to all human beings. but what could have been the *exterior* motive? In the situation in which the supposed delinquent appears to have been placed, where is the object to be found, which could excite a desire strong enough to give birth (notwithstanding the opposition made by the combined force of the several tutelary sanctions) to an offence of the nature of that which he is suspected of?

To go about to prove on the part of the supposed delinquent the existence of a *desire*, a *feeling*, a *passion*, which presents itself as capable of accounting for the commission of the crime, would be an enterprise frequently impracticable, and always useless No crime that has not some species of desire for its cause, and, with an exception or two not worth dwelling upon, no human bosom that is not the seat, constantly or occasionally, of every modification of desire

It is not the mere existence of the desire — the propensity or the relish for this or that source of pleasure, the aversion for this or that source of pain If it were,—by the same rule that the supposed delinquent is guilty, so is every other human creature It is the existence of some exterior object, of a nature to call into action this or that desire or propensity, and to infuse into it a degree of force capable of surmounting the joint force of those tutelary motives, by the influence of which men in general are restrained from giving the reins to criminal desire

Under the denomination of the *motive* must be comprised, for the present purpose, not only the internal desire, but the contemplation of the exterior event, or state of things, which the desire looks to for its gratification — looks to as the cause which will bring within a man's reach the good (whatever it be) which is the object of the desire The existence of the motive in the former sense, is the psychological fact — in the latter, the physical fact It is in the latter sense, and that alone, that the existence of a motive either requires proof, or is susceptible of it. In this case, the internal motive to the act— the criminal act — is the expectation that the good in question will be brought into a man's possession by such criminal act. The existence of Titius is sufficient proof of Titius's being acted upon, and that during the whole course of his life, by the love, the desire, of the matter of wealth The man who, desiring to live, has no desire for the matter of wealth, exists only in the fancy, or rather in the language, of shallow declaimers · to desire to live, is to desire to eat; and to desire to eat, is to desire to possess things eatable.

What, then, is the matter of fact proved, under the name of the existence of a motive? It is either the actual excitation of this or that desire by this or that assignable cause, or else the existence of this or that object,

* See below, the chapter (Chap. XVI.) on *Improbability and Impossibility.*

in a state in which it will naturally, in the breast of the party in question, have had the effect of exciting this or that desire. Man in general is susceptible of enmity—the desire of witnessing pain on the part of the individual who is the object of it. Man in general is susceptible of sexual desire. No human bosom that does not harbour within itself the love, the desire, of the matter of wealth. Thus much is what everybody is sufficiently persuaded of: thus much is what nobody ever thinks of proving. But Clodius had become the object of enmity to Milo. in the bosom of Tarquinius the appetite of sexual desire had attached itself upon the idea of Lucretia with particular force. upon the death of Amerinus, property to a considerable amount was secured to Hæres; of that state of things Hæres could not be unconscious, and had been heard to speak of it with impatience These are facts which admit of proof, and may well appear to call for it. But, in the case of the happening of the correspondent obnoxious event in question, and a suspicion pointing to Milo, Tarquinius, or Hæres, respectively, as the criminal author of that event,—to prove the existence of these respective facts, is to prove, on the part of these persons respectively, the existence of the appropriate motive

Thus it is that the consideration of any object pointed to as capable of having operated, in the case in question, with an adequate degree of seductive force, acts in relation to the supposed offence, not so much in the character of a directly probabilizing consideration, as in that of a consideration tending to repel the force of improbability (psychological improbability) acting in the character and direction of a disprobabilizing circumstance. On no occasion (says the defendant) does man ever act without a motive. Admitted (replies the prosecutor) but here, then, was your motive: such or such may have been the desire excited in your breast: thus or thus was it, or might it have been, gratified by the event, of which, from all the evidence taken together, your act, your criminal act, is concluded to have been the cause. Against this disprobabilizing circumstance—psychological improbability,—the existence of a motive, if proved, may have considerable weight. it may even destroy the force of the disprobabilizing circumstance altogether. Considered in itself, the criminative force of the circumstance consisting in the *motive* (consisting in this, viz. that the situation in which the supposed delinquent is, is such as subjects him to the action of the motive in question,) amounts to nothing. In the natural course of things, where there is any property, every child has something to gain by the death of a parent. But, upon the death of a father, no one is ever led by any such consideration to look to an act of parricide, in the first instance, as the most probable cause of the death.

Not being properly a criminative circumstance, no counter-probabilities seem applicable to it in the character of infirmative considerations.

The following cases may serve as instances where, in the way above explained, the *motive* (viz. the *exterior* motive) became, and with propriety, an object of consideration, in the character of a criminative circumstance.

Anno 1781.—Donnellan's case at Warwick assizes Offence, murder of his wife's brother. Motive, prospect of succession to his property.

Anno 1803.—Fern's case at Surrey assizes. Offence, incendiarism. Motive, profit by over-insurance.

Anno 1803 — Robert Wilson's case at Edinburgh. Offence, murder of his wife. Motive, paving the way to a more agreeable connexion with another woman.

Anno 1753.—Mary Blandy's case at the Oxford assizes. Offence, the murder of her father by a long course of poison. The property of the father was considerable: she was an only child; it would fall to her of course. But, where parricide is the offence, is it in the nature of money to constitute a seducing motive? At that rate, parricide, instead of being as rare as it is horrible, would be among the most frequent of offences. She was enamoured of the wretched Cranston, her seducer, and the existence of the fondest of parents presented itself as an obstacle to an union, which, had she known all, she would have known could not be legalized. What the force of steam is in the physical world, the force of love is in the psychological—capable when under pressure, of opposing the strongest force. The existence of such pressure is among the most common of all family incidents; the attempt to surmount it by such flagitious means, happily among the most rare. But to bring this motive to view required no separate evidence. The same evidence which showed from what source she had received the poison, showed by what motive she had been led to administer it.

Theophrastus is accused of theft. Fortune, opulent, reputation, unspotted; disposition, generous. The object of small value. Delinquency assumed; what could have been his motive? It was a black-letter book; a cockleshell; a butterfly. Theophrastus was a collector.

Means—*i. e.* means of producing the mischievous effect in question—seem to come under consideration to much the same purpose as *motives*. The belief of the existence of whatever means are regarded as necessary to the production of the effect in question, being a condition precedent to the endeavour,—*means* may in this case be considered

as coming under the denomination of *motives*: power being as necessary an article as desire, in the assemblage of productive causes.

By *opportunity* seems to be understood an assemblage of such articles, in the composition of the aggregate mass of means, as possess not a permanent, but only a transient existence.

§ 2. *Of the situation of the supposed delinquent in respect of* disposition *and* character, *considered as probabilizing or disprobabilizing delinquency.*

Disposition is produced by motives

A man is said to be of such or such a disposition, according as it is to the influence of the motives that belong to this or that class that he is considered as being more or less in subjection, reference being made to the degree of influence supposed to be exercised by these same motives over the minds of the generality of the class of persons with whose conduct his conduct is compared If the motives of the self-regarding class are considered as predominant, a selfish disposition is ascribed to him if motives of the social class, a disposition of the social or benevolent cast if of the dissocial kind, a disposition of the dissocial or malevolent cast.*

The effect of *disposition*, supposing it in proof, may be either inculpative or exculpative. So far as it is of the virtuous cast, and thence the tendency of its operation exculpative, important as the consideration is, it belongs not to this place The effect and use of it is, to be opposed to inculpative evidence of all sorts, and, on the ground of a modification of improbability (viz psychological improbability,) to tend to discredit direct and positive evidence, or, in the character of an infirmative consideration, to diminish the probative force of the inferences drawn from the circumstantial part of the evidence

So far as the disposition indicated is of the vicious cast, exhibiting a more than ordinary degree of force on the part either of the self-regarding or dissocial motives,—it will generally, though not uniformly, afford inferences tending to probabilize the delinquency of the supposed delinquent, in respect of the offence in question, whatever it may be In general, however, it admits not of proof on purpose To take *disposition* for the subject of express inquiry, would be to try one cause, or perhaps a swarm of causes, under the name and on the occasion of another.

But, not unfrequently, indication of disposition, depravity of disposition, comes in of course, along with other and more directly apposite evidence; and when it does, it is naturally impressive, and, if sufficiently proved, it is scarcely to be wished that it should be otherwise than impressive.

As to infirmative suppositions, they are, here also, plainly out of the question · reasons the same as above

Character is sometimes used as synonymous to *disposition* itself, but, more commonly, for the opinion supposed to be entertained concerning the disposition of the individual in question, by such persons as have had more or less opportunity of becoming acquainted with the indications given of it †

Character is accordingly, on occasions of this sort, the word almost exclusively in use. *disposition* very seldom the distinction is scarcely an object of notice

For the consideration of character (so far as there is any difference) there is evidently still less room, in general, than for that of *disposition*, for the purpose of probabilizing the act of delinquency in question, on the part of the supposed delinquent

Cases, however, are not altogether wanting, in which not only the question of *disposition*, as indicated by this or that article in the general mass of evidence collected for other purposes, but even the question of *character*, as distinguished from disposition, may, in a criminative view, present a claim to notice

Offences having ill-will for their motive — having ill-will for their psychological cause, —seem to be those, in respect of which, in a criminative view, the question of character is most apt to be material In the case of an offence of this description, take the following examples —

1 Offence, personal injury, the author uncertain the character of the supposed delinquent, is it such as to point to him rather than to others?

2 Quarrel mutual, the supposed delinquent a party the transaction more or less involved in obscurity —considering the adverse party on the one hand, and the supposed delinquent on the other,—which, in respect of his *character*, seems most likely to have been in the wrong, or likely to have been most in the wrong?

§ 3. *Difficulties attendant on the admission of character evidence.*

In an abstract point of view, it appears ob-

* See *Introduction to the Principles of Morals and Legislation*, Vol. I. Where a multitude of acts of the same complexion are considered as following one another on the part of the same person (especially if in a series extending over a considerable length of time,) the word *habit* is applied to the case. From a single act, disposition is apt in some cases to be inferred: *à fortiori*, from habit.

† Thus in English. In French, *caractère* seems scarcely ever to be employed to denote anything but the disposition itself: where the opinion entertained of it by others is meant to be brought to view, the word *réputation* is employed.

vious and indisputable, that, on the question between delinquency and non-delinquency, considerable light may be expected to be thrown by the consideration of previous character. But, when the occasion calls for applying this general notion to practice, difficulties of no small moment will be seen to arise: some of them such as seem scarce capable of receiving solution but in the Gordian style.

1. Character favourable tendency of the evidence, exculpative fact indicated, non-delinquency. Bond of connexion between the evidentiary fact and the fact indicated, improbability of the psychological kind: improbability that a man bearing such a character should have soiled it by such an offence: that a man in whose instance the preponderance of the social motives over the dissocial and self-regarding has been so decided and confirmed, should, in the individual instance in question, have given way to the impulse of the seductive motives.

Whether the character be general or special, in this case the danger of prejudice to justice does not present itself as by any means considerable enough to indicate the propriety of excluding the evidence in any case. 1. Circumstantial evidence so loosely connected with the fact in dispute, is not likely to prevail against a mass of appropriate evidence, whether direct or circumstantial, or both together, to an amount sufficient for conviction. 2. In the case of general bad disposition, and its natural consequence, bad character, it will in general not be easy to obtain testimonials of good character from persons possessing a character of sufficient apparent trustworthiness to present a prospect of material probative force.

Nor would it be safe to put an exclusion upon evidence of this nature inasmuch as, in case of an inculpative conspiracy, or even an untoward combination of circumstances, it may be the only sort of evidence by which it may be in the power of the purest and most exalted probity to defend itself. In all such cases, general character, it being on the favourable side, is pertinent: nor does it lie open to the objection which we shall see applying to it if employed for the purpose of painting character on the unfavourable side.

What seems the only objection, then, in this case, is referable to the head of vexation: vexation to the judge (which is vexation to the public through the medium of the judge,) by the time that may come to have been consumed in the exhibition of a species of evidence of which the probative force is so inconsiderable and inconclusive: vexation again to the judge, by the quantity of his power of attention that may come to have been expended upon a species of evidence comparatively irrelevant — a species of vexation which, when screwed up to a certain height, becomes dangerous even to the direct justice of the cause.

To the species of vexation attaching itself (as above) to the station of the judge, may be to be added in some cases another lot of vexation attaching itself to the station of witness; viz. to the witnesses from whom the testimony in question is to be extracted. On the other hand, vexation, in this instance, supposes unwillingness on the part of the witness, power to compel his testimony notwithstanding, and that power exercised. A witness who is on such an occasion unwilling to depose in a man's favour, is not likely (it may be said) to be called upon by him for that purpose: hostility rather than sympathy is the affection in such a case to be expected. But it does not follow by any means, that because a man is unwilling to take upon him the loss of time, and perhaps expense, imposed upon him by his coming forward in the capacity of a witness, his reluctance and resentment should rise to such a height as to engage him to give an unfavourable testimony, in contradiction to his own conscience.

2. The case where the party calling for the evidence of character (the defendant's character) is the demandant — the prosecutor, — the expected tendency of it consequently unfavourable — presents much greater difficulties.

1. Is it conceived in general terms? — no specification of facts, no instances of particular misconduct on any individual occasion specified? — A wide, and at the same time a safe, door is opened to calumny. The calumny is in its nature unpunishable. By the supposition, no particular fact is or can be specified, nothing which, for the purpose either of punishment or compensation, is capable of being disproved. What is delivered is mere matter of opinion, and that an opinion which, by the power of the law itself, a man is compelled to give.

2. Is it conceived in particular terms? particular facts stated? — Still either the door is left open to calumny, or fresh difficulties present themselves. Neither on this nor on any other occasion ought a man's reputation to be liable to be destroyed or impaired by mere hearsay evidence. If a punishable or otherwise disreputable act is to be charged upon a man, on this occasion as on others, the charge ought to be made good by a satisfactory mass of evidence. On this as on any other occasion, he ought to be heard in his defence, with liberty to contest the charge, and produce exculpative evidence of all sorts, as in other cases. Under the name of giving evidence of character, what then does the operation here in question amount to? It is trying one cause for the purpose of another cause. Say rather, trying an indefinite number of causes; for it is not a single swallow that makes a summer — a single act a habit, a disposition, a sufficient

ground for character, and that unfavourable. Causes thus in any number are tried — one cause, at least, is tried — as it were in the belly of another.

Considered in itself, the trial of any or every such incidental cause cannot, with any consistency, be regarded in the light of an inconvenience. Either the law is a bad one, and as such ought to be repealed, or obedience to it ought to be enforced. Either the law itself is a grievance, or the non-execution of it (bating the particular cases calling for pardon) is a grievance. Far from regret, it should be matter of satisfaction, that, by so cheap and unexceptionable a method, delinquency is brought to light.

But it is by the decision given in these incidental causes, that the decision to be given in the principal cause is to be influenced On this supposition, perhaps the progress, at any rate the conclusion, of the principal cause, is kept back till after the conclusion of each such incidental cause

Such are the difficulties, in the case where the imputation clothes itself in specific forms Where, as above, it confines itself to generals, the difficulty, the ulterior difficulty, that remains to be brought to view, is different, but not less. Those persons on whose opinion or pretended opinion, without any check upon their mendacity, the fate of the defendant is more or less to depend, who are they? What sort of a character is theirs? *Character* in this case—the case of a witness, a mere witness — presents (it must be allowed,) or at least ought to present a different idea in this instance from what it did in the other, in that of the defendant. In the instance of the defendant,—the character, the disposition in question (it is, by the supposition, of the unfavourable cast,) admits of any modification, according to the nature of the imputed offence: in the case of the witness, it is confined to mendacity, or, if it extend to any other vicious propensity, it is only in so far as a propensity to mendacity may be inferred from it.

But if the character of any one witness ought to be suffered to be put in issue, so, by the same reason, ought that of every other. This being admitted, you put it in the power of the party—of that one of the parties whose interest it is to defeat law and justice — to bring upon the carpet a chain of character evidence without end; — an arithmetical repetend, or, by accident, even an arithmetical circulate.

§ 4. *Rules tending to the solution of the above difficulties.*

In judicature, in legislation, difficulties (how great soever) should never be dissembled. From falsehood, from concealment, from imposture in any shape, justice never profits, never can fail of suffering, upon the whole.

The complete removal of the eventual inconveniences and correspondent difficulties being hopeless, all that remains is to present such considerations and expedients as appear calculated to reduce the embarrassment to its minimum.

On the one hand, to compel the admission of this sort of evidence in all cases, on both sides, and of both aspects, favourable and unfavourable — on the other hand, to compel the refusal of it in any case by an unbending rule, — are two extremes, both of which, though not in equal degree, threaten to be prejudicial to the interests of justice It seems to be one of those cases in which a considerable latitude ought to be given to the discretion of the judge To abuse it, will not, indeed, be out of his power, but neither is the danger of abuse so great, but that, if he is not fit to be trusted with this power, neither is he fit to be trusted with the other powers attached to his office.

If there were a case in which it would be proper to render the admission of evidence of this species compulsory, it would be the case where, the character in question being that of the defendant, the evidence is called for at his instance, and the punishment attached to the offence is loss of life Why? Because, in case of an improper refusal, punishment undue, and at the same time irreparable, may be the consequence. But what is the measure indicated by this consideration? Not the making the admission of this species compulsory, even in this case, but the forbearing to employ a mode of punishment, which in this, as well as every other point of view, is adverse to the interests of justice — favourable to them in none

The case in which the sort of circumstantial evidence afforded by moral character is of greatest importance, is that in which, the station of the party and the witness being combined in one, the cause affords no other evidence on that side

The demand for this species of evidence is of course doubled, in the case where the same combination of stations takes place on both sides, and on each side is accompanied with the same absence of all other and less suspicious evidence

In cases not penal, it will constitute a natural safeguard against perjury on the part of a plaintiff deposing in support of his own demand, supposing an habitual course of perjury to be capable of being otherwise engaged in as a source of livelihood. The taint which a few steps in this career would have the effect of imprinting on a man's reputation, would not fail to oppose a powerful obstacle to his persevering in it with any adequate prospect of success.

The following seem to be the considerations by which the admission or rejection of this species of evidence ought to be determined:

1. The importance of the cause to the demandant's side, in respect of the mischief of impunity.

2. The importance of the cause to the defendant's side, in respect of the mischief of undue punishment.

3. The importance of the matter in dispute to each party respectively, in the case of a non-penal cause.

4. The delay threatened by the production of the evidence applied for.

5. The vexation apprehended to third persons, from the production (supposing it compulsory) of the evidence applied for.

6. The doubtfulness of the case, as it stands on the ground of the other more appropriate evidence.

The following rules and observations seem calculated to aid the judge in determining on the admission or rejection of this species of evidence:—

1. No evidence of character, good or bad—no speaking to character, favourably or unfavourably (*i. e.* at the instance either of the defendant or the demandant)—ought to be admitted, without power to the judge (if he thinks fit) to allow of time for inquiry into the character of the character-givers themselves. Why? For the same reason as in case of *alibi* evidence.* But the force of the reasons in this case are much less conclusive, the evidence of badness of character being in its nature so much less precise and satisfactory than the evidence of the existence or non-existence of such or such a person, at such or such a time, in such or such a place.

2. Evidence of bad character in crimination of the defendant, ought not to be admitted, unless in so far as it results from evidence admissible on other grounds; or unless, the fact of the offence being clear, the question is, between two persons suspected, which of them was the author? And even in these cases (that the quantity of vexation and delay may not be altogether boundless,) power should be left to the judge to limit the quantity or quality of the evidence, the number and choice of the witnesses, in declared consideration of the apprehended magnitude of these respective inconveniences.

3. If, at the instance of the defendant, evidence in favour of his character is admitted; so, at the instance of the other side, should counter-evidence operating in disfavour of his character be admitted, and time accordingly be allowed for it.†

4. Supposing the extraction of self-criminative evidence from the mouth of the defendant admitted, examination to this point will be as unexceptionable as to any other; and, so far as it extends, the vexation will be kept from reaching third persons; and the additional delay will be less, in the case of evidence extracted from this source, than of evidence extracted from any other.

5. Two considerations operate in diminution of the inconvenience from character-evidence at the instance, and consequently in favour, of a defendant. If the characters of his witnesses are obscure and unknown, the danger of their obtaining undue credence is but little; if suspected, still less:—if known, so as to present a claim to confidence, the inference thence deduced, though not good as to past innocence in respect of the individual offence charged, may be good in respect of the probability of future reformation, in consequence of the impression made by the trial and its attendant terrors.

6. But if, in consideration rather of the prospect of reformation than of the probability of innocence, acquittal be grounded on evidence of preceding good character, as above,—it ought not to extend beyond the amount of punishment under the name of punishment: it ought not to preclude the party injured from satisfaction at the expense of the defendant, if the force of the evidence, upon the whole, would be sufficient to entitle him to a decision in his favour, supposing the case a purely non-penal case.

7. If the appropriate evidence in the cause leans in favour of the defendant, the demand for this inappropriate evidence has no place.

8. Supposing a professional judge or judges, with a jury of occasional judges,—power might be given to the judge to suspend the admission of this character-evidence, so as not to admit it but in case of conviction, or indecision, on the ground of the appropriate evidence. Suppose a professional judge or judges, acting without a jury,—the demand for the conditional decision, as above, has no place. He simply suspends his definitive decision till the evidence of character has been got in.

Character-evidence has this in common with *alibi* evidence, that it is with the utmost facility and clearness distinguishable from every other species of evidence. What passes in relation to it is therefore, with proportionable facility, susceptible of registration:

1. Whose character it is—the demandant's or the defendant's.

2. At whose instance called for—that of the demandant, the defendant, or the judge.

3. When called for by demandant or defendant—whether ordered accordingly, or refused, by the judge.

* See farther on, Chap. XVI. § 11.

† In English practice, the only counter-evidence which is allowed to be produced is such as may be extracted from the witnesses, who come to speak in favour of the prisoner's character, in cross-examination.—*Ed.*

4. If refused, on what ground.—whether delay, and to whose prejudice—that of demandant or defendant; or vexation, and to whom—whether, 1. to the court and the public in respect of time consumed, or 2 to the witness or witnesses, or 3 to the party repugnant, in respect of the expense

5. If exhibited, whether prevalent or inoperative; *i. e* whether the decision was in favour of that side or of the opposite

6. Length of time consumed by the evidence of this description in court, by the exhibition of it,—out of court, in waiting for it: ratio of this length of time to that of the length of time consumed in like manner upon the other evidence, the appropriate evidence in the cause.

7. Names, description, and number of the witnesses of whose testimony this evidence was composed: ratio of this number to that of the whole number of the witnesses whose testimony was exhibited in the course of the cause

Such is the information by which the advantages and disadvantages attending the employment of this species of evidence would be placed in a distinct and satisfactory point of view. In this place, the statement of the heads occupies space, but, in each cause, the space as well as time consumed by the entry of the matters coming under these heads would be trifling indeed in comparison with the use

Hitherto, the question regarding the admissibility of character-evidence has been considered only so far as regards the character of the defendant But there still remains another question.—how far shall it be allowable to produce evidence for or against the character of a witness?

In this case, an imputation conveyed in general terms may, on certain conditions, without any preponderant inconvenience, be admitted. What then are these conditions?

1. In the first place, the imputation, if general, should be confined to that part of a man's character which respects veracity The witness, among his acquaintance, is regarded as an habitual liar. A habit of this sort may be ascribed to a man without specific proof Why? Because a habit of this sort may be the result of a multitude of acts, none of them, perhaps, punishable in course of law, and too numerous to be proved

2. But in this case it should be allowable for the party by whom the witness is produced, to call upon the impugning witness (viz. upon his cross-examination) to declare, if it be in his power, the particular instances in which this alleged disposition to mendacity became apparent.

3. In the next place, an imputation of this sort ought not to be admitted, unless it has been previously ascertained that there are three witnesses, or two at least, to maintain it. The considerations that suggest this limitation are as follows.—

Of evidence of this sort, if false, the falsity is not, in its nature, capable of being proved for the purpose of punishment In case of that sort and degree of improbity on the part of the party in question, which prompts to subornation, this is of that sort of false evidence which is procurable with least risk, and therefore with least difficulty

If an imputation of this sort has really attached upon a man's character, it can scarce happen but that more witnesses than one may be found to speak to it There seems, therefore, little danger that the condition in question, if annexed, should operate in exclusion of this species of evidence

The objection above mentioned as presenting itself on the ground of facility of subornation, will thus be proportionably reduced in force It is not only twice as difficult—indeed (as on close examination it would appear) more than twice as difficult—to suborn two false witnesses, as one, but, in case of them being procured, the chance of detecting the falsehood is much increased, in respect of the probability of disagreement and mutual treachery, as between individuals thus linked together by community in guilt

Supposing the general habit of mendacity (viz extrajudicial mendacity) ever so clearly established, the judge should not regard the inference from such general mendacity to mendacity in the individual case in question (viz a judicial case,) as being by any means conclusive. On the ordinary occasions of life, a man has no such cogent motives to confine him to the path of truth, no such sanctions to bind him to it, as in this extraordinary one Without a motive of some sort or other, a man will not encounter any risk, without a motive, and a motive of very considerable force, a man will not subject himself to such serious risks

So far as specific acts are concerned, there are but two sorts of crime that present themselves as affording any inferences worth regarding in this view These are—

1 Crimes of mendacity At the head of these stands actual perjury underneath, at a considerable distance, stand other crimes of extra-judicial mendacity, such as obtaining valuable things or services by false assertions, which, though made in direct terms, are made without oath below these again, crimes in which the assertion is indirect and inexplicit, as in case of forgery at large, and those forgeries which have coin or money of any kind for their subject-matter.

2 The other class is composed of such other offences of the predatory cast (such as theft, highway robbery, and housebreaking,) as suppose what may be called a general prostration of character, though here, too, the

inference from such an act will be very inconclusive, unless it appear connected with a habit of the same kind. But, in the case of all offences in the description of which mendacity is not involved, the inference will stand lower in the scale of strength by a very determinate and perceptible degree.

As to offences which neither are indicative of any such prostration of character, nor involve any breach of the duty of veracity — in the case of any such offences, the inference may be said to fail altogether. Offences produced by the irascible passions, and offences produced by the sexual appetite, may serve for examples.

In the case of a witness, evidence of good character can scarcely ever be admissible with propriety in the first instance, for no imputation is cast upon a man's character in this case, as there is in that of the defendant: and, till a ground for a contrary opinion presents itself, the character of the witness, like that of every other man, ought to be presumed a good one. The endeavour to produce evidence of this sort would merely have the effect of producing useless delay, vexation, and expense.

But, in this same case of a witness, if evidence charging him with bad character has been produced on the adverse side, there seems no more reason for excluding evidence of good character in behalf of the same person, than has been seen already in the case of a defendant. On various scores, evidence of good character is liable to much less objection than evidence of bad character. When no evidence of bad character had been adduced, the demand for similar evidence of good character did not exist, but the demand now does exist, the case being reversed.

§ 5. *Of the* station *of the supposed delinquent, considered as probabilizing or disprobabilizing delinquency.*

Station may be considered as indicative of the disposition, and thence of the character, of the class, viz. of the class to which the individual in question belongs: of the class composed of the individuals by whom the station in question is occupied.

To an inculpative purpose, this circumstance can scarcely be considered as having any application. In every political community, the lowest station is that which is occupied by the greatest number of the members.

It is only in the character of an *exculpative* circumstance, viz. on the ground of improbability — psychological improbability, as above, — that this circumstance is apt to operate with any considerable degree of probative force: and, thus applied, the force (*i. e.* the disprobative force in respect of the probability of the offence in question on the part of the supposed delinquent in question) with which it operates, is apt to be very considerable *.

The principal application of this species of evidence is that which obtains in a cause (especially a penal cause) where the matter in question is an article of property: more especially in cases where (as in ordinary thefts) the value of it is inconsiderable, in respect of the habitual pecuniary circumstances of the defendant, as indicated by the species of circumstantial evidence in question, viz. his station in life. A man in a station of life thus elevated, is it likely that his necessities should be so urgent as to drive him into a channel of supply at once so scanty and so hazardous?

Compared with moral character, the pre-

* The distinction between *general* and *special* is applicable to the circumstance of station, as well as to disposition and character. Laying out of the case the general distinction between high and low, inferences of an inculpative nature seem to have been deduced from the consideration of this or that particular station or occupation by English law.

Thus, on the ground of supposed hard-heartedness, butchers[a] have been considered as being (in capital cases at least) excluded from the capacity of serving as jurymen: and, judging on this principle — supposing an act of homicide, or offence attended with bloodshed, committed, and, as between two men, the one a butcher, the other not, the question, *which was the man?* hanging in suspense — the answer would, if consistent, be, the butcher. It seems questionable, however, whether, upon consulting the annals of criminality, this presumption would be found to have any ground in fact. Against soldiers and sailors it might be supported, perhaps, with a closer appearance of reason; not to speak of surgeons: and even in these instances it seems questionable whether (numbers being taken into the account) the presumption would receive any support from experience.

In a case where, literally speaking, blood is supposed to have been shed, the presumption would, with better colour of reason, plead for the fixing upon the butcher in preference to the non-butcher for the delinquent, than for the exclusion of the butcher from the faculty of officiating in the character of the occasional sort of judge called a juryman. It seems altogether impossible to find a reason why, in a capital case more than in any other, a butcher should be more disposed than another man to do injustice; altogether easy to find a reason why a lawyer should. Lord Chancellor Jefferies and Judge Page, of hanging memory, were not butchers.

[a] There is no legal objection to butchers serving on juries in capital cases in England, nor do the authorities afford reason to presume that there ever was any. In point of fact, butchers do serve in such cases. It is remarkable that the vulgar error on this subject extends to Scotland, where it is held as traditionary law that butchers cannot serve. Not being excepted by the qualification act, however, they are in the same situation as other citizens. It is usual for the court, probably for the purpose of obviating popular complaint, to excuse them for non-attendance. — *Ed.*

sumption afforded by this circumstance will, in general, be much more persuasive. Why? Because the matter of fact will, in general, be so much the more notorious, so much the less liable to be misrepresented by the force of bias. The presumptive evidence of habitual opulence afforded by office, visible property, education, habitual expenditure, will, in general, be much more incontestable than any which can be afforded of moral character by general expressions.

Singly (much more if in conjunction,) a certain degree of opulence and rank in life are enough to render scarcely credible on any evidence, a fact for which, in another station in respect of rank and opulence, slight evidence would be sufficient to gain credence In any of the civilized nations of Europe, what evidence would be sufficient to convict a prince of the blood, or a minister of state, of having picked a man's pocket of a dirty handkerchief, in a street, or in going into a playhouse?

One particular case there is, in which the force of the presumption derived from this source is not quite so great as, on general considerations, it might appear This is the case of thefts committed on articles possessing a value of affection, and, in particular, thefts committed by amateurs on fancy articles—rare books, rare pictures, rare plants, shells, minerals, rare anything A man who might be trusted with safety with a heap of untold gold, might not be capable of resisting the temptation presented by some choice desideratum, which, if to be sold, might be to be purchased for a few shillings

The warning afforded by this observation is happily of no great use in practice Thefts of special concupiscence are the offences of the rich: thefts of general concupiscence are the offences of the poor. Thefts of the former description are apt to experience a degree of indulgence, in which the principle of sympathy and antipathy will naturally find much to reprobate, but to which the principle of utility is by no means equally severe The alarm in this case is extremely narrow few but amateurs have anything to fear from the thefts of amateurs, and the mischief which the negligence of an amateur has to fear from the concupiscence of another is confined to simple theft. to the more formidable mischiefs of robbery, house-breaking, and murder, the apprehension does not extend. Hence it is that thefts of this description, in the few instances in which they are detected, experience commonly a degree of indulgence such as would not be extended to those which have the plea of *necessity*, or at least of *indigence*, for their excuse Hence too it is that the indulgence extended to them is not productive of any such general mischief to society, as would be the result of the like indulgence, if extended with equal frequency to promiscuous thefts.

In some cases, the question in regard to opulence and rank in life enters into the essence of the cause the probability and improbability of the main fact in dispute is in a manner governed by them; and in these cases, whether character be or be not expressly held up to view, it is in a manner impossible to it not to act, with more or less force, upon the mind of the judge

Take the famous case of the Comte de Morangiès, in Linguet's *Plaidoyers* The Count — having occasion to borrow money to the amount of 300,000 livrès — with evident, though not unusual imprudence, trusts an obscure female money-broker, and through her means a pretended money-lender, with bills of his, payable to order, to that amount and upwards Of this large sum no more than 1,200 livres were really delivered The pretended lender proves the delivery of the whole, by the testimony of three pretended eye-witnesses The whole cause of the unfortunate man of quality rests upon circumstantial evidence upon improbability, partly of the physical,* partly of the psychological kind Station, in respect of rank and opulence, on both sides, but more especially (in respect of opulence) on the part of the pretended lender, became a necessary subject of inquiry Traced out from the time of the pretended acquisition of this large fortune to the time of the disposition thus pretended to have been made of it, the whole history of her life and conversation concurred in representing the fact of her having possessed it, or anything like it, as scarce credible upon any testimony—absolutely incredible upon the strength of the testimony produced.

CHAPTER XIV

POSTERIORA PRIORUM — PRIORA POSTERIORUM FACT INDICATED, A PRIOR EVENT, EVIDENTIARY FACT, A POSTERIOR EVENT IN THE SAME SERIES AND E CONVERSO

THESE two topics are scarcely susceptible of a separate consideration no two can be more intimately connected

In any series of facts (the existence of acts or other events — the existence of works, physical or pyschological, the fruit of such acts or events,) following each other in the character of so many successive means leading to a common end, of so many successive effects originating in a common cause, — the

* The money, having, according to the evidence on that side, been delivered, by being carried, by the same person, at thirteen different times, a certain distance within six hours, — could not, within that time, have been carried to that distance.

existence of a posterior article will naturally serve as evidence of the existence of each prior article: and *è converso*, the existence of a prior article will operate, though commonly with much less force, in the character of evidence of the existence of each posterior article.

With a view to cases of a penal nature, these topics have been already handled, under a variety of modifications: handled, not under their own names, but under the names of their respective modifications. Fear (for example,) fear of punishment, being the natural consequence of delinquency, operates as evidence of it. Preparations for a crime, being among the causes of the pernicious event, operate as evidence, serving to fix upon the person who is ascertained to have been engaged in them the authorship of that event.

The sort of facts that remain for consideration on the present occasion, are those that are liable to come in question in cases of a non-penal nature. Examples:—

1. A voyage or journey of considerable length. Evidentiary fact, the arrival of the traveller at the *terminus ad quem*. facts indicated, his appearance and transactions at the several intermediate stages. *E converso*, evidentiary facts, his appearance and transactions at any of the intermediate stages, coupled with evidence of his intentions of conveying himself to the *terminus ad quem;* fact indicated, his arrival there.

2. General settlement of a man's property, by deed *inter vivos*, or testament. Evidentiary fact, the execution of the appropriate written instrument: fact indicated, the existence of transactions and scripts (letters, papers of instruction, &c.) preparatory to that event. *E converso;* evidentiary fact, the existence of a transaction or script of a nature preparatory to such event: fact indicated, the ultimate event itself.

3. Entrance into a new condition in life. *e. g.* marriage. Evidentiary fact, the celebration of the marriage ceremony facts indicated, preparatory transactions and scripts; *tete à tete* conversations; overtures to parents or guardians; love-letters; bespeaking of the ring and wedding clothes; housekeeping preparations; publication of banns, or obtainment of licence, &c. *E converso;* evidentiary fact, any one or more of these preparatory incidents: fact evidenced, the performance of the ceremony.

4. Engaging in a profit-seeking occupation: engaging in a partnership. The preparatory steps will be infinitely diversifiable, according to the particular nature of the occupation in each case. To pursue the exemplification further, seems unnecessary.

5. Litigation. Evidentiary fact, the ultimate decision: or, in cases requiring active execution, the extra-judicial transactions designated in each particular instance by that word: facts indicated, the several preparatory transactions and scripts of procedure, according to the nature of the case. *E converso;* evidentiary fact, the existence of any such preparatory transaction or script: fact evidenced, ultimate decision of the cause, in favour of the demandant or the defendant, according to the particular nature of such cause.

From this general view of the subject, several observations may be deduced—observations, some, if not all, of which, may appear too obvious to be worth mentioning: but there is no observation so obvious as not sometimes to be overlooked:—

1. In every such natural series, facts posterior and prior are naturally evidentiary of each other.

2. The probative force of posterior events in regard to prior ones, is naturally much stronger than that of prior events with regard to posterior ones.

In all human affairs, execution is better evidence of design, than design of execution. Why? Because human designs are so often frustrated.

3. When the posterior event indicated by a prior event did not take place, it will in most instances happen that the failure will have been proved by some notorious or easily-proved facts, by which, in this case, the probative force of the prior event with reference to the posterior will have been entirely destroyed. But sometimes it will happen, especially in the transactions of a remote period, that no completely satisfactory evidence is forthcoming, either of the failure of the design or of the consummation of it. As far as this is the case, the modification of circumstantial evidence, here called for shortness *priora posteriorum*, may beyond question have its use.

A state of things may be supposed, in which the probative force of this species of evidence might be estimated, or rather observed, with the utmost nicety. This is where on the one hand, the instances in which the design has proceeded to the stage of consummation—on the other hand the instances in which the execution has stopped short at any of the several preliminary stages, have been made the subject of official or other trustworthy registration.

The case thus put is not absolutely out of the reach of practice. In different degrees it has been exemplified in different countries and different courts in the practice of judicial registration. It might be, and generally speaking ought to be, exemplified in the most perfect degree in the practice of all such courts.

When the ends of justice are taken for the ends of judicature, a system of forensic bookkeeping will be employed, by which it will appear in what degree fulfilment is given to

those salutary ends. It will be apparent, in each individual cause, at what price, in the shape of expense, vexation, and delay, justice (or what is given for justice) is purchased: and likewise what proportion of that price is the result of natural and unavoidable — what of factitious, and therefore avoidable, causes In that state of judicial book-keeping, the mode and period of termination will in each cause appear of course

Under such a system of book-keeping, the termination of each cause being manifested by direct evidence, there will not (it may be said) be any demand for any such circumstantial evidence as is here in view The facts of all stages being on record, posterior ones as well as prior ones, there will be no use in any such operation as that of inferring the existence of either from that of the other But, in regard to any given individual cause, suppose the memorials of a posterior transaction or script to be unforthcoming — destroyed, obliterated, lost, or inaccessible In this case, any prior article of the same series may afford inferences, and have its use

In another way, a rational system of judicial book-keeping might have a much more extensive use, and still in the character of a source of this modification, of circumstantial evidence. The application given to such a register might not only be prospective but retrospective. The negligence of preceding legislators might in some measure be repaired by the diligence of succeeding ones. Two equal spaces of time are taken — say of ten years each the posterior, a period of perfect registration, as above, the prior, a period when registration was more or less imperfect, or altogether deficient In the period of imperfect registration, a certain cause, it is known, proceeded to a certain stage what is the probability of its having arrived at the ultimate stage? and, in that case, of its having terminated in favour of the demandant rather than of the defendant? Turn to the accounts of the period of good book-keeping, the probability of the two events will be respectively found in numbers.

CHAPTER XV

ON THE PROBATIVE FORCE OF CIRCUMSTANTIAL EVIDENCE.

§ 1. *What ought to be done, and what avoided, in estimating the probative force of circumstantial evidence?*

On this as on every other part of the field of evidence, rules capable of rendering right decisions secure, are what the nature of things denies. To the establishment of rules by which misdecision is rendered more probable than it would otherwise be, the nature of man is prone. To put the legislator and the judge upon their guard against such rashness, is all that the industry of the free inquirer can do in favour of the ends of justice.

Probative force of the evidentiary fact in question, in relation to the principal fact in question, — and closeness of connexion between such evidentiary fact and such principal fact, — are interconvertible expressions

Probative force, and closeness of connexion as between fact and fact, having no more than an apparent and relative existence (relative, viz relation being had to him by whom the facts are contemplated in this view,) nothing more can be truly indicated by them than strength of persuasion on his part — strength of persuasion, applied to evidence of the description in question, — viz to circumstantial evidence

On each individual occasion, the degree of strength at which the persuasion stands would be capable of being expressed by numbers, in the same way as degrees of probability are expressed by mathematicians, viz by the ratio of one number to another But the nature of the case admits not of any such precision as that which would be given by employing different ratios (*i e* different pairs of numbers) as expressive of so many uniform degrees of probative force, belonging one of them to one *sort* of circumstantial evidence, another to another *

Of an evidentiary fact of the same description, described in and by any combination whatsoever of general words, the probative force will be found different in different individual cases It may be in any degree slight, and it may be strong in almost any degree short of conclusive

The use of infirmative suppositions is to afford a test of conclusiveness, and, in some sort, of probative force.

To judge whether, with relation to a given principal fact, a given evidentiary fact be conclusive or no, look out on all sides for all such infirmative suppositions as can be found.

If, with relation to a given fact proposed in the character of a principal fact, another fact given in the character of an evidentiary fact appear to you as operating in that character — operating in any degree, howsoever slight, — look round to see if no supposition operating upon its probative force in the character of an infirmative supposition be to be found — no fact which in its nature is not impossible, and with which (supposing it, on the occasion in question, realized) the existence of the principal fact in question would be incompatible, or in virtue of which the existence of the principal fact would be seen to be less probable. If any such infirmative

* But, for a practical purpose, such as that of judicial decision, the nature of the case seems to afford a particular mode of expression, an account of which has been already seen in a chapter in the introductory part of the work. (See Vol. VI. p. 225.)

supposition be found, the probative force of the evidentiary fact is not so great as to be conclusive.

But if, after your utmost endeavours, you find yourself unable to discern any such infirmative supposition, — then, in your own particular instance (relation had to the state of your own persuasion,) the probative force may be conclusive

Supposing one evidentiary fact, and only one infirmative supposition applying to it: then, to estimate (*i. e* express in numbers) the quantity of probative force remaining to the evidentiary fact, — deduct from the ratio expressive of practical certainty, the ratio expressive of the probability of the fact the existence of which is by the infirmative supposition supposed: the remainder will be the nett probative force

To one and the same evidentiary fact, suppose a number of different infirmative suppositions applicable, and, of each of the several supposed facts, suppose the probability the same; the sum of their infirmative forces will be as their number

In an evidentiary chain composed of a number of links, of which the first is a fact proved by direct evidence, the last the principal fact in question, and between them one supposed fact at least, of which the fact proved is regarded as evidentiary, and which itself is regarded as evidentiary of the principal fact; the greater the number of such intermediate links, the less is the probative force of the evidentiary fact proved, with relation to the principal fact Why? Because, of the several facts thus evidentiary one of another in a chain, each is liable to have its infirmative counter-probabilities, by the disprobative force of each of which, as above, its nett probative force is liable to be diminished

Accordingly, on the occasion of each such chain, let it be your care to see that no intermediate link or links, with their respectively applicable infirmative suppositions, be omitted.

From the probative force of each evidentiary fact applying to the same principal fact, that of every other will receive an increase

But no reason can be given for concluding that the sum of the probative force of such evidentiary facts will be uniformly as the number of the facts themselves.

On looking over, for example, a table or list of evidentiary facts, having for their common principal fact delinquency, — it will be found that, in more instances than one, two evidentiary facts, of each of which taken by itself the probative force would be scarcely worth regarding, shall, when taken together, be found to operate with a very considerable degree of probative force: so considerable as to be, if unopposed by any counter-evidence on the other side, conclusive. Or if two, thus unopposed, be not sufficient, three may; and so on.*

* A number of facts, each of which taken by itself proves nothing, or next to nothing, but the probative force of which, when all taken together, amounts to something considerable, constitute what is called in common language a *chain* of circumstantial evidence.

In this instance, however, the word chain is used in a different sense from that in which it has already been, and will hereafter be, employed in this work

Where the phrase *chain of evidence*, or any phrase of analogous import has been made use of in the present work, it has always been intended to designate a series of facts, each of them standing in the relation of an evidentiary fact with respect to that which stands next to it in the series. If A be evidentiary of B, B of C, and C of D, then A, B, C, and D constitute, in this sense of the word, a *chain* of evidence

Such combinations or series of evidentiary facts have already been brought to view under the name of concatenated facts, — facts constituting a *chain* of evidence; viz combinations of psychological facts thus connected in a chain. Other chains of the like nature will hereafter be necessarily brought to view; chains of oral evidence in the form of hearsay evidence; chains of written evidence in the form of transcriptural evidence. The more mouths a narrative has passed through, the less trustworthy it is universally understood to be: the more copies have been taken the one from the other of a written original, the less trustworthy the last of them is understood to be.

To none of these instances has the metaphor, the necessary metaphor, of a chain, been applied as yet in jurisprudential language. Nor yet is the figure of speech, or the term, by any means unusual in jurisprudential language. It is, on the contrary, in every day's use But the occasion on which, and on which alone, it is in use, is so widely different, that the practical consequences drawn from the use of it are directly opposite. On the occasions above brought to view, the greater the number of links there are in the chain, the weaker it is: on the occasions ordinarily in view, the greater the number of links there are in it, the stronger it is.

On the new occasions on which I have here found it necessary to employ the metaphor, the use made of it is more conformable than on the already customary occasions, to the nature of its material archetype Take an iron chain, the more links you add to it, the weaker you will make it, not the stronger: and by adding link to link, you will at last make it break by its own weight. If, then, it be our wish to avoid confusion and self-contradiction, we must by some means or other contrive to express the distinction between the two opposite kinds of evidentiary chains: styling the one, for example, the *self-infirmative* chain, we may style the other the *self-corroborative*.

Exemplifications of the self-corroborative chain of evidence, are, in a form more or less distinct, in the mind of almost every man, and require only to be fixed by words. In the course of his progress to and from the scene of action, lawful or unlawful, a man is seen by different persons at different places. The respective testimonies of these several persons, each of them declaring the facts present to his senses, constitute together

Of facts of the psychological class, there is no one species of evidentiary fact, the probative force of which can with propriety be considered as being in all cases conclusive

Why? Because, as hath already been seen, there is not one, the probative force of which is not liable to be weakened by different classes of facts, distinguished on that consideration by the appellation of infirmative facts

Among physical facts, one may be evidentiary of another with any degree of probative force, and accordingly with a degree of force sufficient to be regarded as conclusive

On this head, see what, under the head of *physical incredibility*, is said farther on, of the three modifications of extraordinary facts, viz. facts amounting to a violation of a law of nature, facts devious from the course of nature in *degree*, facts devious *in specie* If, the existence of fact A being supposed, the non-existence of fact B would be a violation of any law of nature, or devious in degree or species to such an extent as to be incredible, the probative force of fact A, in relation to the existence of fact B, may be deemed conclusive

Thus, in regard to quadrupeds, take the two facts, parturition and sexual conjunction Between these two facts, parturition is the indicative fact — sexual conjunction the fact indicated by it, and, of the former, the probative force, in relation to the existence of the latter, may be pronounced conclusive

Among physical facts, however, even such as are the most completely conclusive, the conclusiveness affords no sufficient reason for the establishment of unbending rules, imposing on the judge the obligation of forming the conclusion indicated

Why? Because, in proportion as the rule is safe, secure against being productive of erroneous decision, it is in the same proportion useless Safe, it is not effective, effective, it is not safe.

Suppose a rule laid down, that, in every cause in which virginity may happen to come in question, parturition shall be regarded as a fact conclusively disprobative of it The rule would be innocent enough, but where would be the use of it? Is there any the least danger, that, by any judge or set of judges by whom parturition has been admitted to have been satisfactorily proved, the existence of sexual intercourse should be disaffirmed?

If the establishment of any one such rule would be proper, so would that of as many others as could be constructed But in this way a complete system of physical science would be to be established by authority, and engrafted into the system of judicial procedure and limits to the improvement of every branch of physical science, and especially of the most important of all — the medical — would be fixed by law

No rule ought to be laid down, rendering the exhibition of this or that evidentiary fact necessary as a condition *sine quâ non* to a judicial decision affirming or assuming the existence of any other fact in the character of a fact indicated, and requiring for the proof of it the proof of such evidentiary fact

Reasons. — If the probative force of the other parts of the evidence is not sufficient to produce persuasion on the part of the judge, persuasion will accordingly not be produced; and the rule restraining the judge from acting on the ground of such persuasion will be unnecessary and useless. If the probative force

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what has been usually and hitherto exclusively understood by a chain of evidence This is what I call the *self-corroborative* chain

Let it be a question, for example, whether on a particular day Titius went from London to Portsmouth; and let it be out of doubt, that on that day at six in the morning he was seen on horseback at one of these places, to wit, London, and that by one witness it is proved that at six o'clock in the afternoon he was seen at Portsmouth It is evident, that, the greater the number of intermediate places I can prove him to have been at, at correspondent hours, the stronger the persuasion I shall produce in the mind of the judge of the existence of the principal fact in question, viz that of Titius's having gone that day from London to Portsmouth. The journey in question will thus be proved upon him by a chain of evidence composed of as many links (say six) as between those two places there are stages at which he was seen by so many different persons. Double the number of the stages, and thence of the witnesses; instead of six, call them twelve; you double the strength of the stream of evidence.

In another case (instead of my six witnesses, each of whom saw Titius at a different stage in the road between London and Portsmouth,) my evidence consists of the alleged testimony of six alleged witnesses, of whom the first (as I allege) saw Titius at the time in question at Portsmouth, he having said as much to the second, who said as much to the third, and so on to the sixth, being the witness I produce in court to prove the existence of Titius at Portsmouth at that time It is manifest enough that the testimony of each of these witnesses loses more or less of its strength by their being disposed in a chain thus constituted: and that the chain, if it consisted of the testimonies of twelve such witnesses instead of six, would, instead of being twice as strong, be twice, or perhaps more than twice, as weak as before.

In conclusion, the distinction between the self-infirmative chain and the self-corroborative chain of evidence appears to be this. In the former case, — so many witnesses, so many intervening mediums interposed between the source of evidence and the faculties of the judge: and, the fact so evidenced being but one and the same fact and the source from whence the evidence issues being but one source, the testimonies of all these witnesses put together compose but one article of evidence.

On the contrary, in the case of the self-corroborative chain, so many distinct evidentiary facts, so many distinct sources of evidence.

of the evidence is sufficient to produce such persuasion, and such persuasion is produced accordingly, although the proof of the evidentiary fact in question be wanting, — the restrictive rule is improper, prejudicial to the interests of truth and justice.

In the history of law, be the country what it may, — the further we go back, the more numerous the instances we may expect to find of convictions and executions on insufficient evidence: but, for the opposite reason, the longer we go on in the track of civilization, the more rare we may expect to find the instances of such errors in judicature as have the weakness of the mental faculties for their cause. It is in the strength which, by the continually-increasing stock of information, may be given to the mental faculties of judges by apposite instructions drawn from correct and comprehensive views of the subject, that the true preservative against such errors is to be looked for; not in the restrictive operation of unbending rules of evidence.

If there be any cases in which any such unbending rules promise upon the whole to be beneficial to the interests of truth and justice, the two following seem to be of the number.

1. Where, — the mischief of the decision, if erroneous, being in a certain respect irreparable, and (by reason of the distance of the tribunal from the seat of government or otherwise) the confidence reposed in it by the legislator inferior to that which is reposed by him in some other and higher tribunal, — cases are accordingly marked out, in which, on the ground of evidence of such or such a description, or without the concurrence of evidence of such or such a description, a decision productive of such irreparable consequences shall not be pronounced, or shall not be executed.

It is upon this same principle, that, in the Austrian code, certain offences are marked out, such as magic and witchcraft, in relation to which the inferior tribunals of distant provinces are forbidden to proceed upon any evidence.

2. The other case comprehends in its whole extent the range of capital punishment — the only species of punishment which is absolutely and totally irreparable. But, of the consideration of this irreparability, what is the true result? The impropriety of this mode of punishment: not the propriety of those unbending rules.

In the instance in question, it was the consideration of the nature of the punishment — of the property thus belonging to it — that called into action the humane temerity of the judge. In every system of law into which this irreparable mode of punishment has been admitted — but most of all in the English system, in which the fondness shown to it is so great, and so continually upon the increase — the system of procedure in general, and of the law of evidence in particular, teems with rules and practices tending to the encouragement of criminality in every shape, and most of all in such as are most mischievous. Capital punishment has thus been all along operating, and will continue to operate with continually increasing force, as a slow poison upon the whole system of procedure, including that of evidence. Thus it is that the work of real inhumanity and of false humanity, of folly under that specious name, go on together: and, while substantive law, with its favourite and unwearied instrument, capital punishment *, is straining every nerve to tighten the bands of society, — adjective law, with its prejudices and inconsistencies, is as pertinaciously employed in loosening them.

From the above theoretical propositions, the following practical instructions of a monitory nature seem deducible —

I. Warnings tending to prevent under-valuation.

1. Reject no article of circumstantial evidence on the score of weakness.

2. Much less on the score of its not being conclusive.

3. Hold not the aggregate mass insufficient, for the separate insufficiency of the elementary articles.

4. Hold not an aggregate mass of circumstantial evidence insufficient, for the mere want of an article of this or that one description.

5. Hold not circumstantial insufficient, as such, for the mere want of direct evidence: viz. where direct evidence is not obtainable, or not without preponderant inconvenience in the shape of delay, vexation, and expense.

6. Hold not direct evidence insufficient, merely for the want of circumstantial.

II. Warnings tending to prevent over-valuation.

7. (1.) Set down no article, nor any aggregate mass, of circumstantial evidence, as even provisionally conclusive *in all cases*.

8. (2.) Much less as conclusive against, or (what comes to the same thing) to the exclusion of, all counter-evidence.

9. (3.) Content not yourself with general circumstantial testimony, when you can have special direct testimony from the same source.

10. (4.) Whatever evidence (in particular, circumstantial evidence) other than that produced by interrogation of the respective parties, presents itself, — if the situation of the party be such as to present any probability of his being able to give explanation of it (*i. e.* to contribute either to give completeness or correctness to it, or to the inferences deducible from it,) — fail not to employ interrogation — judicial interrogation applied to the party — for the explanation of it.

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* *Vide supra*, Vol. VI. p. 382, No. 13.

11. (5.) Reject not circumstantial as needless, on account of the abundance of direct.

§ 2. *Errors of jurists, from neglect of the above rules*

The warnings given above are (it may be said) reasonable enough, but are they not too obviously so to be of any use?

Among the errors thus pointed at, not one perhaps that has not been embraced in practice, propagated by law-writers, or (what is worse) carried into effect by legislators and by judges

In each part of the field of evidence, after what presents itself as the path of utility and reason has been traced out, the course taken in the present work is to bring to view the deviations made from it by the most distinguished systems of established law, the Roman and the English Such, accordingly, is the course pursued on the occasion now in hand except that—as exemplifications of such deviation cannot be found for every one of the above monitory rules—to supply the deficiency, the view given of the established practice in the two systems will here be preceded by a few examples, taken from the speculations of jurists, whose notions in regard to the points in question do not appear as yet to have been on any occasion explicitly adopted, so as to have given birth to practice With a view to this particular subject, the order given to the monitory rules should also have been given to the examples but, to avoid confounding unauthoritative notions with authoritative practice, the particular principle has been sacrificed to the general one

1 An aggregate body of circumstantial evidence treated as insufficient, on the ground of the separate insufficiency of the elementary articles.

When, in a penal cause, the charge is supported (as is commonly the case) by a number of evidentiary facts, with or without direct testimony to the principal fact in question,—a natural, and, on the part of the advocate for the defendant, a necessary course, is, to take the body of evidence to pieces—to examine each member of it, each evidentiary fact, separately—and, from the inconclusiveness of each, to infer the inconclusiveness of the whole

In the case of Captain Donnellan, on the criminative side no article whatever of direct evidence was produced, but a prodigious number of criminative facts—articles of circumstantial evidence After he was executed, a book was written to prove the evidence insufficient. Each criminative fact was taken separately: how inconclusive this! how inconclusive that! and so on. each being inconclusive of itself, the inference was, that so they were all of them put together Of the individual premises, each taken separately, the truth was undeniable; but the collective conclusion did not follow

Donnellan practised distillation. as a proof of poisoning, what did that amount to?—next to nothing At that rate, all distillers would be poisoners Not engaged in that or any other occupation with a view to profit, nor yet occupying himself with chemistry in any other shape, still he practised distillation what did that again amount to?—some small matter perhaps, but very little more At that rate, all the Lady Bountifuls (a class which, though not quite so numerous as formerly, is not yet quite extinct) would be poisoners

He distilled what there was reason to think was laurel-water,—a known poison, not known to be used for any other purpose the proof strengthens, though still very far from conclusive

Thus much as to preparations, though there were others in the case Go on next to *motives* The relation of the defendant to the deceased was such, that, upon the death of the latter, a large property was to devolve upon the former Here, then, was temptation—a sinister motive, to which he stood exposed What he saw, what he could not but see, was, an advantage (and that to a great amount) on the point of accruing to him on the happening of that event In that point of view, he was urged by a particular species of motive (pecuniary interest) to use his endeavours for the bringing about of that event In that point of view, he stood exposed to the impulsive action of that motive. Does it follow that he yielded to the impulse? Here was a survivor who had profit in expectancy upon the death of the deceased Does it follow that, at the expense of so horrible a crime, he used his endeavour for the procuring of such death? At that rate, the most common of all causes of death is parricide

Ill-humour has been observed between man and wife the woman dies Is this a proof that she died by murder, and that her husband was the murderer? At that rate, the few couples excepted who might be capable of making title to the flitch at Dunmow, all married men and all married women are murderers

2 An aggregate body of evidence held insufficient, for want of a particular article of circumstantial evidence

In several instances that have been made public, and in a number greater than might at first view have been supposed,—a defendant has been convicted of the murder of a man, who has afterwards made his appearance in a living state

In consideration of the fatal errors in judicature thus brought to light, instances have been mentioned in which a judge has declared his resolution never to concur in any convic-

tion of murder, where the dead body has not been found * But a resolution known to be thus declared (at least if corroborated by a known instance in which such resolution has been acted upon,) is sufficient to give birth to a rule of jurisprudential law

The motive of the determination was evidently a laudable one: but the consequences of the determination, if converted into a rule, and that without exception, and known to be so, would be in the highest degree prejudicial to justice To secure to himself impunity, a murderer would have no more to do but to consume or decompose the body by fire, by lime, or by any other of the well-known chemical menstrua, or to sink it in an unfathomable part of the sea In any of these ways might the body be effectually got rid of and, though it were in the face of any number of witnesses, the rule being established without the correspondent exceptions, impunity would follow of course

Nor yet would the rule afford the security it aims at, without another condition, not expressed upon the face of it The body found, —by what evidence is it to be proved to have been found? The judge before whom the prosecution for the homicide is to be tried, —is it to *his* eyes that the body is to be produced? This is not in any case what is meant. What, probably enough, is meant, though not expressed, is, that the existence of the body in a dead state should have been ascertained by the testimony of some ocular witness, whose trustworthiness is regarded as being exception-proof for example, in English law, the coroner with his jury. For, if any testimony at large is to be regarded as sufficient, the intended security is gone. "I saw the body of Titius after he was dead:" "I saw Sempronius beat out the brains of Titius." Falsehood may attach with as little difficulty upon the one speech as upon the other.†

3 An imperfect body of circumstantial evidence set down as conclusive, for want of due attention to supposable infirmative facts.

Of the need there may be for these warnings, an exemplification may be seen in the doctrine of Lord Coke ‡ Of his division of *presumptions* (i. e. of circumstantial evidence) into three degrees, in respect of force — violent, probable, and light or temerarious — mention has been made upon another occasion in another place ||. "Violenta presumptio" (says he) "is many times" (in many instances) "plena probatio" (full proof) and the instance he gives is this — "As if one be run thorow the bodie with a sword in a house, whereof he instantly dieth, and a man is seen to come out of that house with a bloody sword, and no other man was at that time in the house" "Presumptio probabilis moveth little, but presumptio levis seu temeraria moveth not at all"

To the probative force of this body, or rather article, of circumstantial evidence, two facts present themselves in the character of supposable infirmative facts

1. The deceased plunged the sword into his own body, as in the case of suicide the

* This judge was Lord Chief-Justice Hale, who laid down this dictum, in consequence of two cases: one is mentioned in Coke's 3 P. C. cap. 104, and the other happened in Hale's remembrance, in Staffordshire. The first case is thus stated—"An uncle who had the bringing up of his niece, to whom he was heir-at-law, and, while he was correcting her for some offence, she was heard to say, *Good uncle, do not kill me* After which time the child could not be found, whereupon the uncle was committed upon suspicion of murder, and admonished by the justices of assize to find out the child by the next assizes: against which time he could not find her, but brought another child as like her in person and years as he could find, and apparelled her like the true child; but on examination she was found not to be the true child: upon these presumptions he was found guilty, and executed. But the truth was, the child being beaten, ran away, and was received by a stranger, and afterwards, when she came of age to have her land, came and demanded it, and was directly proved to be the true child." The second case is as follows: "Where A was long missing, and upon strong presumptions B was supposed to have murdered him, and to have consumed him to ashes in an oven, that he should not be found; whereupon B was indicted of murder, and convicted and executed: and within one year after, A returned, being indeed sent beyond sea by B. against his will." 2 Hale, 290.

Although it is the general rule of law, that the body must be found, it is not acted upon without qualification. See Rex *v.* Hindmarsh, 2 Leach, 571.—*Ed.*

† The evidence so anxiously looked out for by this worthy judge was of the sort which the Romanists have in view by the term *corpus delicti* the body of the offence — in so far as they have anything determinate in view. The *body* of the offence; meaning the fact of the offence: evidence of the fact of the offence,—evidence of that sort by which the fact of the offence may be indicated, without affording any indication of the person of the offender In the case of real evidence, the indication thus afforded is frequently, though not constantly and necessarily, thus confined In the case of testimonial evidence, the most natural case is, that the fact of the offence and the person of the offender should be comprised in the same narrative. That (in addition to direct testimonial evidence) circumstantial, and more particularly *real* evidence, is highly desirable, and ought accordingly to be looked out for, especially in case of homicide, is evident enough But a rule requiring it as indispensably necessary in all cases, would, besides the unreasonableness of it, be inconsistent with the necessary practice in regard to a large division of crimes. It is of the nature of all verbal offences — offences committed by mere words — not to be productive of any real evidence.

‡ Co. Litt. 6, b. || See Vol. VI. p. 231.

accused, not being in time to prevent him, drew out the sword, and so ran out, through confusion of mind, for chirurgical assistance.

2. The deceased and the accused both wore swords. The deceased, in a fit of passion, attacked the accused The accused, being close to the wall, had no retreat, and had just time enough to draw his sword, in the hope of keeping off the deceased the deceased, not seeing the sword in time, ran upon it, and so was killed

Other suppositions might be started besides these; nor do these exculpative ones either of them seem in any considerable degree less probable than that criminative one if so, the probability of delinquency, instead of being conclusive, is but as 1 to 2

Such is the evidence upon which the father of English jurisprudence would have pronounced a man guilty without scruple

What it is he would have found him guilty of, — murder or manslaughter, — a capital crime, or a crime short of capital, — he does not say: murder, probably enough, since manslaughter, being a sort of alleviation, requires special evidence murder, accordingly, is the verdict which the coroner's jury find of course, where no alleviating circumstances, to reduce it to manslaughter, have presented themselves *

§ 3 *Defects of established systems, from neglect of the above rules*

1 General circumstantial testimony, received to the exclusion of special direct testimony from the same source, as also of all counter-evidence, is exemplified in the instance of the several sorts of actions or suits to which the evidence called *wager of law*† applies — Restoration of a specific thing is claimed at the defendant's hands By whatsoever body of apposite evidence, direct or circumstantial, the claim is supported, — the defendant is allowed to adduce the counter-evidence thus denominated, and the evidence in support of the claim becomes inadmissible The defendant comes into court, and denies, in general terms, the fact (whatever it be) on the ground of which the obligation is sought to be imposed upon him Along with him comes a posse of other witnesses number, a dozen, neither more nor less They know nothing about the matter, but, by the opinion they have of him, they are certain that what he says is true The evidence they furnish is so much character evidence

Swearers of this denomination are like ghosts and witches nowhere do they exist, but in many and many a place they do as much mischief as if they did Two or three sorts of actions are altogether laid asleep by them, and the effect of it is, that, for no one moveable thing that he has, has an Englishman any remedy at law Money is given him instead of it The sum is never equal in value to the injury sustained by the want of the thing sought To keep the thing, at the price thus put upon it, is always at the option of the wrong doer

In Roman law, general circumstantial testimony accepted in lieu of, or in addition to, special direct testimony from the same source, is exemplified in the cases where the oath denominated *juramentum expurgatorium*‡ was employed The cases being penal, and the evidence on the criminative side neither sufficient for conviction nor yet for torture, the judge might, if he thought fit, call upon the defendant to swear to his non-delinquency in general terms of a fixed formulary for that purpose, I know no instance. The description of the practice is obscure and vague enough, like everything else in Roman law

In these as in all other penal cases, interrogation of the defendant himself was in the power of the judge extraction, consequently, of a full body of confessorial evidence, or of the denegatory testimony given by him in lieu of it (testimony, of which, on the supposition of delinquency, more or less must have been false)

Was this power employed? This was letting off a delinquent upon bad and unsatisfactory evidence, when, upon better evidence,

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* Here would come in one use of a table of circumstantial evidence On the supposition of criminality, criminative circumstances of the description in question, could scarcely fail to be accompanied by a variety of other circumstances of the same tendency apposite motive, apposite disposition, previously-known enmity, preparations, previous threats, confessorial discourse, criminative deportment (contemporary or subsequent;) all these articles of psychological evidence, under all or any of their numerous modifications; not to mention such further real evidence as might have been afforded by a transaction so described.

One mode, and that not a very unobvious one, of throwing light upon so dark a subject, would have been to subject the accused to a judicial examination. But this, for any other purpose than that of judging whether to commit the man or let him out to bail, an English lawyer (if not then, at least now) would start from and be shocked at. *Nemo tenetur seipsum accusare.* Pronounce a man guilty without examination? Yes; in this consists English mercy. Examine him, to judge whether he be guilty or not? — No: the idea is not to be endured.

† So lately as the year 1824, in an action for debt on simple contract, a defendant waged his law, as it was called, and applied to the Court of King's Bench to determine what number of compurgators he ought to produce But the plaintiff abandoned the action, and there the matter ended. King *v.* Williams, 2 B & C. 538. This form of trial was abolished by the 3d and 4th Will IV. c. 42. — *Ed.*

‡ Heinecc. ad Pandect. lib. xii. tit. ii. pars iii. p. 292 (edit. 1728.)

and (in case of confession) the very best of all, he had been either shown to be not guilty, or shown to be guilty. This is recurring to inferior evidence, after receiving superior evidence from the same source. It is like Harpagon in the play.* *Rends moi, sans te fouiller, ce que tu m'as volé*: the search had already been made, and produced nothing.

Has the power remained unemployed? This is employing the inferior to the exclusion of the superior evidence. It is as if the master, persuaded of the guilt of his innocent servant, had contented himself with saying to him—"*Tell me whether you are guilty or no*," forbearing purposely to make search.

Juramentum suppletorium.—This was an oath in certain non-penal cases. It possessed, in common with the *juramentum expurgatorium*, the feature which renders it applicable to this purpose. In different nations, on different occasions, it appears to have been employed in the character of an evidentiary fact, right of some sort or other being the fact indicated—right to some service, such as that very extensive sort of service which consists in the transfer of money or money's worth to the possessor of the right—right to an exemption from an obligation of that or some other nature, sought to be imposed on him.

The error applicable to the present purpose consists in the acceptance of a vague assertion, in addition to, or to the exclusion of, a specific statement, of an article of weak circumstantial evidence, in addition to, or in exclusion of, a body of direct evidence from the same source †.

2. Evidentiary facts excluded altogether, under the idea of their being weak, and even under that of their not being conclusive.

In the case of this, as of every other species of evidence, the production of it should neither be compelled nor admitted, when by such compulsion or admission more evil will be produced in respect of the collateral ends of justice (viz. avoidance of delay, vexation, and expense,) than by the exclusion of it, in respect of the direct end of justice, viz. by danger of indecision.

Except on this ground, however, there is no evidence, presented in the character of circumstantial evidence, the production of which ought not to be, not only permitted, but compelled. In particular, no such evidence ought to be excluded on the ground of deficiency in point of probative force.

Why should any be excluded? Operative, it is useful; inoperative, it is innocent.

The rashness with which, on different pretences, exclusions—peremptory and inexorable exclusions—have been put upon evidences of different descriptions by men of law, will be matter of ample observation in another place ‡. The ground which forms the subject of the present book is that on which this rashness has displayed itself with least violence.

From oral evidence,—circumstantial evidence orally delivered,—it seems to have abstained altogether: in the permanent texture of written evidence, it has found (as it were) solid ground to fasten upon.

In the shape of parole evidence,—be the evidence, when of this description, ever so slight—be the inference it affords ever so short of being conclusive,—there is no objection to the reception of it. In this shape imagination cannot frame a circumstance more trifling, more inconclusive, than many are which have been admitted to be produced in evidence, and continue to be admitted in every day's practice.

Admitted? Yes, and with great and just effect. Why? Because (not to speak of greater numbers) even two articles of circumstantial evidence—though each taken by itself weigh but as a feather,—join them together, you will find them pressing on the delinquent with the weight of a millstone.

Give to the evidence in question the form of a written document, the treatment it meets with is reversed. An inexorable bar is now opposed to it. Presented by the mouth of a witness, be its value ever so small, it is allowed to pass for whatever it is worth: presented in writing, if it fall short of being conclusive it is not allowed to go for anything.

So it be exhibited *viva voce*, no matter how remote and inconclusive the evidentiary fact reported by the circumstantial evidence. When received, the impression made by it may be slight, or amount to nothing; but the lightness of it, how extreme soever, is never made into a ground for the exclusion of it. It is only when consigned to writing that it is scrutinized before admission, and, if not looked upon as weighty enough to be conclusive, is thrown out as worthless. Rash exclusion on one side, or equally rash exclusion on the other: rash exclusion of the lot of evidence in question, or rash exclusion of every other evidence that might have been opposed to it: such is the only alternative.

A record (says the immortal Gilbert, the father of the law of evidence,) a record is a diagram whereby right is demonstrated ‖. To

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* Moliere's *Avare*.

† In addition to this error, comes that of forbearing to give justice the benefit of cross-examination, together with the other securities for trustworthiness that stand in connexion with that essential practice. But this latter is an error that belongs not to the present head. See Book II. *Securities*.

‡ See Book IX. *Exclusion*.

‖ The following is the whole of the quaint passage partially quoted in the text.—*Ed*.

"And first of records: those are the memorials of the legislature, and of the King's Courts of justice; and are authentic beyond all man-

appear, and not to command assent, is beneath its dignity where demonstration enters, doubt finds no room to stand upon.

Numerous are the instances in which the admissibility of matters of record, in proof of the existence of other matters of record, has been disputed; and in some it has been disputed with success with relation to the fact supposed to be indicated, the existence of the document in question has been pronounced no evidence, or (what comes to the same thing) the court has in that character declared it inadmissible—refused to pay regard to it

That the ultimate decision which has taken place in consequence of this rejection, has been contrary to truth and justice, is more than, in all or any of these instances, I could take upon me to affirm an opinion to that effect, well or ill grounded, would be of no use materials for forming it are not forthcoming Possibly, in each one of these instances, had the document been received in evidence, and its probative force been taken into consideration, it would have been found inconclusive that is, the whole of the evidence on that side (whether the document in question constituted the whole or only a part of it) would have been considered in that light

Nor yet will I take upon me to say (for perhaps it may not be to be known, and, if it were, the result of the inquiry would not be worth the trouble) whether, in the several instances in question, the case was, that the evidence was rejected without consideration of the tenor of it Excluded or no in fact, and in that individual cause, it appears at any rate in the character of a species of excluded evidence, in the books of law * Accordingly, in due form of legal architecture, a species of case is built upon the ground of it and thereupon, as usual, in each succeeding cause in which the same or a similar point presents itself, the question is—not whether the fact happened, but whether the individual case in hand belongs or does not belong to that species of case

What is the consequence? Though, in the individual case in hand, not a person concerned that is not persuaded of the existence of the fact indicated—the existence of the document which, supposing it to exist, would be decisive, persuaded, and that by the other document, the existence of which is exhibited in the character of the evidentiary fact, yet still the decision is to be directly contrary —Why? Because the case is of the same *species* as that in which, in the former instance, an evidentiary document of the same or a similar species was regarded as inadmissible

What, then, is the practical conclusion here contended for? It is this viz that every article of evidence, the nature of which is to operate in the character of circumstantial evidence—whether it be presented in the form of oral or of written evidence, and (if in the form of written evidence) whether in the form of a judicial document or any other,—ought equally to be admitted the judge of fact being left equally free, in all these cases, to form his judgment of its probative force That accordingly, in those instances where (as in England) the function of the judge of fact is exercised by a jury, the question respecting the probative force of the document in question, with reference to the fact alleged to be indicated by it, ought to be suffered to be submitted to them—in the same manner as the probative force of any article of circumstantial evidence exhibited to them through the medium of oral testimony

Circumstantial evidence at large (supposing no legal cause of exclusion opposable to the testimony of the reporting witness,) circumstantial evidence, as such, is supposed to go to a jury, who, being simple and unlearned persons, are left to judge of it in their own way, without any better light for their guidance than the light of common sense. But it would be beneath the dignity of the sages of the law to suffer themselves to be led by any such vulgar guidance When they judge, it must be by rule and measure: practice, not reason, is their guide. To judge of the probative force of evidence is not their practice: it is an operation out of the sphere of their practice, and beneath it. The sort of question to which they are in use to find answer, is, whether a piece of evidence shall be admitted or excluded Between being admitted and being deemed conclusive—between a man's being heard, and his exercising an ab-

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ner of contradiction, they are (if a man may be permitted a simile from another science) the proper diagrams for the demonstration of right and they do constantly preserve the memory of the matter, that it is ever permanent and obvious to the view, and to be seen at any time in all the certainty of demonstration inasmuch as the record, as is observed elsewhere, can never be proved *per notiora*, for demonstration is only appealing to a man's own conceptions; which can never be done with more conviction than where you draw the consequence from what is already a *concessum*: and consequently there can be no greater demonstration in a court of justice, than to appeal to its own transactions —Gilbert's Evid. p. 7.

* The authorities do not go the length of showing that records are *excluded* as matter of evidence in any case, but only that they are not to be taken as *conclusive* of the truth of all the allegations contained in them,—as for instance, with relation to matters which were neither material nor traversable upon the issue. Co. Lit 352, b. In criminal cases, if the jury give a *general* verdict where the felony is proved at another day than that laid in the indictment, then the party may falsify. But if the time when the fact was committed is found by the jury, all parties are concluded. Gilb. Ev. 870.—*Ed.*

solute command over the decision — there is in the nature of things a medium obvious enough. But whatever there may be in the nature of things, in their practice there is none. If admitted (says the lawyer to himself) it is that sort of evidence that must be conclusive; for who is there that shall take upon him to pronounce it otherwise? Not I: it is not our province — it is not our practice, to weigh the force of evidence. Not the jury; for, being a law document, it belongs not to them to judge of it — such matters are too high for them. If I considered it as conclusive, — insomuch that, were I to take it into consideration, I should regard it as absolutely demonstrative of the fact indicated? Yes. But could I regard it in that light? No, I could not. What, then, is to be done with it? Done with it? — why, what else can be done with it than what we are so much in the habit of doing by evidence of all sorts, and for any the slightest reason, or no reason? — shut the door against it, and refuse to look at it.

3. A single article of circumstantial evidence set out as being of itself conclusive (viz. of the existence of the fact indicated), is an incongruity exemplified in the case where, on the score of *interest* (i. e. exposure to the sinister and seductive action of this or that species of motive), a man is excluded from the faculty of giving testimony in the cause. Titius has such an interest in this cause, that, supposing him to swear falsely to such or such a fact, and thereby commit perjury, and supposing his testimony to be believed, he would be a gainer by such perjury. By the impulse of that *motive*, he is prompted to commit perjury, therefore, if heard, he would perjure himself, therefore he shall not be so much as heard. The exclusion is just as rational as if Donnellan had been convicted of the murder on no other evidence than that of his being next in remainder to the estate. If this were reason as well as law, no witness ought ever to be heard in the character of a witness, no man ought ever to be out of the pillory.

Observe, that, though the assumption here made were always realized, it would not still be sufficient to warrant the exclusion grounded on it. For the strongest interest which a witness can have in being guilty of mendacity is inconsiderable, in comparison with the interest by which a defendant under examination in a capital case is prompted to incur the same guilt, and *for this very reason*, the evidence which a man in this situation yields to his own prejudice is of all evidence the most satisfactory. But of this more fully in its proper place.*

* See Book IX. *Exclusion.*

§ 4. *Circumstantial and direct evidence compared, in respect of probative force.*

In respect of probative force, circumstantial evidence has sometimes been put into comparison with direct, both being considered in the lump; and, on a survey thus superficial, the superiority has sometimes been attributed to the one, sometimes to the other.

A few observations, for the purpose of clearing up the subject, may perhaps not be misemployed.

Possession of either affords, as observed above, no reason for neglecting the other.

But it may happen, that (especially in a penal case on the defendant's side) evidence of one of the two sorts may be supposed to be wanting; or, in a cause of any sort, on each of the two opposite sides, evidence of the one sort may stand single or predominate.

Taking circumstantial in the largest sense, so as to include all the several modifications that have here been referred to that head, — it has already been observed that in no case perhaps was ever a mass of evidence formed, consisting of direct evidence alone, without any admixture of circumstantial; more especially not in any disputed case; and the rather, as different portions of direct evidence will operate in support of each other, thus acting each of them in the character of circumstantial; direct evidence being that which affords not, or at least requires not, any inferences, whereas circumstantial is in a manner composed throughout of inferences.

But circumstantial evidence is, on the other hand, presented oftentimes without any admixture of direct, and in that pure state, decisions are often grounded on it.

Regarded in an abstract point of view, — the essence of the species being considered, without regard to the quantity naturally found in a state of conjunction, in the several individual cases, — the inferiority of circumstantial, as compared with direct, is out of dispute. Direct evidence requires no inference; circumstantial evidence is composed of inferences, and, as already observed, there is scarce an inference to which it may not happen to be fallacious.

Strictly speaking, in the case of direct evidence (it is to be observed) there is always indeed an inference; but this inference is in every instance of the same nature, — from the report made by the witness, the inference that the facts contained in that report are true.

Of circumstantial evidence, by way of argument in proof of the superiority of its probative force over that of direct evidence, it has been said that it cannot lie. But it is only of certain modifications of circumstantial evidence that the proposition is true.

The evidence, and the only evidence, which cannot lie, is that which, without the inter-

vention of any human testimony, presents itself directly to the senses of the judge. In this case is *real* evidence, and such involuntary evidence as is exhibited by the deportment of a party or an extraneous witness while undergoing the process of interrogation. In this same situation is even lying testimony *(false responsion)* itself, considered in respect of the inferences which, on the supposition of its mendacity, it affords—inferences in virtue of which its character is changed from that of direct to that of circumstantial evidence

But all evidence, which, in its way from the source of evidence to the senses of the judge, has passed through the lips or the pen of a human being, is no less susceptible of that pernicious quality than direct evidence is And in this situation are all the remaining modifications of circumstantial evidence (real evidence itself not excepted,) when, by having passed through the lips or pen of a deposing witness, it has sunk into the state of *supposed real evidence reported*

But it is only in so far as it is a cause of deception, and in so far as it acts with success in that character, that lying is productive of effects adverse to the ends of justice and real evidence, it has been seen, is no less capable of acting in this character than direct personal evidence real evidence, like written evidence, being, in the hands of a forger, a source no less capable of producing deception, than, when passed through a mendacious mouth or pen, the direct testimony of a deposing witness is

Thus much, however, is true, viz that it is only here and there by accident that *real* evidence is capable of being fabricated, or by alteration adapted to a deceptitious purpose whereas there is no case in which it may not happen to a man, in the character of a deponent, to stain his deposition by mendacity, if he sees what to him forms an adequate inducement, and is content to run the risk

The features of advantage by which circumstantial evidence is in a more particular manner fitted for rendering service to the cause of truth and justice, seem to be as follows:—

1. By including in its composition a portion of circumstantial evidence, the aggregate mass on either side is, if mendacious, the more exposed to be disproved Every false allegation being liable to be disproved by any such notoriously true fact as it is incompatible with,—the greater the number of such distinct false facts, the more the aggregate mass of them is exposed to be disproved for it is the property of a mass of circumstantial evidence, in proportion to the extent of it, to bring a more and more extensive assemblage of facts under the cognizance of the judge.

2 Of that additional mass of facts, thus apt to be brought upon the carpet by circumstantial evidence, parts more or less considerable in number will have been brought forward by so many different deposing witnesses But, the greater the number of deposing witnesses, the more seldom will it happen that any such concert, and that a successful one, has been produced, as is necessary to give effect to a plan of mendacious testimony, in the execution of which, in the character of deposing witnesses, divers individuals are concerned

Thus, suppose a guilty defendant's reliance placed in a false mass of *alibi* evidence The greater the number of mendacious witnesses, who depose to their having seen him at the time in question, at a place at which he really was not at that time (they having been themselves each of them at a different place at that time,) the greater the number of false depositions, each of which is exposed to be disproved by true ones And so in case of evidence to character

3 When, for giving effect to a plan of mendacious deception, direct testimony is of itself, and without any aid from circumstantial evidence, regarded as sufficient,—the principal contriver sees before him a comparatively extensive circle, within which he may expect to find a mendacious witness, or an assortment of mendacious witnesses, sufficient to his purpose But where, to the success of the plan, the fabrication or destruction of an article of circumstantial evidence is necessary, the extent of his field of choice may in this way find itself obstructed by obstacles not to be surmounted *

One thing may, on this occasion, have a claim to notice viz that, in a great (probably the greater) number of instances, a fact necessary to be established in disfavour

* Instances have occurred, where,—a forged instrument having been employed in the execution of a plan of depredation,—the employment of a paper with a wrong stamp has afforded the means of detection, by bringing to bear against the body of authenticating evidence a mass of de-authenticating evidence not to be resisted .On a species of stamped paper not in use (for example) till the year 1800, a deed was written, purporting to have been executed in the year 1799. The non-existence of any such paper at the time of the date being a fact of the utmost notoriety among the officers of the stamp-office,—the testimony of any one of them, being thus placed out of the reach of all effectual temptation to mendacity, would be sufficient to outweigh the opposite testimony of any producible number of ordinary witnesses. [" In an action of improbation of a writ, which the Lords were convinced was forged, but puzzled for want of clear proof, the Lord Binning took up the writ in his hand, and holding it betwixt him and the light, discovered the forgery by the stamp of the paper." Forbes's Journal of the Session. Preface, xxvii.—*Ed.*]

of the defendant's side—a fact necessary to be established on the part of the plaintiff—belongs to that class of facts which is scarce capable of being proved to satisfaction without the aid of circumstantial evidence.

In this situation, for example, are all those facts of a psychological class, the proof of which, as against the defendant, is necessary to his conviction; and which cannot be proved by direct evidence other than that testimony of his own—that confessorial evidence—which nothing but an assured expectation of a sufficient mass of inculpative evidence from other quarters will ever prevail upon him to give. Criminative or otherwise inculpative consciousness,—inculpative, criminative intentions—to which is added, in some cases, the existence and influence of this or that particular sort of motive,—to one or other of these heads may be referred the psychological facts, proof of which, one or more of them, is (in case of most of the offences occupying a high rank in the scale of criminality or penality) regarded, and that justly, as indispensable.

But these are among the facts, the existence of which no defendant, who does not regard his case as rendered desperate by other evidence, will ever acknowledge. Proof, therefore, whatsoever they are susceptible of, if they receive, they must receive from extraneous evidence: and, until the parable of the man with windows in his breast be realized, such extraneous evidence cannot be of any other nature than that of circumstantial evidence, viz under one or other of the modifications as herein above brought to view *

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* Extract from the printed pamphlet on *Circumstantial Evidence*, occasioned by Donnellan's case:—

"We hear this observation everywhere echoed: 'Circumstantial evidence is the best, for circumstances cannot lie.' But if we would give ourselves the trouble to bestow a little consideration upon the subject, I think we shall be convinced that circumstantial evidence is not the best, and that circumstances seldom lie. There are circumstances which cannot lie, where the conclusion or inference is necessary and unavoidable; but where the conclusion or inference is contingent, circumstances may lie, that is, we may draw an erroneous conclusion from the given facts. The learned Mutæus clearly describes this distinction:—'Argumentum porro necessarium vel contingens est: necessarium, cujus consequentia necessaria est, veluti convisse eam quæ peperit, contingens, cujus consequentia probabilis est, veluti cædem fecisse, qui crudelitatus est; Atalantam virginem non esse, quod cum adolescentibus spatietur sola per sylvas.' In the first case, one fact is a certain demonstration of the other, but in the second, the circumstances must frequently lie, when they charge with murder a person stained with blood, or Atalanta, from such companions and conduct, with a want of chastity. But he proceeds to observe—'Contingentia vero quamquam singula fidem non faciunt, plura tamen conjuncta crimen manifestare possunt. Rem uno atque altero exemplo declarabimus. Occisus est Kalendis Martiis: Titius perempti inimicus fuit; eidem sæpius non solum interminatus, sed et insidiatus est. Cum deprehenderetur iisdem kalendis, in loco cædis, cruentatus, cum gladio cruento, ad mensuram vulneris facto, toto vultu expalluit, interrogatus nil respondit, trepide fugit. Hic singula quidem argumenta infirmiora sunt, universa tamen cædis auctorem Titium evidenter designant, recteque Duarenus duxit, non dubitaturum se hunc reum carnifici jugulandum dare.'—Tit. 15, c. 6. Yet Duarenus might have condemned and executed an innocent man. Every one of these circumstances must be proved by positive witnesses, who may be either wicked or mistaken; but even if they are pure and correct, the conclusion we draw from the facts disclosed may be erroneous. So that in circumstantial evidence there must of necessity be more chances for error than in positive evidence. If any number of witnesses should swear they saw the prisoner draw a reeking sword from the side of a dead man, we have not the same degree of certainty that he either murdered or killed him, as if the same witnesses had sworn they had seen him run it through his body. It affords a violent presumption; but still, it might have been the friendly act of an innocent man, who had accidentally passed that way after the murder was committed; or even if it was the prisoner's own sword, it might have been snatched from his side, and plunged into the body of the deceased by some one who had escaped; or the deceased might have borrowed it, and have fallen upon it himself. All human testimony is nothing more than a high probability; and it is true that circumstantial evidence in one case may produce a higher degree of it, or more nearly approach to certainty, than direct and positive evidence in another.

"That both positive and circumstantial evidence may fail, will appear from the following cases: the first is in the chronicle of the Gentleman's Magazine for Oct. 1772; the other is from the 5th vol. of Causes Celebres, p. 436, where several more such stories are related.

"'Sept. 14, 1772, came on, at the sessions in the Old Bailey, the trial of one Male, a barber's apprentice, for robbing Mrs. Ryan, of Portland Street, on the highway, on the 17th of June last. The witnesses swore positively to the identity of the lad, and the whole court imagined him guilty. He said nothing in his defence, but that he was innocent, and his evidences would prove it. His evidences were the books of the court, to which reference being made, it appeared that on the day and hour when the robbery was sworn to be committed, the lad was on his trial at the bar where he then stood, for another robbery, in which he was likewise unfortunate enough to be mistaken for the person who committed it; on which he was honourably acquitted.'

"'Voici un autre fait, dont j'ignore l'époque, et qui m'a été transmis par la tradition. Avant qu'on eût rebati cette longue suite de maisons qui bordent la place Saint Michel à Paris, en face de la rue Sainte Hyacinthe, une marchande veuve et âgée occupoit, au meme endroit, une petite boutique, avec une arriere-boutique où elle couchoit. Elle passoit, dans le quartier, pour

CHAPTER XVI

OF IMPROBABILITY AND IMPOSSIBILITY *

§ 1. *Improbability and impossibility are names, not for any qualities of the facts themselves, but for our persuasion of their non-existence*

IMPOSSIBILITY and Improbability are words that serve to bring to view a particular, though very extensive, modification of circumstantial evidence

The occasion on which they are employed, — the occasion, at least, on which, under the present head, I shall consider them as employed, — is this — on one side, a fact is deposed to by a witness, on the other side, the truth of it is denied — denied, not on the ground of any specific cause of untrustworthiness on the part of the witness, but because the fact is in its own nature *impossible:* impossible, or (what in practice comes to the same thing) too improbable to be believed on the strength of such testimony as is adduced in proof of it

What is the nature and probative force of this modification of circumstantial evidence? Is there any, and what, criterion, by which impossible facts, or facts which are to such a degree improbable, as to be, for practical purposes, equivalent to impossible ones, may be distinguished from all others?

If any such criterion existed, its use in judicature would be great indeed By the help of it, a list of such impossible and quasi-impossible facts might in that case be made out—

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avoir beaucoup d'argent amassé Un seul garçon composoit, depuis longtems, tout son domestique Il couchoit a un quatrieme etage, dont l'escalier n'avoit point de communication avec l'habitation de sa maîtresse, il etoit obligé, pour s'y rendre, de sortir dans la rue, et lorsqu'il s'alloit coucher, il fermoit la porte extérieure de la boutique, et emportoit la clef, dont il etoit seul depositaire On voit un matin la porte ouverte plutot qu'à l'ordinaire, sans qu'on remarquât aucun mouvement qui annonçat que la marchande ou son garçon fussent leves Cette inaction donna de l'inquietude aux voisins. Cependant on ne remarque aucune fracture a la porte; mais on trouve un couteau ensanglante, jetté au milieu de la boutique, et la marchande assassinée dans son lit a coups de couteau Le cadavre tenoit dans une main une poignée de cheveux, et dans l'autre une cravate. Auprès du lit étoit un coffre, qui avoit été forcé On saisit le garçon de boutique il se trouve que le couteau lui appartient La cravate que tenoit la marchande étoit à lui On compare ses cheveux avec ceux qui etoient dans l'autre main, ils se trouvent les mêmes* Enfin, la clef de la boutique étoit dans sa chambre, lui seul avoit pu, moyennant cette clef, entrer chez la marchande, sans fracture D'apres des indices ainsi cumulés et si concluants, on lui fait subir la question; il avoue, il est rompu Peu de tems après on arrête un garçon marchand de vin, pour je ne sçais quel autre délit il declare, par son testament de mort, que lui seul est coupable de l'assassinat commis a la place Saint Michel Le cabaret où il servoit étoit attenant a la demeure de la marchande égorgée Il étoit familierement lié avec le garçon de boutique de cette marchande; c'étoit lui qui mettoit ordinairement ses cheveux en queue; quand il le peignoit, il avoit soin de ramasser ceux que le peigne detachoit, et dont il avoit, peu-à-peu, formé la poignée qui s'étoit trouvée dans les mains du cadavre. Il ne lui avoit pas été difficile de se procurer une des cravates et le couteau du son camarade, et de prendre, avec de la cire, l'empreinte de la clef de la boutique, pour en fabriquer une fausse.'

"There is a species of testimony which is called the *evidentia rei:* though this must be introduced by positive evidence, yet, when produced, it speaks for itself, and requires no explanation. Of this nature may be mentioned two cases, which have happened within a few years upon the northern circuit: in one case, a man was found shot by a ball, and the wadding of the pistol stuck in the wound, and was found to be part of a ballad called 'Sweet Poll of Plymouth,' which corresponded with another part found in the pocket of the prisoner The other also was a case of murder, and in the head of the deceased there was a chip or splinter, which exactly fitted the cavity in a bludgeon from which a piece had been lately broken; which bludgeon the prisoner carried in his hand when he was apprehended. Though this account of the two pieces of the ballad, and two pieces of the bludgeon, must be proved by positive testimony, yet the court and jury are as competent judges of the fitness and correspondence of the parts as the witnesses *Cui adsunt testimonia rerum, quid opus est verbis?* These were certainly strong corroborations of other circumstances; but if they had stood alone, they would have deserved little consideration, for if the ballad and the bludgeon had been thrown away by the murderers, they were objects likely to draw the attention of an innocent man, who would naturally have put one in his pocket, and have carried the other in his hand"

* In putting together the scattered papers from which this work was compiled, considerable difficulty was felt in assigning its proper place to what Mr Bentham had written on the subject of improbability and impossibility

Had it been in the power of the editor to select that arrangement which appeared to him best suited to the nature of the subject, he would have placed so much of the present chapter as is merely explanatory of the *nature* of improbability and impossibility, in the first book, entitled *Theoretic Grounds*, and so much of it as relates to the *probative force* of improbability and impossibility, considered as articles of *circumstantial evidence*, in the present book. It appeared to him, however, on perusing the manuscript, that the mode in which Mr Bentham had treated the subject did not admit of any such separation of it into two parts, as he had at first contemplated. The only question, therefore, which remained, was, whether to place the chapter under the head of Theoretic Grounds, or under that of Circumstantial Evidence? and, on consideration, he has thought it better to postpone the more general and explanatory matter to the present book, than to separate this one species of circumstantial evidence from the rest.—*Editor.*

made out by the legislator, and put into the hands of the judge. To know whether the probative force of the testimony in question were or were not destroyed by this modification of circumstantial disprobative evidence, the judge would have nothing more to do than to look into the list, and see whether the species of fact in question were to be found in it

Unfortunately, there exists no such criterion—no *possibility* (if the word may here be employed without self-contradiction) of making up any such list Not only would one man's list contain articles which another man would not admit into his; but the same article which would be found in one man's list of impossibilities, would be found in another man's list of certainties

From a man who sets out with this observation, no such list, nor any attempt to form one, can of course be expected. Yet, on the following questions, some light, however faint, may be, and will here be endeavoured to be, reflected

1 What it is men mean, when they speak of a fact as being impossible—intrinsically impossible?

2 To what causes it is owing that one man's list of impossible facts will be so different from another's?

3 Different modifications of impossibility different classes of facts which men in general—well-informed men in general, may be expected to concur in regarding as impossible

4 Among facts likely to be, in general, considered as impossible, what classes are of a nature to be admitted in evidence?

When, upon consideration given to a supposed matter of fact, a man, feeling in himself a persuasion of its non-existence, comes to give expression to that persuasion,—he pronounces the matter of fact, according to the strength of such his persuasion, either more or less *improbable*, or *impossible*

In and by the form of words thus employed for giving expression to that which is in truth nothing more than a psychological matter of fact, the scene of which lies in, and is confined to, his own breast,—a sort of quality is thus ascribed to the external phenomenon, or supposed phenomenon; viz. the matter of fact, or supposed matter of fact itself. Upon examination, this quality, it will be seen, is purely a fictitious one, a mere figment of the imagination, and neither improbability and impossibility on the one hand, nor their opposites, probability and certainty, on the other, have any real place in the nature of the things themselves.*

So far as concerns probability and improbability, the fictitiousness of this group of

been applied, not only to the fact, but to the witnesses—not only to the supposed matter of fact itself, but to the persons by whose testimony the existence of it has been asserted.

In the structure of these two epithets, an undeniable impropriety is observable. By the termination *ible* (in Latin, *ibile* and *ibilis*,) potentiality and its opposite are the only qualities which, on other occasions, are denoted: on this occasion, instead of that of potentiality and its opposite, the import which they are employed to convey is that of *propriety* or *fitness*, *impropriety* or *unfitness*.

As to *potentiality*, or say *capacity*,—no imaginable matter of fact, how unfit soever to be credited, but what is credible—no matter of fact that is incredible. No supposed matter of fact more unfit to be credited than many a one which is actually, and by immense multitudes, firmly credited, and, as to witnesses, there never has been, nor ever can be, any one, not in a state of absolute insanity, who has not been not only credited, but properly and fully credited.

In connexion with, but rather in opposition to than in conjunction with, credibility and incredibility,—lawyers, in speaking of a proposed witness, employ the attributives *competency* and *incompetency*, speaking of the witness as being *competent* or *incompetent* Of these words the use is, to form a sort of disguise for the question, whether the person produced in the character of a witness shall be admitted as such, or excluded: for the same individual, of whom they will not say that in that character he is incredible, shall be excluded by them under the notion of his being incompetent By the ambiguity in which they either found the epithets *competent* and *incompetent* involved, or contrived to involve them, these epithets became not ill fitted for their purposes. Incompetent, on every given occasion, was by each man deemed synonymous to *incredible*, or to *inadmissible* according to the purpose which he had to serve. If to inadmissible, it was on this ground, viz. that, being by the supposition unfit to be believed, and in that sense *incredible*, it would by consequence be useless and dangerous to give him admittance, since in that case it might happen to him to be, in the other sense, so far from being incredible as to be actually credited.

All this while, in the words *trustworthy* and *untrustworthy*, the language possessed a pair of appellatives, by which (if employed instead of the words *credible* and *incredible* on the one hand, *competent* and *incompetent* on the other) the purposes of common sense and common honesty would have been fully answered.

In trustworthiness and untrustworthiness, there is no such impropriety as that which, in the instance of credibility and incredibility, has just been brought to view: and in regard to admission, had the word trustworthiness been employed, an idea that might have presented itself to an unsophisticated mind was, that it was a quality the existence or non-existence of which was a point rather to be *tried* afterwards, by means of *admission*, than to be determined without trial, for the purpose of forming a pretence for non-admission.

But, by the same qualities by which these terms were, in so superior a degree, adapted to the purposes of truth and justice, they were rendered unfit for the purposes of lawyers. In

* While the opposite and corresponding attributives, probability and improbability, have thus been applied to the supposed matter of fact,—another pair of opposite and similarly corresponding attributives, viz. *credible* and *incredible*, have

qualities will scarcely, when once suggested, appear exposed to doubt.

Take any supposed past matter of fact whatever, giving to it its situation in respect of place and time At the time in question, in the place in question, either it had existence, or it had not there is no medium Between existence and non-existence there is no medium, no other alternative By probability—by improbability,—by each of these a medium is supposed—an indefinite number of alternatives is supposed

At the same time, the same matter of fact which to one man is probable, or (if such be his confidence) certain, is to another man improbable, or, if such be his confidence, impossible

Often and often, even to one and the same man, at different times, all this group of fictitious and mutually incompatible qualities have manifested themselves

If his persuasion be felt to be of such a strength, that no circumstance capable of being added to the supposed matter of fact could, in his view of the matter, make any addition to that strength, or if, on looking round for other conceivable matters of fact, he fails of finding any one, in relation to which his persuasion of its non-existence could be more intense,—*impossible* is the epithet he attaches to the supposed matter of fact—impossibility is the quality which he ascribes to it.

If, on the other hand, a circumstance presents itself, by which, in his view of the matter, an addition might be made to the intensity of such disaffirmative persuasion; or if the supposed matter of fact presents itself as one in relation to which his persuasion of its non-existence might be more intense; in such case, not *impossible*, but *improbable*, is the epithet,—not *impossibility*, but *improbability*, is the quality ascribed

Certainty, which is the opposite to impossibility, or rather of which impossibility is the opposite, is applied to the persuasion, and from thence to the supposed matter of fact It is not, any more than impossibility, applied or applicable to testimony

As certainty, so uncertainty, applies itself to the persuasion and the fact, and not to the testimony In the scale of persuasion, it embraces all degrees except the two extremes The existence of a fact is not matter of uncertainty to me, if the fact be regarded by me as impossible

Certainty, therefore, has for its opposite, *uncertainty* in one way—*impossibility* in another Uncertainty, in the language of logicians, is its contradictory opposite—impossibility, its contrary opposite

The fiction by which (in considering the strength of a man's *persuasion* in relation to this or that fact, and the probative force of any other matter of fact when viewed in the character of an evidentiary fact in relation to it) occasion is taken to ascribe a correspondent quality, indicated by some such words as *certainty* and *probability*, to the principal fact itself,—appears to be like so many other figments, among the offspring of the affections and passions incident to human nature It is among the contrivances a man employs to force other men to entertain, or appear to entertain, a persuasion which he himself entertains or appears to entertain, and to make a pretence or apparent justification for the pain which he would find a pleasure in inflicting on those on whom a force so applied should have failed to be productive of such its intended effect

Were it once to be allowed, that, as applied to the facts themselves which are in question, probability and certainty are mere fictions and modes of speaking, that all of which, on any such occasion, a man can be assured, is his own persuasion in relation to it, that that persuasion will have had for its cause some article or articles of evidence, direct or circumstantial, real or personal, and will be the result of, and in its degree and magnitude proportioned to, the probative force of that evidence, that, of such evidence, neither the probative force, nor consequently the strength of his persuasion, are at his command; that it is not in the power of any article of evidence to have acted with any degree of probative force upon, nor consequently to have given existence to any persuasion

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In the word *untrustworthy* they would have found but one sense in the word *incompetent* they had the good fortune to find, or the dexterity to make, two senses, one of which served as a pretence, or a sort of reason, for the other "Assuming the man to be unfit to be credited if heard, they assumed, as if it were the same thing, rather than a consequence of the other, that he was unfit to be heard.

To the profession the occasion was in its day an occasion of great interest, and is to this day had in general remembrance, in which the two words *credible* and *competent*, as applied to witnesses, served as cestuses to Lord Mansfield and Lord Camden; who might be termed the Cribb and Molyneux of Westminster Hall, but for the undissembled rancour by which the warfare of the psychological was distinguished from that of the physical combatants

In regard to trustworthiness, how the matter stands in universal experience has been already stated. Every man is in general habituated to the language of truth, and on every occasion disposed to employ it; but on every occasion liable to be induced, by particular interest acting in a sinister direction, to substitute to it the language of falsehood.

But, according to the theory of these habitual and licensed utterers of falsehood, mankind are divided into two parcels; one of these never using any other language than that of falsehood, nor ever failing of causing it to be accepted as if it were the language of truth.

in a mind to which it has not been applied; and that therefore it is not in the power of any evidence to give either certainty or probability to any matter of fact (the matter of fact being, at the time in question, either in existence or not in existence, and neither the evidence nor the persuasion being capable of making any the slightest change in it) that it depends in a considerable degree upon the mental constitutions of A and B respectively, what sort of persuasion, if any, shall be produced in their minds by the application of any given article of evidence, and that it is no more in the power of evidence applied to the mind of A, and not to that of B, to produce in the mind of B a persuasion of any kind, than it is in the power of evidence applied to the mind of B, and not of A, to produce a persuasion on the mind of A,—were all this to be duly considered and allowed, neither the existence nor the non-existence of a persuasion concerning a matter of fact of any sort, would have the effect of presenting to any person any other person as a proper object of punishment, or so much as resentment.

But the certainty of this or that fact is assumed as perfect and indisputable: and thus he of whom it is conceived that he fails of regarding, or of representing himself as regarding, that same fact in such its true light, is on no better foundation considered and treated as being either mendacious, or perverse and obstinate: perverse and obstinate, if he fails of regarding it in that light—mendacious, if, it being impossible to him to fail of regarding it in that light, he speaks of himself as if he did not.

When a man is himself persuaded—or though he does but, under the impulse of some interest by which he is actuated, appear to be, or profess to be, persuaded—of the existence of a fact,—it is matter of pain and vexation to him to suppose that this same persuasion fails of being entertained, still more to observe that it is professed not to be entertained, by those with whom, on the occasion of it, he has to deal.

Hence it is that, in his mind and in his discourse, to entertain it is made matter of merit—to fail to entertain it, matter of demerit and blame, on the part of others with whom he has to do: and, to cause them to pursue that supposed meritorious line of conduct, the power of reward, if within his reach, is employed, and to deter them from the opposite conduct, even the power of punishment: of both which powers, in the application thus made of them, mankind have been unhappily accustomed to see and to feel the exercise, carried to a pitch so repugnant to the dictates of humanity and reason.

§ 2. *Impossible facts distinguished from verbal contradictions.*

It having been shown that improbability and impossibility, applied to a matter of fact, are merely terms expressing a certain strength of persuasion of the non-existence of that fact—what remains is, to show what are the grounds on which such a persuasion is liable to be entertained: to show, in other words, in what consists the improbability or impossibility of any alleged fact.

Previously, however, to entering upon this inquiry, it will be necessary to discard out of the list of impossible facts, articles that might be in danger of being considered as included in it. These are—

1. Contradictions in terms: or, as they might be termed, verbal impossibilities. Examples. Two and two are not so many as four.—Two and two are more than four.—The same thing is, and is not, at the same time.

The truth is, that in these cases no matter of fact at all is asserted, consequently none of which it can be said that it is impossible.*

2. Inconceivable facts. Sometimes to this class, sometimes to the former, belong the opposites of a variety of propositions of a mathematical nature. e. g. that two and two should be either more or less than equal to four: that two right lines should of themselves inclose a space.†

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* This may be illustrated by the following passage from Locke:—"All propositions, wherein two abstract terms are affirmed one of another, are barely about the signification of sounds. For since no abstract idea can be the same with any other but itself, when its abstract name is affirmed of any other term, it can signify no more but this, that it may or ought to be called by that name; or that these two names signify the same idea. Thus, should any one say, *that parsimony is frugality*, that *quantity is justice*—that this or that action is, or is not *temperance*,—however specious these and the like propositions may at first sight seem, yet when we come to press them, and examine nicely what they contain, we shall find that it all amounts to nothing but the signification of those terms"—*Essay concerning Human Understanding*, book iv. ch. viii. § 12. —*Editor.*

† These propositions, even such an one as the last, viz. that two right lines cannot inclose a space, are but verbal contradictions. The terms *straight line*, and *space*, and *inclose*, are all general terms, and to affirm them one of another, is merely to say that they are of this or that meaning. It is merely to say that the meaning we ascribe to the term space, or rather to the term inclosure of space, is inconsistent with the meaning we ascribe to the term two straight lines. When we pass from names to things, and take two straight rods in our hands, we have the evidence of our senses, that they cannot inclose a space. If they touch at one part, they diverge from one another at every other part. If they touch at more than one part, they coincide, and then are equivalent to one straight line. What we mean by an inclosure, is such a line, or continuance of lines, that a body departing from any one point can pass on without turning back till it come to that point again, without having met in its progress any place where the line was inter-

§ 3. *No facts universally recognised to be incredible.*

Before I enter upon the topic announced by the word *incredibility*, a topic the consideration of which does really belong to the subject of judicial evidence, it may be of use to clear the inquiry of a topic that does not belong to it, viz *impossibility* On the former, it will be at all times in the power of a reasonable man, in the station of a judge, to form a persuasion sufficient for his guidance on the other, it will not be in the power of a reasonable man, in that station, to form a persuasion sufficient for his guidance in the business of judicature and, of the introduction of the topic in argument, nothing but perplexity and illusion can be the result

In truth, the degree of incredibility that can with propriety be the subject of consideration for any purpose of judicature, is merely relative and comparative The object of comparison is the probative force of the evidence by which the existence of the fact considered as improbable is indicated and the question is, which of the two forces ought to be deemed the greater?—the probative force of the testimony by which the existence of the fact in question is indicated? or the disprobative force designated or pointed to by the word *incredibility*, as employed to express an attribute of the fact? Let the disprobative force of the incredibility be but ever so little greater than the probative force of the testimony by which the existence of the fact is maintained, it is sufficient for the purpose of judicature the question concerning any superior degree is purely speculative, not applicable to judicial practice, and, as such, irrelevant to the business of judicature—to the question (whatever it be) before the court

In a loose and popular sense, nothing can be more frequent than the use of the word *impossible*, and its conjugate *impossibility*: frequent, and (such is the exigency of language,) we may venture to say, *necessary* But, if applied to the subject of judicial evidence, to express an idea distinct from, and (if one may so say) superior to, that of improbability—a high degree of improbability,—it then becomes productive of the confusion above spoken of

The impropriety of introducing the word in this strict sense, on a judicial occasion (not to speak of other occasions,) may be rendered apparent by this consideration, viz. that in the use of it in this sense is involved the assumption of omniscience and infallibility on the part of him who uses it * .

Examples lending an apparent countenance to the use of it in this strict sense, may, I am aware, not be altogether wanting but, upon a closer inspection, it will appear, that the objects in question either do not come at all under the notion of facts, or at any rate not under the notion of such facts as are capable of being made the subject of evidence.

Take the following examples —

1 It is impossible for the same thing to be, and not to be The negative or opposite of this, it may be said, is a fact, the incredibility of which will be recognised by everybody And so with the two following —

2 Where there is no property, there is no injustice

3 Two and two make four

Answer —In the first case, no *fact*, properly speaking, is concerned In that case we have a proposition, but it has not any fact for the subject of it Examined closely, it will be found to be no more than a proposition concerning the signification of words So vague and so inapplicable to any useful purpose is the import it conveys, that it is

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rupted, any place where there was not a portion of line. An inclosure is a line or conjunction of lines, which beginning at one point is continued till it comes to that point again. Two straight lines are lines which departing from one point never meet, but continually diverge What is affirmed, then, is, that lines which do meet, in the manner thus described, and lines which in that manner do not meet, are not the same lines. The question, then, either is about the physical fact—the rods to which the evidence of sense and experience is applicable; or it is about the meaning of general terms.—*Editor.*

* In the uncertainty thus confessed, there is nothing that applies, with any peculiar force, to this modification of circumstantial evidence In the case of affirmative evidence (*i. e.* where the object of the evidence in question is to establish the *existence*, instead of the non-existence, of the fact to which it applies,) if we were to look for a mark by which to distinguish, on each occasion, such lots as may, with confidence, be given for *conclusive*, our endeavours would be equally unavailing If, where the object is to frame a description of the cases in which the non-existence of one fact may, without danger of error, and by rules not exposed to contestation, be deduced from the existence of another; the cases in which the existence of one may be deduced with equal assurance and success from the existence of another fact, will not be found to stand upon ground in any degree more satisfactory Evidence is the ground we have for the truth of the propositions of which we are least assured evidence, and nothing better, is the ground we have for those facts, of the existence or non-existence of which we take upon us to speak with the greatest confidence. What there is of reality in the ideas expressed by such words as *impossibility*, *necessity*, *certainty*, is, as already observed, not any property in the things, in the facts themselves, but only the degree of persuasion by which the opinions we entertain in relation to those facts is accompanied. He who, by the use of any of these expressions of confidence, should think to attach any additional strength to the grounds of persuasion, or any additional security for universality of assent, would be the man to answer the question put in Scripture—"Which of you all, by taking thought, can add a cubit to his stature?"

difficult to say what it does amount to: perhaps an observation relative to the use of the word *not;* showing an occasion on which it cannot with propriety be employed.

No fact at all being indicated by the proposition in question, no fact is indicated by it capable of forming a subject of controversy in a court of justice.

2. The second supposed example is brought to view on account of the deserved celebrity of the author, and as an instance to show how idle and nugatory may be the language of the acutest mind, when dealing with propositions of an extensive import, without having as yet scrutinized into their contents, and applied them to particulars.

Howsoever it may be with the preceding proposition, this one may readily be seen to be neither more nor less than a proposition concerning the import of words. Where you cannot, in the way in question, employ the word *property*, neither can you, in the way in question, employ the word *injustice*.*

3. That the proposition, two and two make four, is neither more nor less than a proposition concerning the import of words, seems evident enough, as soon as intimated. To these same apples to which, when taken together, I apply the numeral word four,—to these same bodies, when divided into two parcels equal in number, I apply respectively the numeral words two and two, and in both cases with equal propriety, and conformity to the usage of language. In this, then, we have another instance of a proposition not enunciative of any fact—of any fact having for its subject-matter anything other than the occasion on which the words in question have been wont, in the language in question, to be employed.

In this example, then, we do not see any exception to the general proposition in question; viz. the proposition, that, of facts liable to be the subject of judicial controversy, there is no assignable one which all men would be sure to be agreed in speaking of as incredible.—and this for the three following reasons:—

1. The proposition in question—two and two make four—is not, properly speaking, the enunciation of a matter of fact,—only of a manner of employing words.

2. If that, which it is an enunciation of, *were*, properly speaking, a matter of fact, it would not be of the number of those facts which are liable to be the subject of judicial controversy or exhibition.

3. Although it were a fact, and liable to be the subject of judicial controversy or exhibition, there would be no assurance that all men would be agreed in speaking of the existence of it as certain, or the negation of it as incredible.

Did any such thing exist as a catalogue of universally-acknowledged impossible, or even incredible facts, and these facts liable to be brought to view in judicature,—the facts being arranged in alphabetical order, open the dictionary, the cause is at an end.

Unfortunately, so far from a collection of such facts, whether any one such fact be to be found, is more than I would venture willingly to determine: and if forced to answer, my answer, I suspect, would rather be in the negative.

If, among physical facts, there should be one that presented a fairer chance than another of being allowed to occupy a place in such a catalogue, it should, I think, be this, viz. the existence of any body in two distinct places at the same time. But this, which, by the greater part of mankind, would (I suppose) be admitted into the catalogue of incredible facts, is, by one portion of mankind,

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* So unfortunate is this great genius in his choice of this proposition, by which, in his conception, such great things may be done, that, even in the character of a proposition concerning the words in question, it is far from being uniformly true. If, by a report, true or false, I injure you in your reputation, is there no injustice in that case? Is it unconformable to the usage of language to say, I thereby do you an *injustice*? Yet, what property of yours is concerned in it, or affected by it? Will it be said, the property you have in your reputation? In this sense, the use of the word property is manifestly improper and figurative. Property is a thing that can be transferred: is reputation transferable?

Truth being generally desirable—demonstration being a means of coming at it with the greatest certainty—moral science being a department of knowledge in which the importance of truth is at the highest pitch,—Locke wished to find, and thought he had found, moral truths to be a subject for demonstration. All moral truths, he thought, were capable of being demonstrated, by a chain of logical or rather dialectical propositions, of which this proposition constituted the first link.

Moral truths a subject for logical demonstration! As well might he have predicated the same thing of medical truths. As little could be done by this wonder-working proposition for moral science as for medical. The one, as well as the other, is founded on facts—on facts made known by observation, experience, and experiment. In both cases these facts are human feelings: in the case of medical science, the feelings more particularly of the body; in the case of moral science, more particularly the feelings of the mind. Of moral science, the only true and useful foundations are propositions enunciative, not like that of Locke, of the import of words, but of facts; viz. of the existence of human feelings, pains, or pleasures, as the effects of this or that disposition of law, or of this or that state of human affairs calling for a correspondent disposition and exercise, of the power of the law. Of these, under the name of axioms of mental pathology, a specimen, nor that a scanty one, has been given in another place. (See Dumont, "Traités de Législation," and above, Vol. I. p. 304.)

nor that an inconsiderable one, held not to be incredible without one exception and in the case to which that exception extends, it is held to be not simply not incredible, but certain and indisputable Far be it from me to mention this deviation from the more common opinion, as matter of reproach to the deviators I mention it only in proof of the discrepancy — perhaps the incurable discrepancy — of opinion, that prevails among mankind, and as one out of so many other considerations which concur in impressing the impropriety of precipitate exclusions and conclusions on the mind of an upright and zealous judge As to the exception in question, whether in point of truth it be warranted or no, it belongs not to the present subject to inquire. Fortunately, supposing it unwarranted, — so long as the proposition, how paradoxical soever, confines itself to the highly extraordinary case to which alone it seems to have ever hitherto been applied, — no error, if it be one, can be more innocent to every purpose of judicature

As there is nothing whatever (supposing it possible) that men cannot be made to do, — so there is no fact whatever that men may not be made to speak of as certain or as incredible — no proposition which they may not be made to speak of as certainly true or certainly false, — by interest, real or imagined — by hope of pleasure, or fear of pain, from a source conceived (rightly or erroneously) to exist In the particular case in question (two and two make four) — this subjection of discourse (as of all other modifications of human agency) to interest — this consequent versatility and ununiformity of discourse, has not, perhaps, been exemplified But, in an example that stands next to it, the exemplification has actually and notoriously taken place That two and two make four, has, perhaps, never been denied But that one and one and one make three, has been denied That in its application to most subjects it has been generally spoken of as true, is evident enough, otherwise, the known usage of language, and the known import of the word *three*, could not have obtained But, that there is a subject in relation to which this agreement does not obtain, is, in many countries, matter of equal notoriety Agreed, as applied to apples, agreed, as applied to men, not agreed, as applied to Gods.

I mention it, not as meaning to take a part in such a controversy; I mention it only as a striking proof, as well as illustration, that there is no fact whatever, real or nominal, that is out of the reach of controversy — a proposition which, to the present purpose, has already been shown to be of no small practical importance.

In vain would it be to say, that the exception here is in language merely, not in persuasion As a general proposition, it is but too true, that persuasion and language are but too often at variance, but in the instance of no one individual person would I take upon me to affirm, but upon special grounds, that any such variance had place in this particular case Granting, however, that, on the present occasion, persuasion were not conformable to language, what would it signify to the present purpose? It is in language, and in language only, that the catalogue in question, the supposed catalogue of facts universally agreed to be incredible, would be expressed

By these same considerations it may be rendered equally apparent, that if, at any given moment, an article were in existence fit for entering into the composition of such a catalogue, the next moment might at any time expunge the article, and leave the catalogue a blank Neither over internal persuasion, nor over exterior discourse, is the power of interest less at one time than another. Today, men are agreed, that, to the truth of the proposition "one and one and one are equal to three," there is but this one exception. Let human laws, or opinion of divine command, or any other efficient cause of interest, experience an appropriate change, there shall be no exception at all, or any number of exceptions And so in regard to the proposition, two and two make four, or any other proposition of grammar, mathematics, or physics

Under the influence of interest, so far is what may be termed the *natural* incredibility of a fact from excluding it from a place in the catalogue of credible facts, and *vice versâ*, that its tendency may be, and seems to be, to provide it with a place in that same catalogue, and a place even in the class of *certain* facts For, let the expectation of reward be annexed to the practice of regarding or speaking of facts naturally incredible as if they were certain, and let this reward be to be obtained pure, earned without sacrifice in the shape of reputation, or any other shape, what should hinder it from being embraced? *Credo quia impossibile est*, is the often mentioned and natural result of the determination generated, and enthusiasm lighted up, by prospects of this kind For at what cheaper rate can the matter of reward be earned in any shape? And so of punishment a principle of action, the force of which, when applied in adequate quantity, is, in its operation, still more certain and irresistible

What the influence may be (beneficial or otherwise) of the matter of reward or punishment so applied, to the interests of morality, knowledge, or social harmony, belongs not to the present place. When, of the above-mentioned proposition, which does belong to the present place, the truth is established, the inquiry is at an end.

§ 4 *Improbability and impossibility resolvable into disconformity to the established course of nature.*

An incredible fact, as contradistinguished from a verbal contradiction (whether improbable or impossible be the epithet by which the particular strength of the belief in its non-existence is designated,) owes its incredibility to one cause, and to one cause only.

This cause admits of a variety of appellations. On the part of the matter of fact deposed to by the affirmative evidence, disconformity (as supposed) to the established course* of nature thus may be expressed

* In ordinary language, the phrase would be, disconformity to some one or more of the *laws* of nature.

The expression *law of nature* is figurative, metaphorical: it is a metaphor taken from the use given to the same word *law* in the case of a political law: it is to that source, consequently, that we must resort for an explanation of it.

When a political law, the expression of an act of human will, is issued, that law emanating from recognised authority and backed with the usual sanctions,—a correspondent degree of conformity in human actions—in the conduct of such individuals as are subject to the law—is the customary and manifest consequence: and (human actions being events) a law—a political law—is thus a cause of conformity among events.

In regard to events of a physical nature, the grand and constant object of curiosity and inquiry, is that which respects the *cause*: and on a subject so interesting, when men cannot come at facts, rather than have nothing, they are eager to catch at, and content themselves with, words. Between this and that group of facts a certain conformity is observed: what is the cause of that conformity? becomes then the question. Cause of the conformity?—none at all: the conformity is itself nothing: it is nothing but a word expressive of the state our minds are put into by the contemplation of those facts. There are the facts: they do exist, but the conformity, as taken for a fact distinct from the facts themselves, has no existence.

Like so many other truths, this being no more than a confession of ignorance—and that invincible ignorance—is not satisfactory to the human mind. Nothing but words being on this occasion to be had—words, the counterfeit representatives of facts—them men are determined to have, rather than have nothing. The conformity being (like every other fact, real or supposed) susceptible of the denomination of an effect, this proves the existence of a cause: what name, then, shall be given to that cause? What name?—what word?—for when men have got words, they have got that with which (on this, as on so many other occasions) they are content to pay themselves. What cause?—A *law of nature*. Here are events: these events are conformable to one another: here we have conformity amongst events. But, for that sort of thing which is a cause of conformity among events, we have a known name already: it is a *law*. The sort of events, the conformity among which this term hath been hitherto employed to designate, are human actions. The sort of events of which we are now looking out for the cause, are not human actions, but natural events. Law in this sense must, therefore, have something to distinguish it from law in that sense. In that sense it is termed *law* simply, without an adjunct: to distinguish this from that, let us give the word law an adjunct, and say *law of nature*.

If it were fully understood, that a *law of nature* signifies not an occult cause of conformity among facts, but merely the conformity itself, the phrase might be employed in this sense without danger of confusion.

what seems to be the most apposite and the clearest designation, of which, in any such small number of words, it is susceptible.

From the course of nature at large, that of the mental part of man's nature requires to be distinguished, hence disconformity in a *physical* respect, and disconformity in a *psychological* respect.

The remarks which follow, will, in the first instance, refer more particularly to physical, as contradistinguished from psychological facts. But they will, for the most part, be found applicable equally to both.

As it is only from evidence, coming under one or other of the descriptions already brought to view, that any notion whatever concerning the established course of nature can be derived, and consequently any notion concerning what is conformable to that course; so neither from any other source can any notion be derived respecting the disconformity of any supposed matter of fact to that same course.

The evidence thus characterized will, therefore, be composed of an indeterminate and indefinite multitude of matters of fact, drawn from all the evidence of every description that to the mind of the person in question (viz. the judge,) have happened to present themselves during the whole course of his life, and composed of all such facts as present themselves to him as bearing the sort of relation in question, to the matter of fact in question.

To produce disbelief of the existence of the matter of fact in question, this disconformity must be such as (in his judgment) to render its existence *incompatible* with a certain portion, at least, of those other numberless matters of fact, of the existence of which he has been persuaded by the indeterminate but ample mass of evidence above indicated.

When the improbability (that is, the apparent, the relative, improbability) of an alleged fact, is set in the balance against testimony, it is still at bottom little more than testimony against testimony. Of the facts of the existence of which a man is persuaded, the knowledge, the persuasion, is derived partly from his own perceptions, partly from the alleged perceptions of others. But, in the unmeasurable mass of facts which (at least in a country where civilization is tolerably diffused) the

most ignorant man is said to *know*, the number of those of which his knowledge is derived from his own immediate perceptions — from his own individual experience, is small, in comparison with those, for the knowledge or supposed knowledge of which, he stands indebted to the experience or supposed experience of others

Concerning individual facts, — so far as mere perception, exclusively of inference drawn from perception by judgment, is concerned, — no force of exterior evidence can either increase or diminish the degree of persuasion of which such perceptions cannot but have been productive But in regard to *species* of facts, there is not one, perhaps, concerning which the persuasion derived by a man from his own experience, would not be capable of being overborne by allegations of contrary experience on the part of other men What makes our confidence so entire as it is in regard to the existence of those species or classes of individual facts, the existence of which is announced by the phrase which exhibits as the cause of it this or that law of nature, is, — that, so often as it falls in his way to make the trial, a man finds his own perceptions in relation to them confirmed by the reputed perceptions of all other men without exception.

§ 5. *On the three modes of disconformity to the course of nature, — viz* 1 *Disconformity* in toto, 2 *Disconformity* in degree, 3. *Disconformity* in specie

It has been seen, that in all cases without exception, in which any matter of fact is supposed by any person to be incredible, the ground of the supposition is a supposed disconformity between this matter of fact, and what is by the person in question considered to be the established course of nature

But this disconformity is of three kinds, and corresponding to these three kinds of disconformity are three classes, into which facts supposed to be incredible may be divided

1. Facts disconformable *in toto* facts which, supposing them true, would be violations of some manifest and generally-recognised law of nature: *e g* a body at the same time in two different places

2. Facts disconformable *in degree*. true, perhaps, in every day's experience, in certain degrees; false, in the degree in which, by the testimony in question, they are stated as being true: *e g* a man sixty feet high

3. Facts disconformable *in specie* facts altogether different from any which have ever been observed, but which, if true, would not be violations of any generally-recognised law of nature: *e. g.* the unicorn

It is manifest, that in the two last of these classes, the incredibility of the fact rises only to a greater or less degree of improbability, not to that of impossibility. The supposed facts are not *repugnant* to the established course of nature, they are only not conformable to it: they are facts which are not yet known to exist, but which, for aught we know, may exist, though, if true, they would belong to the class of extraordinary facts, and therefore require a greater degree of evidence to establish their truth, than is necessary in the case of a fact exactly resembling the events which occur every day *

Though facts of these two classes can never be properly said to be impossible, they may be improbable to a degree little short of practical impossibility

I Facts disconformable *in toto*. facts *repugnant* to the course of nature.

To give a complete list of facts impossible *in toto*, would be to give a complete list of those general observations which have been, or use to be characterized by the appellation of laws (physical laws) of nature

To give any such complete list, will, I suppose, be universally recognised as beyond the limits of human knowledge, in its present state a complete system of physics might be considered as included in it

By way of illustration, I will venture to propose a few articles as a specimen of what might be the contents of such a list

Specimen of the laws of nature common to all matter, as far as hitherto known —

1 No two bodies can be in the same place at the same time (cases of penetration and inclusion not excepted)

2 No one body can be in two places at the same time

3 All known bodies are, in proportion to their quantities of matter, affected by the law of gravitation

4 All bodies are governed by the law of gravitation, except in so far as an exception to that law is created by any of the other known causes of motion or rest In other words,

5 For each instant of time, the place of every body, of every particle of matter within the reach of our observation, is determined by the law of gravitation, modified by the other known primum mobiles, or causes of motion and rest These seem to be as follows —

1 The centrifugal force.

2 The force of cohesion — the attraction observed to take place amongst the homogeneous parts of the same whole

3 The force of chemical attraction; to which, perhaps, may be to be added repulsion. The attraction (and repulsion) observed to

* It will be attempted to be shown in a subsequent note, that even what Mr. Bentham calls impossibilities *in toto*, are in reality nothing more than facts in a high degree improbable. — *Editor.*

take place amongst the contiguous heterogeneous parts of the same whole.

4. The force of repulsion or elasticity, given to the particles of other matter by caloric, when, being united with them, it forms a gas.

5. The force of expansion and contraction (repulsion and re-attraction) produced by the addition and subtraction of caloric to and from other bodies in the states of solidity and liquidity.

6 The force of electrical and galvanic attraction and repulsion

7. The force of magnetic attraction and repulsion.

8. The force of muscular motion put in action by the will

9 The force of muscular motion put in action by the vital power, in the case of the involuntary motions that take in living animals.

10. The force of muscular motion put in action in the way of animal galvanism.

11 The force of vegetation

Of these forces (setting aside the centrifugal force, the existence of which is rather matter of inference than observation) the influence of gravity is so much more extensive and powerful than the rest, that the observation expressive of its existence seems entitled to be distinguished by the appellation of the general or universal law of nature, applicable to all bodies of which we have any sort of cognizance while the other laws of nature, as above brought to view, may be considered as constituting so many exceptive clauses, with reference to that general law. In most of these instances, the force is not perceptible but in the case where the distance between the particles concerned is extremely small and accordingly, in few, if any, can it be clearly perceived to have place beyond the limits of the planet which we occupy *

Taking this, for argument's sake, as a complete list of primum mobiles (and I am inclined to think it would not be found to be very far from a complete one,) any motion which, being in a direction opposite to that of the attraction of gravitation, should not be referable to any one of those particular causes of motion, may be pronounced *impossible*: the existence of any such motion on any given body upon or near any part of the earth's surface, for and during any given space of time an impossible fact.

A particular example may here help to explain the nature and probative force of *impossibility*—physical impossibility, and that impossibility *in toto*—as adduced in the character of an evidentiary fact disprobative of the supposed fact, supposing the existence of it averred by direct testimony.

In one or more of the many books formerly current on the subject of witchcraft and apparitions, I remember reading the following, stated as a fact. In a room somewhat lofty, not by any muscular exertions either of his own or of any other person, other persons being however at the same time in the same room, a man finds himself gradually raised up to the height of the ceiling, and let down again; his body all the time not being in contact with any other, except those of which his apparel was composed

This I would venture to give as a specimen of a sort of fact practically speaking impossible, viz such an one as I could not be persuaded of the truth of, not only upon the testimony of any one single witness, but upon the testimony of any number of witnesses that ever found their aggregate testimony contradicted by other witnesses in any court of justice. The supposed fact impossible?—why impossible? Because it is in repugnance to the law of gravity, and not in conformity to any of those particular laws which operate as so many exceptions to that general law. Be it so it cannot be brought under any of these particular laws But, supposing these to be the only particular laws, or say causes of motion, as yet known,—can you take it upon you to pronounce it impossible there should be any others? The steam-engine, as a source of power, is but a century and a half old: the

* Gravity, the species of attraction common to all perceptible matter, constitutes, as it were, the general law of nature: attractions inferior in force, or limited in extent—attraction of cohesion, of magnetism, of electricity, of galvanism, with the multitudinous system of chemical attractions,—constitute, as it were, so many exceptions to that general law of nature. The relation of a prodigy, will, if false, be traceable into the relation, the allegation, of a violation of some one or more of the known laws of nature. In most, if not all, the relations of this kind that have been current, so gross has been the deceit, that the law, or among the laws, stated as having been violated (*i. e.* superseded on that occasion by some being distinct from and paramount to the universe,) has been the general, the universal, law—the law of gravity itself. The other particular laws not having been in any degree known, at any period when relations of this sort obtained general credit among the superior and most enlightened classes, instances of any pretended violation of these more particular laws are scarce discernible. An instance of a needle of pure iron of a certain weight disobeying the magnet, or of a needle of pure gold of a certain weight[a] obeying it, would be in not less palpable repugnance to a known law of nature, than the assent of an insulated and naked man into the region of the sky would be. But while the magnet or its characteristic properties remained unknown, false stories about magnets could not be broached.

[a] I say of a certain weight: for of late a notion has been advanced, and, for aught I can say to the contrary, proved, that most if not all bodies may be seen to pay obedience to the magnet when reduced to a certain minute quantity.

knowledge of electricity, as to the great bulk of its effects, not so much as a century galvanism, but of yesterday —till the other day there were but six primary planets moving round our sun, now there are eleven Are new primum mobiles less possible than new planets?

I answer — As to the discovery of new causes of action — causes apparently distinct from, and not referable to, any of those above enumerated — I am not disposed to regard it as in any degree improbable Yet, as to any causes adequate to the production of any such effect as the effect in question, — in the discoveries just spoken of there is not anything that would prevent me from regarding it as being, in the sense above determined, practically impossible Why? Because it appears to me practically impossible, that, after so long a course of physical experience and experiment, any primum mobile, of a force adequate to the production of an effect of such magnitude, can have remained undetected As to the power of steam, the application of it to any useful purpose is not so old as a century and a half, but the existence of it as a source of motion could never have been altogether a secret to any one who ever boiled a pot with a cover to it *

* It may, perhaps, be doubted, whether, until our knowledge shall have attained a perfection far beyond what it has attained, or is ever likely to attain, such an attribute as impossibility *in toto*, can, in the sense in which Mr. Bentham uses the words, be predicated of any conceivable phenomenon whatever

Mr. Bentham has given a list (whether complete or incomplete is of no consequence for the present purpose) of the various forces by which gravitation is known to be, under certain circumstances, counteracted and assuming this list to be complete, he proceeds to infer, that "any motion which, being in a direction opposite to that of the attraction of gravitation, should not be referable to any one of those particular causes of motion, may be pronounced impossible" and for practical purposes, no doubt it may; but if metaphysical accuracy be sought for, I doubt whether even in this case the impossibility in question be anything more than a very high degree of improbability. For,

1*st*, Suppose the catalogue of all the known forces which may operate to the production of motion (or, as Mr. Bentham calls them, the primum mobiles,) to be at present complete does it follow that it will always remain so? Is it possible to set limits to the discoveries which mankind are capable of making in the physical sciences? Are we justified in affirming that we are acquainted with all the moving forces which exist in nature? Before the discovery (for instance) of galvanism, it will be allowed, we should not have been justified in making any such assertion. In what respect are circumstances changed since that time, except that we are now acquainted with one force more than we were before? By what infallible mark are we to determine when we have come to the knowledge of all the properties of matter?

II Facts disconformable *in degree*

Of facts impossible in degree (meaning al-

Mr. Bentham himself acknowledges that the discovery of new moving forces is not impossible; but the discovery of new forces, adequate to the production of such an effect as that of raising a heavy body from the floor to the ceiling of a room without any perceptible cause, he does consider impossible, because (says he) had any force, adequate to the production of such an effect, been in existence, it must have been observed long ago.[a] No doubt, the improbability of the existence of any such force, increases in proportion to the magnitude of the effect, but it may be permitted to doubt whether it ever becomes an impossibility Had our grandfathers been told, that there existed a force in nature, which was capable of setting gold, silver, and almost all the other metals on fire, and causing them to burn with a bright blue, green, or purple flame — of converting the earths into bright metallic substances by the extrication of a particular kind of air, &c &c. — they surely might have said, with fully as much justice as we can at present, that if any cause had existed in nature, adequate to the production of such remarkable effects, they could not have failed to have been aware of it before

2*dly*, Suppose it certain that all the great moving forces, to one or more of which all the phenomena of the universe must be referable, were known to us, — we should not, to any practical purpose, be farther advanced than before. We might indeed, in a general way, be assured of the impossibility of every phenomenon not referable to some one or more of these forces as its cause but that any *given* alleged phenomenon is in this predicament, is more than we could possibly be assured of — until we knew not only all the moving forces which exist, but all the possible varieties of the operation of all those forces, and all the forms and shapes under which it is possible for them to manifest themselves — until, in short, we knew all which it is possible to know of the universe How can I be sure that a given phenomenon which has no perceptible cause, is not the effect of electricity, unless I knew what all the effects of electricity are? And so of all the other laws of nature As, however, it is very improbable that we ever shall know all the laws of nature in all their different combinations and manifestations, and as, moreover, it is difficult to see how, even if we did know them all, we could ever be certain that we did so, it seems that we never can pronounce, with perfect certainty, of any conceivable event, that it is impossible. See even Mr. Bentham himself, *infra*, section 9, *ad finem*

Although, however, it could not be pronounced, of the story told by Mr Bentham, that the event which it relates is impossible, thus much may with safety be pronounced, that, if it did happen, it was not produced by witchcraft. I can conceive the existence of sufficient evidence to convince me of the occurrence of the event, im-

[a] In this instance, Mr. Bentham really breaks down the distinction between his impossibility *in toto*, and impossibility *in degree*. Causes may exist (says he) which are not yet known to us, adequate to the production of *some* effect; but not adequate to the production of *so great* an effect. If so, however, this impossible fact is impossible in degree only, and not *in toto*.

ways by impossible, such as would generally be accounted so,) the exemplifications that might be given are innumerable. These consist in deviations from the ordinary quantities: deviations extending to such a degree, as on that account to be regarded as incredible.

Let us take those which regard the manner of being of the human species —

1. Extent of human stature
2. Quantity of human force.
3. Duration of human life
4. Duration of life without food
5. Time of gestation
6. Number of children at a birth.

Various are the grounds on which facts having, like the above, the human species for their subject, present a claim to preference. Being more interesting than any others, they are more open to observation, and more likely to attract it: and they are wont, on a variety of occasions, some of them more than others, to come in question on judicial occasions: in particular, time of gestation, and duration of life without food, but most of all the former, legitimacy or illegitimacy depending upon it.

Of the six examples thus taken for the purpose of illustration, two admit of deviations at both sides, viz. extent of stature, and time of gestation. In the other cases, there is no room for deviation but on the side of increase: the minimum being in the ordinary course of nature.

In relation to facts objected to as incredible in consideration of the magnitude of the *degree* in which they deviate from the ordinary course of nature, erroneous judgment on the part of the judge seems rather more to be apprehended in disaffirmance of the supposed incredible facts, than in affirmance. Why? Because, in most instances of facts, the credibility of which is liable to come in question in judicature, the judge (especially supposing him a man of a mind cultivated in a degree at all approaching to what befits a man in such a situation) will naturally be more or less apprized what is the ordinary course of nature: but, of the known deviations — of the degrees of deviation known by men possessed of appropriate information in the line in question — it may well happen to him to be very imperfectly, if at all, apprized. If, then, without having recourse to scientific evidence (viz. to such as applies in particular to the species of fact in question,) he takes upon him to decide in disaffirmance of the fact, error on his part may be but too naturally the consequence.

Take, for instance, the question,—Of what length of time passed without food, the patient surviving, may the existence be regarded as credible?

Anno 1753, at the Old Bailey, London, Elizabeth Canning was convicted of perjury. Of the mendacity of her testimony, the whole evidence taken together, I have not the smallest doubt. But one part of it consisted in an affirmation on her part of her having passed a certain length of time almost without food. In the course of the history of that cause, several persons, it appears, regarded the extraordinariness of this supposed fact as sufficient to render it incredible. This judgment I should not expect to find confirmed by the opinion of well-informed scientific witnesses. Why? Because at different times I remember reading different accounts of the protraction of animal, and in particular human life, without food, for much greater lengths of time — accounts that did not appear on the face of them to present any suspicious circumstances.

In the list of cases above exhibited, there are few (if any) in which it might not happen, in one way or other, to come into question in the course of judicature; and this without having recourse to wagers, by means of which, if legalized, there is no sort of fact whatever that may not be made to call for the decision of a judge.

1. Duration of life. Titius is nominee in a life-annuity, or sends to put in a claim of property in a distant country. The age of Titius

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probable though it be — I cannot conceive the existence of any evidence which could convince me that witchcraft was the cause of it. The reason is this. Suppose the fact proved, the question remains,—Is it referable to witchcraft, or to some natural cause? — Of extraordinary events, produced by natural causes, many have come within my experience: of events produced by witchcraft, none whatever. That extraordinary events from natural causes have frequently occurred, there is abundant evidence: while there cannot, in the nature of things, be any evidence that any event has ever been occasioned by witchcraft. There may be evidence that a particular event has uniformly followed the will of a particular person supposed to be a witch; but that the supposed witch brought about the given effect, not by availing herself of the laws of nature, but through the agency of an evil spirit, counteracting those laws,—this can never be more than an inference: it is not in the nature of things that any person should have personal knowledge to that effect; unless he has that perfect acquaintance with all the laws of nature, which alone can enable him to affirm with certainty that the given effect did not arise from any of those laws. What alleged witch, or magician, was ever suspected of producing more extraordinary effects than are daily produced by natural means, in our own times, by jugglers? Omniscience alone, if witchcraft were possible, could enable any one not in the secret, to distinguish it from jugglery. It is no wonder, then, that no evidence can *prove* witchcraft, since there *never can be* any evidence of it, good or bad, trustworthy or the reverse. All the evidence that has ever been adduced of witchcraft is,—testimony, in the first place, to an extraordinary event; and, in the next place, to somebody's *opinion* that this event was supernatural; but to nothing else whatever.—*Editor.*

is 170, 160, 150. Parr is said to have passed his 151st year, Jenkyns his 169th But the judge either has never heard of the reputed age of Jenkyns or of Parr, or disbelieves it In some periodical print an article appeared some years ago, stating as still in existence a man who had passed the age of 180

2. Duration of the time of gestation This is a question of no very unfrequent occurrence, and (in respect of the legitimacy of children, and the honour of parents) of the utmost practical importance There are well-attested instances of women whose pregnancy has continued ten, eleven, or even twelve months In the case of a pregnancy protracted for the term of ten months, a rash judge, too decided to suffer the exhibition of scientific evidence on this point, might do a cruel injustice

3. Number of children at a birth Of three children born at the same time, of the same mother, the existence (suppose) has been put out of doubt by other evidence Comes another person, claiming property on the ground of succession, and says, "My mother had four children at a birth, and I am one of them" "Four at a birth!" says the judge "that I never can believe, three I can believe, for I have known instances of it I will not hear your evidence" Five at a birth I remember reading of in newspapers, with individualization of names, times, and places

4. Number of children born of one woman The like precipitation is capable of taking place in this case as in the last preceding one Between thirty and forty, I am clear that I have read of

5. Duration of fecundity in women Delivery some years after seventy, I think I have read of An estate is claimed on behalf of a child, whose mother, it is alleged and confessed, when she was delivered of him, was turned of sixty "No," says our rash judge, "the fact is impossible it is needless to hear evidence"

But such rashness — such irrational refusal to hear evidence — is it to be supposed? — Alas! the rashness here supposed as credible on the part of this or that individual judge, is nothing in comparison to the rashness which continues to be exemplified to this day, in the most enlightened countries, by the whole fraternity of judges

In regard to facts devious in degree, it is impossible to fix upon any point of the scale, as being the point which separates the incredible degree from the credible At a large distance above the ordinary or mean level, to a person determined to take the distance large enough, there will commonly be no difficulty. But begin with the most devious degree allowed to have been exemplified, — propose the next degree, and then the next, scarce any man that will not find himself perplexed, and even in an inextricable degree, to say at what degree credibility ends, incredibility begins — 1. Stature A man a hundred feet high, incredible But nine feet? In London, nominal nine feet has been exhibited to make allowance for exaggeration, say eight feet But, eight feet being certain, shall eight feet and an inch be incredible? The credibility of eight feet and an inch being admitted, add an inch more, and so on without end — 2 Force No man living who is capable of lifting upon his shoulders a fat and full-grown ox of the largest breed, few men who would not have been able to deal in that same way by that same animal when just born Take any man, and propose it to him, or to any one else, to say, at what age of the animal, or at what precise weight in pounds and ounces, the man's power of lifting him will cease — 3 Fecundity at a birth, or total According to the legend, in consequence of the imprecation of a beggar woman, the Countess of Desmond had as many children as there are days in a year whether at one or more births, I cannot take upon me to recollect A delivery of five at a birth has been mentioned, with all the circumstances, within these few years, in the English journals Taking this number for certain, will six be incredible? Thus we get on, one by one, till we come to the Countess of Desmond's number only, the more there are of them, the smaller they must be

A treatise on the deviations from the ordinary course of nature has been spoken of as a necessary part of an encyclopedical system, by Bacon In the synoptical table prefixed to the first French Encyclopedia, the mention of it has been revived by D'Alembert. Of a treatise on this subject, the fundamental part would consist of a statement of the alleged facts In regard to such facts as are more particularly apt to come in question in a court of judicature — such, above all, on the belief or disbelief of which (as in some of the above examples) the property and honour of families may depend, — might it not be of use that arrangements should be taken by governments for their authentication and registration? At present, the credit of facts of this description rests, in general, on no firmer foundation, than that of a paragraph in this or that periodical publication. And who can say but that it may sometimes happen that a false fact of this description shall have been inserted, in the view of its being, on an individual occasion, employed in evidence? In the character of the best and only evidence which the nature of the case admits of, the paragraph may or may not be listened to by the judge. But, — though it should not be admitted in a direct way, — in an indirect and circuitous way it may, nevertheless, operate in the character of evidence.

The judge will, at any rate, not refuse to hear scientific evidence;—but the opinion of the witness is drawn (for from what better source can it be drawn?) from this or that paragraph, which he has read in a newspaper, with or without the faculty of recollecting the source from whence he took it

III. Facts disconformable *in specie*.

When, on a survey of the catalogue of incredible, or supposed incredible, facts, we come to the class of those which, if incredible, are so on this ground, and when, accordingly, on this ground, we set about the task of drawing the line between the credible and the incredible,—we find ourselves on an ocean without a compass, and that ocean without bounds. By what consideration can any bounds be set to the modifications of matter?—to the modifications that may have been exemplified in this place, in that place, or in any place? Take any one of the species of men, spoken of as existing, by Pliny or Mandeville,—who shall say but that, in some place or other, at some time or other, that species may have existed?—who shall say that in no place whatever, at no time whatever, the existence of such species would be other than absolutely incredible?

By anatomists, some of them, if examined, might perhaps be found to involve physiological incompatibilities, but such incompatibilities will not be unapt to be too hastily assumed. Angels are painted by adding goose's wings—devils by adding bat's wings—to an ordinarily-shaped human body. Judging from birds, an anatomist may pronounce the use of such an appendage incompatible with such a shape. Yes supposing no greater quantity of muscular force capable of being exerted by a given quantity of matter than what is exerted by men or birds but what will he say of fleas?

At this moment I have before me a copy of the book known to antiquaries by the name of the "Nuremberg Chronicle." This work contains, in a folio volume in the Latin language, the history and geography of the known world, printed in that city in the years 1492 and 1493, exhibited at the same time to the corporeal as well as to the mental eye, by a multitudinous series of graphical representations, taken from wooden plates. Amongst these are cuts of twenty-one devious species of men, or as we should say, monstrosities, from Pliny and other authors.* Some of them appear to involve incompatibilities of the anatomical kind, as above. Others have actually been exemplified,—some nearly, some ever strictly; the cyclops eye; the horns, the redundant arms and hands. In these instances, however, the exemplification has not been known to extend beyond the individual. But species, are they anything but individuals multiplied? In the case of the porcupine man, the deviation would naturally at first be thought confined to the individual, but it was found to extend to the race

Gulliver, upon his return from Lilliput, consigned, as he tells us, to Greenwich Park some of the neat bulls and cows of that country. Till he read on to the account of this source of permanent real evidence, which converted his doubts into belief, I forget what bishop, mentioned by Swift and others, was induced to regard the whole history as a fable. At the Leverian Museum, full-grown neat cattle, much about that size, were to be seen in glass cases

Among the Nuremberg-Chronicle men, are to be seen the cranes, with their classical enemies the pigmies, the prototypes of the Lilliputians. Is not the incredibility of the Lilliputians lessened, more or less, by the Leverian buffaloes? The *relative* incredibility, I think, beyond dispute. The relative incredibility, that is, our propensity to regard the existence of such a race in that light. But the absolute incredibility, the impossibility,—how can that be affected by the analogy in question, or any other?—the absolute incredibility, supposing any determinate idea to be capable of being found, to annex to the expression, a discovery which, to my view, does not, I must confess, present itself as easy to make

The fact being given,—the incredibility of it—the relative incredibility, is lessened by remoteness in respect of place. The propensity to disbelieve is, certainly. By what cause? The imagination would probably be found to bear a considerable part in the production of the effect; but neither is reason without her share. The more remote the country, the less explored. Had races of Cyclops, of horned men, of many-handed men, of pigmies, existed in England, could they have thus long remained undiscovered? So far as this consideration operates, the relative incredibility of these and other devious varieties of the human species would evidently be much less in the interior of New Holland, than in Old England.

Antecedently to the importation of the kangaroo, and the two species of ornithorynchi, suppose a paragraph in a newspaper, speaking of an animal of any one of those descriptions as found in a wood in England:—the first propensity would have been, to regard the statement as fabulous or incorrect, the next, to take for granted that the animal had been imported from some distant country, and had by accident got loose.

From remoteness in point of place, analogy conducts us naturally to remoteness in point of time. On this ground, imagination and

* Fol. 12.

reason act in opposite directions. the imagination, to diminish the incredibility (meaning always the relative) — reason, to increase it In time as in place, as the scene grows more and more remote, to the mind's eye it is more and more obscure. Ghosts, devils, vampires, hobgoblins of all sorts, may exist in darkness; in the light, we see clearly there are no such things

Reason does not in this case diminish the incredibility, as in the former When the first impulse given by the imagination is resisted, it seems difficult to say why, in the case of an alleged fact devious *in specie*, the incredibility of it should be lessened by this cause As far back as history, supported by sources of permanent *real* evidence (skeletons, statues, sculptured portraits, drawings, pictures, or human works,) goes, can any material difference be found between our predecessors and ourselves?

On the other hand, so far as the incredibility of any devious fact depends upon the causes of untrustworthiness, the increase which it receives from remoteness in point of time is abundantly notorious In the track of experience and civilization, the further back we go, the greater the proportion of incorrectness as well as mendacity, the greater the ratio of fable to history, till at last it is all pure fable In distant times, histories melt at last into fables, as, in distant plains, hills do into clouds It is with the infancy of the species, as with the infancy of the individual dreams mix themselves with realities.

In effect, remote *times* are virtually present to us in remote *places* The different generations of mankind, at their different stages of civilization, are at once present to our eyes. We may view our ancestors in our antipodes. In Japan, sorcerers are still seen riding in the clouds In Negroland, witchcraft is even now the most common of all crimes. Half a century is scarce past since Hungary has been cleared of vampires

Yet, even in time as in place, experience forbids our regarding the present as cast in exactly the same mould with the remote If New Holland has presented us with its kangaroos and ornithorynchi, Cuvier and others have presented us with their parallels in the extinct inhabitants of an antediluvian world,

In this line of investigation, as in others, errors concerning past times might, in a practical work like the present, pass unnoticed, if the application of them confined itself to past times. The misfortune is, that, when facts, mischievous as well as fabulous, have, under favour of the clouds of the morning, been planted in past times, they are apt to be transplanted into present, there to take root, and yield a poisonous increase. If Blackstone refuses a part of his credence (for it is but a part) to modern witches, it is because they are not old enough. A few years more over their head, and then his faith in them becomes entire. A little while, and the imagination of some successor or pupil of the departed sage may beget upon the ghost of the witch of Endor a succession of modern witches, and then comes the reign of terror again, if not of blood for the conspicuous sufferings that have been produced by witchcraft at the foot of the fatal tree, or in the water, or in the fire, are as nothing in comparison with the horrors which it has planted in the pillow, and in the chair which, but for them, would have been an easy one How much better directed has been the zeal of those enlightened divines, who, to conquer peace for flesh and blood (reflecting that the accident of being bound up with history does not give truth to fables,) have made war upon the sorceress, and devoted to annihilation that queen of terrors Has not Farmer, in the same generous view, converted demoniacs into madmen? and did not Priestley, to the same end, and in a sense peculiar to himself, wrestle with the prince of darkness?

Nature makes her mock of those systems of tactics, which human industry presents as leading-strings to human weakness In so far as difference *in specie* is constituted by difference in proportion, which is as much as to say difference *in degree*, this latter division of devious facts must be confessed to coincide with the former The existence of pygmies and Lilliputians being incredible, is it so in the character of a fact devious *in specie*, or devious only in degree? Dwarfs are devious in degree only, and without difficulty Why? Because, the race being the same, the difference is, in the botanical sense, only a variety. But dwarfs, it is believed, may be found, not above four times the height of Lilliputians, and much less superior in height to pigmies than inferior to ordinary men

At the worst, imperfect order is better than total chaos Amidst so thick a darkness, the faintest light is not altogether without its use

[*Further remarks by the Editor*

After an attentive consideration of the characters by which Mr Bentham endeavours to distinguish his three classes from one another, the reader will probably join with me in reducing these three classes to two; — viz. 1. Facts *repugnant* to the course of nature so far as known to us, and 2 Facts merely *deviating* from it; or (to express the same meaning in more precise language) 1 Facts *contrary* to experience, 2 Facts *not conformable* to experience.

The discovery of a new species of animal, presents a specimen of a fact *not conformable* to experience. The discovery were such a

thing possible) of an animal belonging to any of the already known species, but unsusceptible of death or decay, would be a fact *contrary* to experience.

This distinction was pointed out by Hume,* but, having pointed it out, he knew not how to apply it: and the misapplication which it seemed to me that he had made of it, led me at first sight to imagine that there was no foundation for the distinction itself. Having, however, by further reflection, satisfied myself of its reality, I will attempt, if possible, to make my conception of it intelligible to the reader.

All that our senses tell us of the universe, consists of certain *phenomena*, with their *sequences*. These sequences, that is to say, the different orders in which different phenomena succeed one another, have been discovered to be invariable. If they were not so—if, for example, that food, the reception of which into the stomach was yesterday followed by health, cheerfulness, and strength, were, if taken to-day, succeeded by weakness, disease, and death—the human race, it is evident, would have long ago become extinct. These sequences, then, which are observed to recur constantly, compose what is termed the *order of nature*: and any one such sequence is, by rather an inappropriate metaphor, styled a *law* of nature.

When a new discovery is made in the natural world, it may be either by the disruption of an old sequence, or by the discovery of a new one. It may be discovered, that the phenomenon A, which was imagined to be in all cases followed by the phenomenon B, is, in certain cases, not followed by it, or it may be discovered that the phenomenon C is followed by a phenomenon D, which, till now, was not known to follow it.

In the former case, the newly-discovered fact is *contrary* to experience, in the latter case, it is merely *not conformable* to it. In the first case, it is *repugnant* to what had been imagined to be the order of nature, in the second case, it merely *deviates* from it.

The first time that the sensitive plant was discovered, its characteristic property was a fact *not conformable* to experience. A new sequence was discovered; but no sequence was broken asunder. The plant had not been known to possess this property, but neither had it been known not to possess it, not having been known at all.

But if a stone projected into the air were, without any perceptible cause, to remain suspended, instead of falling to the ground—here would be not merely a new sequence, but the disruption of an old one. a phenomenon (projection of a stone into the air) which, from past experience, had been supposed to be universally followed by another phenomenon (the fall of the stone,) is found, in the case in question, not to be so followed. Here, then, is a fact *contrary* to experience.

The error, then (as it appears to me,) of Hume, did not consist in making the distinction between facts contrary, and facts not conformable, to experience; it consisted in imagining, that, although events not conformable to experience may properly be believed, events contrary to experience cannot. That an event is not fit to be credited which supposes the non-universality of a sequence previously considered to be universal, is so far from being true, that the most important of all discoveries in physics have been those whereby what were before imagined to be universal laws of nature, have been proved to be subject to exception. Take Mr Bentham's own list (pp. 84, 85) of the exceptions to the law of gravitation: suppose all these unknown, the law might have been supposed universal, and the exceptions, when discovered, would have been so many violations of it: but do not these exceptions, with the exceptions again to them, and so on, compose by far the most valuable part of physical science?]

§ 6. *The improbability of a fact, relatively to a particular individual, depends upon the degree of his acquaintance with the course of nature.*

The improbability of any alleged fact consists in its deviation from the established, and (as supposed) unvaried and invariable, course of nature.

Of what nature?—Of irrational nature, or rational,—of the nature of things, or of men,—according to the nature of the alleged fact deposed to: according as it is a mere physical event, or a human act, the result of the operation of a human mind. According as the fact belongs to the one or the other class, the description of the improbability will admit of correspondent differences.

Does the fact exhibit any such deviation? If yes, in what degree? considerable enough, or not, to preponderate over the force of such testimony as the case presents? What, in respect of the supposed fact in question, is the unvaried and invariable course of nature? Immediately or ultimately, it is from the opinion of the judge, determined by the knowledge of the judge, that the answer to these questions, and the decision grounded on it, must come.

It must always be borne in mind that probability and improbability are not, in strictness, qualities of nature; they are qualities attributed to supposed natural facts in the way of fiction, for the convenience of discourse—attributed to the facts themselves, in consideration of the persuasion entertained

* See his Essay on Miracles.

concerning them in the mind of him by whom they are spoken of in this point of view The alleged fact,—is it, in his view of the matter, completely unconformable to the ordinary course of nature? he sets it down as improbable in the highest degree or, in other words, as impossible Is it in a less degree unconformable? he sets it down as simply improbable, and not altogether impossible and so downwards, till the improbability presents itself as productive of no other degree of negative persuasion than what is capable of being subdued and made to give way to positive affirmation, by the force of such affirmative evidence as the case affords

The improbability being thus recognised to be purely relative — relative on each occasion to the idiosyncrasy of the individual by whom the fact in question is set down as improbable,—it is easy to see, that in this point of view, the probability or improbability of the fact will depend upon the degree of relative knowledge possessed by the individual judge, and thence upon the degree attainable, and generally attained, in the age, and country, and rank, in respect of mental cultivation, in which he is placed A fact which, in Paphlagonia or Palestine, might, in the Augustan age, not have been too improbable to be established by testimony, in the estimation of the most knowing minds of those respective countries, might have presented itself as impossible to the same class of minds at Rome or Athens at that same time A fact which in that same age might not have been incapable of establishing itself in the character of a probable one at Rome or Athens, even in that highest class of minds, might at this time be rejected as improbable by minds of the same class in Paris or London A fact which would be established by a given force of testimony without a dissentient voice in the minds of the highest class at Timbuctoo, and without many dissentient voices in minds of the same class in Constantinople, might find nothing but incredulity in minds of equal relative superiority in London or Paris Even in our own times, and within the hearing of Bow bells, Stockwell or Cock-lane might, on the strength of hearsay evidence, afford a temporary credence to a fact to which no force of immediate testimony would be able to afford so much as a momentary credence in St. Stephen's chapel

By the relative credibility or incredibility of a fact, I understand the chance it has of being believed or disbelieved by a given person

The relative incredibility, as regards a particular person, of an anti-physical fact — a fact amounting to a violation of a law of nature — will be in proportion to his acquaintance with the laws of nature Suppose a person altogether unacquainted with the laws of nature, yet not altogether unaccustomed to hold converse with mankind he would, upon the credit of a bare assertion, uttered by any person of his acquaintance, give credit to one fact as readily as to another, to the most flagrantly anti-physical fact, as well as to the most common fact, to a fact the most devious and extraordinary in degree or species, as well as to the most ordinary fact, to the existence of a ghost or a devil, as well as to that of a man, to the existence of a man sixty feet, or no more than six inches, high, as well as to that of a man of six feet, to the existence of a nation of cyclops, with but one eye each, and that in the middle of the forehead, as well as to the existence of a nation with two eyes in their ordinary place

In this respect, all nations as well as all men are children for a time Among savages, not to speak of barbarians, the mental state cannot be regarded but as a state to which this supposition is in a great degree applicable

What is there that would not be believed in a nation in which it was generally understood — so generally as to be a position acted upon by law, that guilt or innocence, mendacity or veracity, was to be determined by a man's walking blindfold hurt or unhurt in a maze of red-hot ploughshares?

Of a given apparently anti-physical fact, the relative incredibility will be apt to increase, not only with a man's acquaintance with the laws of nature, but with his acquaintance with the history—the correspondent part of the history, of the human mind, with the observations he has had occasion to make of the extreme frequency of incorrectness and mendacity among mankind, or rather of the extreme rarity of the opposite phenomena; of the extreme frequency of the instances in which either the one or the other has been reduced to certainty, sometimes by irreconcilable contradictions, as between divers reports of the same transaction — sometimes by self-contradiction on the part of each

In the case of an apparently anti-physical fact reported by a writer or a number of writers in a distant period, — to render it more credible that he should either have been a deceiver or deceived, than that the fact was true, it is not necessary that it should appear that he was acted upon by this or that particular cause of delusion, or that he had this or that point to gain, this or that specific advantage to reap, from the lie All men are, occasionally, exposed to seduction in this way, to the temptation of swerving from the truth, by all sorts of motives. True it is, that in this case there are two suppositions to make, for one that there is in the other. But, take each of these suppositions, — what can be more probable?

Go back to distant ages, we shall find men of the very first reputation for sagacity, for

insight into the human heart, very imperfectly apprized (to appearance at least) of the causes of untrustworthiness to which extra-judicial testimony is exposed. Speaking of the two miraculous cures ascribed to the Emperor Vespasian, "Utrumque" (says Tacitus) "qui interfuere, nunc quoque memorant, postquam nullum mendacio pretium." "By persons who were privy to the two transactions, both are still related, now that" (understand, by the extinction of that emperor's family) "mendacity has no longer any reward to hope for." "No reward to hope for! As if punishment was not a still more irresistible principle of seduction than reward! as if forfeiture of reputation, of reputation for veracity, were no punishment!

By Tacitus, both these miracles were believed. The remark could have had no other object than to communicate that persuasion to his readers. Unless his intention was to deceive, he was himself deceived.

In England, miracles of the same kind, but prodigiously greater in number, and beyond comparison better attested, were believed—within these hundred years very generally believed, and now, perhaps (anno 1826) not by a single human being—not even by any of the multitudes that still believe in witches and apparitions. It was among the attributes of the Stuart dynasty, to cure their subjects of the species of scrofula called the king's evil. A piece of coined gold being touched by the monarch for the purpose, the patient wore it thereafter by a string upon his neck, for which purpose a hole was pierced in it. By family inheritance, I have three of these pieces still by me. It was not by the vision of a god—the god Serapis—that so many beneficent monarchs were determined to exercise, for the benefit of their subjects, this healing power; it was by the experience of ages. Under James I. the practice began, or at least existed, with the 17th century, under Anne, it continued for the first fourteen years of the 18th—omitting the reprobate Charles and the usurping William, all of them monarchs of exemplary faith and piety. Would sovereigns such as these have lent a hand to an imposture?*

Thus it is, that, in many instances, improbability is relative: the same fact is at once probable and improbable—probable to some persons, improbable to others, and this without any necessary imputation, on either side, on the judgment of those by whom such opposite decisions are pronounced.

Ignorance, though perhaps more exposed to erroneous judgments on the side of belief, is by no means unexposed to erroneous judgments on the side of disbelief,† inasmuch as the analogies by which extraordinary incidents are brought within the sphere of probability, are, in proportion to the degree of their ignorance, apt to be without the compass of their knowledge.

The less extensive a man's acquaintance is with the ordinary course of nature, the greater is the number of those facts, which by him are not seen and understood to be within the ordinary course of nature—facts which, in his view of the matter, belong to the predicament of extraordinary things. The greater, therefore, is the number of those things which, being to him extraordinary things, are by others reported, and by him (as occasion presents them to his observation) found and proved, to be true.

Supposed facts, which, besides being to him extraordinary, are really out of the course of nature, and not only so, but actually untrue, are by him neither seen nor suspected to be untrue. Why not? Because, by their being extraordinary to him, little cause is presented for suspecting them to be untrue: for many facts which to him are extraordinary, are by the general consent of those with whom he is acquainted held to be, and upon trial found to be, true. Not, by their being really out of the ordinary course of nature, are they presented to him as being in a proportionable degree, if in any degree, improbable: for with the extraordinary course of nature, as distinct from the ordinary, he has little or no acquaintance.

Suppose a Turk, of the ordinary class of Turks in point of education, to have been told of the elevation of a number of persons in the air, and of the aerial voyage performed by them, and this by a bare statement of the fact so far as above described, and without any indication given of the cause by which the elevation was produced. Probably enough, neither disbelief, nor so much as any considerable surprise, would in his mind have been the result. To his disposition to give credence to this, or any other fact of the extraordinary class, no great addition could probably remain to be made by ocular demonstration. Whatever fact of this description could be related to him, would be rendered sufficiently credible by a word, whatever it be, of which in English the words magic or sorcery serve for representatives.

* In the edition of Boswell's Johnson published in 1835 (I. 36.) in illustration of the circumstance of Johnson having been touched by Queen Anne, the following proclamation is copied from the London Gazette, No. 2180:—"Whitehall, Oct. 8, 1686.—His Majesty is graciously pleased to appoint to heal, weekly, for the evil, upon Fridays; and hath commanded his physicians and chirugeons to attend at the office appointed for that purpose, in the Meuse, upon Thursdays, in the afternoon, to give out tickets." During the rebellion of 1745, Charles Edward restored the practice in Scotland.—*Ed.*

† *e. g.* The case of Bruce, the Abyssinian traveller.—*Ed.*

By the Turks, Christians are considered either as being in general magicians, workers of wonders, or, at least, as abounding in magicians: and by magic, one thing may be done as well as another. The contents of the machine by which this wonder was achieved, were in fact composed of rarefied air: had this account of it been given to him, would he have credited it? Not unlikely, and so would he, as likely, had they been represented to him as composed of lead. To a people to whom the face of nature is not visible through any other medium than that of the Koran, one fact is not more unconformable to the course of nature than another.

When an air-balloon, on the hydrogen gas principle, performed for the first time, at St Petersburg, an aerial voyage,—certain Japanese, who having been shipwrecked somewhere in Kamschatka, had from thence been conveyed to Petersburg, were of the number of the spectators. All the rest were wrapped up in amazement: the Japanese alone remained unaffected. A Russian noticing their unconcern, and asking for the cause of it,—"Oh!" said a Japanese, "this is nothing but magic, and in Japan we have practitioners in magic in abundance."

In the long-established empire of Japan, it is probable, as in the long-established and neighbouring empire of China, they have jugglers, whose art consists in the production of whatsoever phenomena seem most unconformable to the known course of nature. In England, as well as in other superiorly-informed nations, such appearances are exhibited by jugglers, as it requires a better acquaintance with the course of nature than falls to the lot of the bulk of the people, to distinguish from impossibilities, and in China, the art of jugglery, having been longer in use than in any European country, appears, by the instances given by travellers, to have been carried, in some particulars, to a still higher degree of perfection than anywhere in Europe.

The art of travelling in the air being referred to jugglery, and considered as no more than a particular branch of that commonly-practised art, all cause of wonder was at an end.

In the character of a faithful picture of real life, the Arabian Nights' Entertainments, to an Arabian understanding, are upon a par with other histories: and if in some points they differ from histories strictly and properly so called, it is only in the same respect as Robinson Crusoe differs from actual biography: though not actually true, they contain nothing but what might have been true, and if, in any instance, they are not to be believed to be true, it is only because, upon a close inspection, it may be found that they are not given for such.

The author being, in the autumn of 1785, on board a Turkish vessel, on a voyage from Smyrna to Constantinople, a storm arose in the sea of Marmora, which made us glad to take refuge in a port on the Asiatic side, called Kiemed, where the first object we saw, as soon as we could see anything, was the wreck of a vessel just driven on shore within a stone's throw of us.

There being several Franks of us on board, the master of the vessel, through the medium of an interpreter, examined us all for the purpose of knowing whether any such article as a fragment of an Egyptian mummy existed in the possession of any of us, and if so, whether we could favour him with a sight of it. The answer having been universally in the negative,—when the storm was over, it was observed to us by the interpreter, that our deficiency in this curious article was, perhaps, a fortunate circumstance for us, mummy being among the implements known to be employed by Christians in the practice of divers magical arts, and, amongst others, of the art of raising storms: whereupon, had any such article been found in our possession, it would have been matter of consideration, as a means of abating the fury of the storm, whether to be satisfied with throwing overboard the magical implement, or to throw over the magicians along with it.

The theoretical principle being established on the ground of notoriety, the practical inferences seemed to follow from it consistently enough. If, by a piece of a dead body, preserved in a particular manner, and introduced on board a ship, a storm could be raised,—what more natural than that, by throwing it out of the ship the storm should be appeased? The cause taken away, the effect will follow. Moreover, if, upon the removal of the supposed cause, the effect should not follow—if, after this magical implement had been thrown overboard, the storm should continue unappeased,—the continuance of it would be a proof that the cause of the storm, if removed in part, was not removed completely: it would be a sign that, along with this known implement, the magician was in possession of some other implement or implements, not equally known, but equally well adapted for the purpose of raising storms: and, under the difficulty of ascertaining what were the other implements by the help of which the magician might be enabled to fulfil his wicked purpose, the surest course was to rid the ship of the magician himself, which done, his tools, were they ever so numerous, would do no mischief.

Be this as it may, the sagacious Turk might have placed his argument on ground absolutely impregnable, by calling in to his aid the principle of the Scotch philosopher. I have a propensity, he might have said, to be-

lieve whatever I hear, probable or improbable: and this propensity is innate; for who can tell me when it first began to show itself? But being innate, it is not derived from experience; and being older than experience, it is stronger than experience, nor, therefore can any argument drawn from probability or improbability stand against it for an argument drawn from probability or improbability rests on no other basis than that of experience, and when experience, or anything that rests upon it, is encountered by the opposing pressure of the pre-established propensity, which it is that must yield, is manifest enough *

The better acquainted we are with the course, the ordinary course, of nature, the better qualified we are, of course, for judging whether a given fact be conformable or unconformable to it

As between credulity and incredulity, belief of false facts and disbelief of true ones, the former will naturally present itself as being, in the greatest plenty, the fruit of ignorance It certainly is so, in so far as ignorance is accompanied with the consciousness of its own existence. Such consciousness is a natural, and perhaps predominantly frequent, accompaniment of ignorance, but it is by no means an inseparable one Much will depend upon the opportunities a man has of being witness of the proofs of a degree of knowledge superior to his own Much will also depend upon the particular temper and cast of mind of individuals †

Carrying with them the productions of European arts, the voyagers that from time to time have, within the two or three last centuries, visited the newly-discovered parts of this our globe, have in general found the inhabitants well enough disposed to give credit to their visiters for reported wonders, on the strength of the wonders presented to their eyes but this facility of credence has not been altogether without its exceptions The case of the King of Siam is old enough to have been noted and commented upon by Locke † When, in reporting the state of things in their own country, the Dutchmen who visited his dominions came to speak of the frozen scenes presented by their winters —water hardened to such a degree as to bear men and waggons like dry land,—a laugh of scorn was the reply, and they were set down for impostors.

At that time of day, the advances made in natural science were as yet but inconsiderable, and the strangers by whom the wonder was reported, were, perhaps, not much more than upon a par with his Siamese majesty, in respect of their advances in the career of science, or, at any rate, were not provided with any ready means of displaying any proofs of their superiority in his view. The fact was not conformable to the course of nature, in any such state of things as his opportunities of observation had presented to his view. He had, therefore, the same reason for disbelieving that fact, as we have for disbelieving facts which, by thousands and thousands that could be mentioned, a European, instructed or not instructed in the rudiments of physical science, would, at this time of day, be disposed to reject as incredible at the first word

In London itself, that great metropolis which disputes with Paris the title of metropolis of the scientific world, his Siamese majesty found, within the compass of my own experience, a not unworthy representative in the person of an English physician. At that time, about twenty years or thereabouts had elapsed since the publication of the first experiment by which mercury, by the help of the Russian ice, had been exhibited in a solid state In company with the learned doctor, I happened, on I forget what occasion, to make allusion to this experiment With an air of authority, that age is not unapt to assume in its intercourse with youth, he pronounced the history to be a lie, and such a one as a man ought to take shame to himself for presuming to bring to view in any other character

Solidity, liquidity, and gaseosity, appear now for some time to have been considered, in natural philosophy, as the three states, of which, by combination with an appropriate portion of caloric, bodies in general, such as we are acquainted with, may be regarded as susceptible insomuch that,—although instances, and those pretty numerous, are not wanting, in which this or that modification of matter has not as yet been seen assuming, or made to assume, this or that one of the three states,—yet its being presented, though for the first time, in such hitherto unknown state, would no more be regarded as repugnant to any law of nature, or as an instance of an incredible deviation from the ordinary course of nature, than the existence of water in the state of ice or steam.

One of the most interesting remains of Grecian antiquity, is the narrative which Lucian (who, though not the most ingenious, may be set down as by far the wisest among the Grecian philosophers)—Lucian, an eye-witness, has left us, of the pranks played by the impostor Alexander: a sort of Sidrophel in a higher sphere, who, upon the strength of a worm enclosed in an egg-shell, a tame real snake, and the head of an artificial one, set up for a prophet and prime minister of the god Æsculapius. Had any man paid a visit to Lucian, and said to him, "Yesterday I saw Alexander, with his serpent-god, sailing in the air in a boat, and mounting up to hea-

* *Vide* Reid, Essay vi ch. v.—*Ed.*
† Essay, Book iv. ch. xv. § 5.

ven, taking with him a globe of not less than thirty feet diameter — saw him and watched him, till his approach to the seat of Jupiter had rendered him invisible what would have been the reception given by the philosopher to his informant? Probably, much the same that the King of Siam gave to the story of the solid water, and the English physician to the lie about the solid quicksilver But suppose, the next day, Lucian himself had been witness to the ascent of Æsculapius, with his favourite, to his native heaven? — he would either have been a convert to the godhead of the serpent, and the divine mission of the prophet Alexander, or have borrowed some such term as magic as a cover to his obstinacy; to a disbelief for which he would not have been able to have given any tolerable reasons.

A fact which, when viewed through the medium of a man's actual stock of physical science (for even the New Hollanders are not without some,) presents itself as rendered incredible by its non-conformity to the known course of nature, may (if his mind be open to reasoning, and passion do not shut the door) be rendered credible to him, by showing its conformity to this or that fact, rendered for the purpose present to his observation, or which, though not altogether foreign to his memory, had not happened to present itself in that point of view Neither the frigorific saline mixtures we are acquainted with — nor ether, which, by the promptness of its evaporation, stands in lieu of all — could at that time have been exhibited to the King of Siam by his Batavian visitants But a handful of nitre, which, being dissolved in boiling water, had been converted in appearance into its aqueous solvent, might, on its cooling, have been made to exhibit to the eyes of the incredulous monarch the transformation of the liquid into that semi-transparent stone which, in the regions of the north, affords natural bridges capable of conveying the heaviest elephants over extensive rivers Or — unless in the climate of Siam there be something, which there does not seem likely to be, to prevent the success of an experiment which in Bengal is so commodiously subservient to wholesome luxury — a set of porous and shallow earthen pans, with, or perhaps without, an artificial current of air, might, without any extraneous additament, have sufficed for converting, in any moderate quantity that could be required, the fable into fact

Not quite so easy might have been the task of him who should have had to reconcile the facetious philosopher of Greece to the evidence of his senses The favourite fluid (he might have said) of Minerva, rides triumphant and unsullied upon the element of Neptune When, from the summit of Ida, a pine is rolled down and precipitated into the waves, it not only rides upon the water, but communicates its buoyancy to the hands that severed it from the parent earth What the oil or the wood is to the water, an air which you are not yet acquainted with, but which nature prepares already in great quantities, is to the air in which we move and breathe Inclose this light air in a bag of sufficient size, it will carry up, as you see, not the bag only, but boats, and men, and gods, along with it, exactly as the pine, when by the force of the fall it has been driven to the bottom of the lake, rises by its own levity, and would still rise, though men and other heavy bodies were attached to it It is not that the new air is devoid of weight, any more than the old air, by the impulse of which vessels are drawn by design along the surface, and by accident to the bottom of the waters, but — the lighter air not being so obedient to the unknown power by which the effect we call weight is produced — the lighter air, which, were it alone, would cling to the earth, is drawn off from it by its more powerful antagonist, carrying with it its receptacle, and the burdens you see attached to it

Would this analogy have satisfied the scoffing philosopher, or would nothing less have satisfied him than the setting up a manufacture of hydrogen gas before his eyes? This would have depended upon his particular frame of mind, upon the humour he happened to be in, and more or less, perhaps, upon the state of his quarrel with the impostor whose pranks he has detailed to us in so agreeable a narrative

Opinions, recognised at present among the enlightened classes in enlightened nations as being unsupported by fact, and in opposition to those laws of nature which have been built on fact, have been erected into what may be styled so many false and spurious laws of nature From these spurious laws, evidence, which on account of the extraordinariness of it would be deemed false, by reason of the circumstantial scientific evidence opposed to it by the science of the age and country, may derive, and in many instances has derived, but too effectual a support At no time have even the most enlightened classes been altogether exempt from the delusion spread by such spurious laws of nature The station of a judge, how high soever it may rank in the scale of mental illumination, has at no time been everywhere sufficient to exempt a man from false persuasions, grounded on the false laws of nature above spoken of

Among these so unhappily prolific opinions, the most conspicuous and persuasive (not to say the only ones) are those which have had the religious sanction for their support. The persuasion generated has been produced, not by any facts by which the opinion has been seen to be supported, but by a persuasion of

a very different sort; viz. that he in whose breast the principal persuasion in question should fail of being produced, would, by reason of such failure, be consigned to inconceivable and endless tortures.

If a clear line could be drawn, and were actually drawn, between time and time, insomuch that the dominion of these spurious laws of nature were understood to be confined to time long since past, the real law of nature reigning with undisputed dominion in time present and to come,—the error might not, in this point of view? be attended with any pernicious consequences in practice. But by no man has any satisfactory or so much as plausible reason been ever given, why any such line should be thought capable of being drawn anywhere, much less has it been shown that, for any precise and satisfactory reason, it should be understood to have been drawn at this or that precise point of time.

Things being thus circumstanced,—opinions enunciative of false laws of nature, opinions that have received their birth at some widely-distant point of time, have, in times little anterior to the present, been productive of judicial decisions, by which much mischief has been done, and a degree of alarm propagated through the community, such as could not have been spread by the most atrocious crimes. It has been the effect of such opinions, not only to give support to the false evidence which would otherwise find itself resisted, and with effect, by the circumstantial scientific evidence of the age and country, but even to give birth in the first instance to such false evidence.

In the seventeenth century, Urbain Grandier, for having employed devils to take possession of certain nuns at Loudun, and enable him to take possession of them for carnal purposes, was roasted alive by a slow fire, after having undergone other tortures. Of this catastrophe, the immediate authors were certain corrupted magistrates and corrupted witnesses of that time: but the original authors were the devils who, in a distant age and country, were cast into the herd of swine, together with so many others who, in that age and nation, found, in such abundance, such easy entrance into the human breast.

In England, not many years afterwards, Sir Mathew Hale, a judge of even proverbial probity—a judge superior to all corruption, but not superior to delusion, if the belief in witchcraft be delusion,—hanged an individual for witchcraft, by the assistance of a jury, whose delusion had probably not waited for his, but, at any rate, was confirmed by it. Of this catastrophe, the immediate authors were the judge and jury, and the either corrupted or deluded witnesses of that place and time; but the original author was the witch of Endor, and those predecessors of hers in the same profession, for whose punishment a law had been inserted into the Mosaic code.

The general evidence applied by scientific information to the direct evidence of particular extraordinary facts, is not always necessarily and without exception (though it is most apt to be) on the negative side, in opposition to such direct evidence. Direct evidence, the truth of which is rendered suspicious by this circumstance—viz. that the fact reported by it would, if true, be a violation of some acknowledged law of nature—may be exempted from suspicion, by showing that it is in conformity to some other less extensive law of nature, which operates, as it were, as an *exception* to that which is more extensive. By magnetism, by electricity, by chemical attraction, by galvanism, by expansion and contraction, produced by the action of calorie on bodies, in their several states of solidity, liquidity, and gaseosity, motions are produced in a direction opposite to that in which the body in question is drawn by the more extensive law of gravitation. Of the attraction of gravity, some sort of conception must have been entertained in every, the rudest age, but in the ancient world, even in its most enlightened period, the conception entertained of this universal property of all matter was but imperfect, and was not expressed by any sufficiently comprehensive name. Of the other laws, which, as just mentioned, stand as it were as so many exceptions to that more general law, scarce any conception was in those days entertained. of the laws of magnetic, in particular, and electrical and galvanic motion, none whatever. In the museum at Oxford may be seen (or at least might once be seen) a natural magnet, by which a mass of iron, weighing 1,200 lbs., is or was kept suspended. At the lectures there delivered on natural philosophy, might at the same time be seen an exhibition which, I suppose, is commonly enough repeated in other such lectures—a plate of gold kept suspended for some moments in a state of absolute rest, by the antagonising forces of gravitation and electricity. Of late, in presence of numerous companies, different parts of a dead body have received, from the so recently discovered power of galvanism, motions opposing and overpowering the action of gravity.

In our own times and country, scarce a journeyman or a milliner's apprentice in a country town, to whom these particular and recently-discovered laws of nature are altogether unknown. Even to these inferior ranks, a fact of any of the classes above exemplified would therefore, at present, be as far from appearing improbable, as the fact of a stone's falling to the ground after being

dropt or projected from the hand. By a person now sitting in the station of a judge, even though he were selected from no higher rank in the scale of illumination, these facts would, any of them, be received upon any, the slightest, evidence. In the age of Lucian, had Lucian sat as judge, and any of these facts been exhibited to him in evidence, without any previous explanation,—Lucian, notwithstanding all his knowledge and sagacity, or rather by reason of that very knowledge and sagacity, could never have failed to reject it as incredible.

Facts, then, which were true, have been rejected, and with reason rejected, as improbable. When a fact presents itself as improbable, does this experience afford any reason for crediting it as if it were true? Nothing like it. Disbelieving improbable things, we shall deceive ourselves once, believing them, we shall deceive ourselves nine hundred and ninety-nine times Deceived we shall be, not unfrequently, do what we can all that is left for us to aim at, is, so to order our judgment that the number of instances in which we are deceived shall be as small as possible

Of eleven witnesses exhibited before a court of justice, and possessing, as far as appears, equal title to credit, ten may perjure themselves, and the remaining one may speak truth. In this case, if the judge gives credit to the ten witnesses, misdecision will be the consequence. But does it therefore follow that, *cæteris paribus*, ten witnesses are not to be believed in preference to one?

In practice, no difficulty is found in believing one fact, and disbelieving, at the same time, another, though both of them standing on the ground of the same evidence Propensity leads to such distinctions, judgment reports the reasonableness of them

In the Nuremberg Chronicle, two facts are reported in the same breath: one (that of the armies fighting in the atmosphere,) to which, at present, no well-informed mind will afford —the other (that of the stones falling from the same region,) to which none will refuse —its belief. Why this difference? The reason is obvious and convincing The fact disbelieved is a fact unconformable to the known course of nature and to such a degree unconformable, that, the better a man is acquainted with the ordinary course of nature, and the more close the attention which in this view he pays to it, the more strongly he will be persuaded that the reporter or reporters (be they who they may) were either deceived or deceivers, rather than that such a fact should have been true. The fact believed, is a fact conformable to the course of nature: in former times not known to be so, but of late years ascertained to be so by a multitude of examples, many of which have undergone the most attentive and most scientific scrutiny.

§ 7. *Improbability is a particular case of counter-evidence.*

The case of improbability or impossibility, on the part of the fact, the existence of which is asserted by the testimony delivered in the first instance, will, when closely looked into, be seen to coincide with the case of counter-evidence

Improbability is constituted by a mass of evidence of a mixed, and in a considerable degree subtle and recondite, nature — an article of circumstantial evidence deduced in the way of inference, out of an immense mass of direct evidence

Improbability or impossibility consists (it has been seen) in the inference deduced from a supposed disconformity, more or less wide, on the part of the affirmed fact in question, as compared with the ordinary and known course of nature

The direct evidence, from which this inference of the non-existence of the affirmed fact is deduced, is composed of the several supposed reports or relations (added to the several supposed perceptions of the deposing witness himself) whereby the existence of the several supposed analogous facts of which the course of nature in this behalf is composed, has been supposed to be affirmed

Operating thus in the way of counter-evidence with relation to the fact affirmed, this immense and in a manner infinite mass of direct evidence may, for distinction's sake, be termed *general* counter-evidence the other evidence antecedently designated by the appellation of counter-evidence, being at the same time named *special* counter evidence *

Certain facts are considered as disaffirmed, certain negative facts in infinite multitude are considered as affirmed, by the perceptions and reports (extra judicial reports indeed) of mankind in general, without any known exception and from all these facts put together, in the character of evidentiary facts, the non-existence of the individual fact in question in the character of principal fact is inferred

Thus, supposing, down to the time in question (say the year 1763,) the greatest length

* *Improbability* on the part of the fact of which the existence is deposed to and asserted by an article of evidence, of testimony delivered in the first instance, may even be constituted by an article of *special* counter-evidence, in any case in which the probative force of the counter-evidence is, with reference to that of the evidence delivered in the first instance, infirmative only, and not destructive Indeed, whether the effect of the conflict on the first-delivered evidence be infirmative only, or altogether destructive,—supposing always that any degree of probative force belongs to either of the opposite articles separately taken,—a degree of improbability, more or less considerable, will by each be impressed on the existence of the fact affirmed by the other.

of way known, within the bounds of the country called England, to have been travelled by any one man in the compass of twenty-four hours, to have been 150 miles.—the existence of a man in a spot 200 miles distant from the spot in which the act in question is known to have been committed, and that within twenty-four hours of the time at which it is known to have been committed, will be sufficient to render the fact of his having been the person who committed it, to a certain degree improbable *

Of all the instances of despatch on journeys that ever came within my observation (here we have *perception*,) and of all that I ever heard of (here we have an indefinite mass of evidence, *extra-judicially* indeed, not *judicially* delivered evidence,) none ever exceeded 150 miles within the twenty four hours Here, if the witnesses are to be believed, we have a rate of dispatch equal to 200 miles in twenty-four hours The supposed fact thus affirmed, is, therefore, out of the ordinary and known course of nature and so widely distant from it, as to be improbable and so great is the improbability, that, notwithstanding the affirmative testimony of the witnesses for the prosecution, the fact of their being either mendacious or under a mistake seems the less improbable fact of the two My decision, therefore, is, that the criminal act charged upon this man was not committed by him.—Such, in the case in question, if developed at length, would be the language of the judge (under English law the jury) by whom, in the case in question, the fact affirmed by the first-delivered evidence was, on the ground of its improbability, disbelieved

To illustrate the nature and effect of *improbability* in the character of an article of circumstantial evidence, opposed to, and adduced in disaffirmance of, the existence of the fact, which, howsoever affirmed by testimony, is thus charged with being *improbable*,—I will bring to view three examples the case of water brought by cold into the state of ice; the case of air-balloons, and the case of stones falling upon the earth from immeasurable heights in the atmosphere

A circumstance by which these examples are rendered all of them the more instructive, is, that, in every one of these instances, the fact that was or might have been rationally and properly objected to as improbable, was nevertheless, and is now, universally acknowledged to be true

The case of the water and the ice, as reported by Locke, has already been brought to view†. In Siam, water is never in that state. The position of the country is in the torrid zone, and there is no elevation in it anywhere, of sufficient height to produce the degree of cold necessary to surmount in that respect the effect of exposure to the sun's heat. Admitted to the presence of the monarch of that country, an ambassador from Holland, in describing the state of things in his own, incidentally found occasion to speak of ice—of water reduced to that state, in masses of such thickness as to bear men and carriages At this point of the narrative he was stopped "What you have been saying till now," said his Majesty, "may be true: but by this I am satisfied you are false. Water turned into stone! was ever any such thing, or anything like it, seen or heard of?"

The monarch was perfectly in the right. Water turned into stone, he had never either seen or heard of Liars he had seen, as many as he had seen men To him the supposed fact was altogether unconformable to the course of nature, much more so than any instance of mendacity to us it is altogether conformable. In his eyes, it opposed an insuperable bar to the probative force of the testimony in ours it would have opposed none

Was he, then, in his situation, condemned to give everlasting discredit to facts thus indubitably true? By no means Supposing his understanding powerful enough to comprehend the force of analogy, the conversion of water from a liquid to a solid state by the abstraction of heat might have been shown to be conformable to facts in abundance, that either already had been, or easily might have been, brought within the reach of his own experience—of his own perceptions

When an asserted fact is disbelieved as improbable,—the ground of its rejection, the efficient cause of the persuasion by which the existence of it is disaffirmed, is the notion of its being unconformable to the ordinary course of nature Show that there is no such disconformity, the improbability is removed altogether. Show that the disconformity is not so wide as it had appeared to be, the improbability is diminished: the diminution is more or less considerable, according as the

* Instead of 200, say 12,000 miles, the distance of the opposite part of the earth's surface,—and one would be apt to say that instead of improbability there was impossibility.

† This being one of the chapters which was written twice over by Mr. Bentham, the last time without reference to the first,—the story of the King of Siam is told twice over at full length. As, however, it is brought to view for two very different purposes—viz. the first time, to illustrate the principle that the credibility of a fact relatively to a particular individual, depends upon his acquaintance with the course of nature; and the second time, to exemplify the effect of improbability as an article of circumstantial evidence; and as, moreover, the illustrations which accompany the story, in the two places in which it is introduced, are different,—it has not been thought advisable to strike it out in either place. —*Editor.*

analogous facts brought to view to show the conformity are more or less numerous, and, in the instance of each, the analogy more or less close.

In the eyes of the King of Siam, the improbability of the conversion of water from a liquid into a solid might have been diminished, by indicating to him the case of metallic substances In the furnace of the founder, the gold with which your palace is decorated is in a state of liquidity, like that of the water in which your barges float when, being removed from the fire, it becomes comparatively cold, it resumes then a state of solidity, like that which, during one part of the year, water resumes so regularly in our canals.

By this one example, the improbability might, in the monarch's eyes, at any rate, have been lessened As to the degree in which it would have been lessened, that would have depended on the cast of his mind, and his opportunities of information *

The improbability might have been still further diminished, had the medical chest of the ambassador's physician happened to be furnished with a corresponding pair of those saline substances which, being separately dissolved in water, present each of them the appearance of water, but immediately on being mixed together constitute a solid and to all appearance a stony mass, the redundant water of the one being absorbed in crystallization by the other —supposing always, that, while the chest of the medical man supplied the substances themselves, his mind furnished him, at that early period, with the knowledge of the properties, which, on this occasion, required to be displayed

In the case of the air balloons, no particular instance, in which, for any length of time, the fact of their ascension found any person to disbelieve it, ever happened to fall within my knowledge The unbelievers, if any, were from the first more likely to be found among the uninitiated, than among the initiated in the physical branch of science The rarefaction and levity which is the long-known result of increase of temperature,—this, added to the known possibility of abstracting from an inclosed space the whole weight of the air that would have been contained in it, were sufficient to reduce very much, if not to remove altogether, the improbability of the fact in the first instance. The discovery of a gas which, under an elasticity and power of resistance equal to that of common air, possessed no more than from a tenth to a fifteenth part of its weight, brought it not long after within that class of facts, which oppose not in any degree the objection of improbability to the testimony of him by whom they are related as having fallen within the compass of his perceptions

The case of the stones that, of late years, have, in so many well-attested instances, been stated to have fallen in different parts of the world from the sky upon the earth, at too great a distance from the nearest volcano to have had any such earthly seat of explosions for their source, brings to my own recollection the feelings which, at different times, reports to that effect presented to my mind The Nuremberg Chronicle was the first source of information by which a fact, or supposed fact, of this kind, was presented to my notice Among the wonders exhibited by graphical representation in this work, is a shower of stones, which, on a day therein recorded, is mentioned as having fallen upon the earth's surface † On a glance bestowed, which was all that seemed worth bestowing, on the point in question, with the few words that served for the explanation of it, the stones were set down in my own mind as having being the missiles employed by the combatants in one of those pairs of armies whose combats in the air used at that time of day to be so frequent ‡

* That it might very well have happened to it not to be removed, is made evident, by the instance already mentioned of the medical man who pronounced the story of the freezing of mercury to be a lie. Water is not a metal—mercury is; and the experience of the doctor could scarce have failed to present to his notice metals more in number than were likely to have presented themselves to the monarch's notice.

† Folio 170, 198

‡ In the Nuremberg Chronicle, the following are the two passages —

One, without mentioning the year, is referred to the time of the Emperor Lotharius. It stands in p 1, of fol 170

"Grandinem mire (*miræ*) magnitudinis his temporibus in Gallia decidisse trudunt, que (*quæ*) pecora multa et nonnullos homines interemit. *Visa est tunc in ipsis grandinibus granum durissimum mire* (*mira*) *longitudinis*"

Supposing this true, splinters from an atmospherical stone must, after its explosion, have cooled to such a degree as to have become encrusted with frozen water, and thus become the *nuclei* of so many hail-stones

The other p 1, of fol. 198, is, by the two last preceding articles referred to the year 1128.

"Acies ignee (*igneæ*) apparuerunt in celo (*cælo,*) quæ per totum celum sperse (*sparsæ*) plurima parte noctis vise (*visæ*) et stelle (*stellæ*) perplures de celo in terram cecidisse vise sunt· superfusa aqua (*superfusâ aquâ*) fumus cum sono exibat."

Supposing this true, the *stars* were *stones*, for they were luminous bodies and these same luminous bodies were seen to fall upon the earth; and, after their fall, water being thrown upon them, noise and vapour were the result. They therefore fell, and it was upon the earth they fell; and were therefore not of the nature of those meteors which, under the name of shooting stars are so frequently observed in the atmosphere shooting in all directions, but not observed to leave behind them, in any known part of the earth's surface, any traces of their existence.

A general recollection remains with me of having read, many years ago, in one of the London newspapers, a paragraph, stating a stone, or a number of stones, to have fallen from the clouds in England, at some place remote from the metropolis. I think it was in Yorkshire. This was the first instance that had met my observation, of an occurrence of this kind, related as having taken place at a point of time near to that of its publication. A statement published in a London newspaper, with mention of time and place, exposed thereby to immediate scrutiny and contradiction, presented a very different claim to attention from any that could be presented by the production of a barbarous age, in which facts possibly true, and facts unquestionably false, were intermixed in every page.

Is it true, this story—or is it not? is the question I remember putting to myself. That it is altogether false (was the answer,) is more than I could take upon myself to pronounce with full assurance. My acquaintance with the several branches of science concerned, is not such as to afford sufficient warrant for any such peremptory conclusion. But, within the time of scientific scrutiny, this is the first report of the kind that ever met my observation: whereas, in the periodical publications of the day, statements more or less erroneous occur every day, and erroneous reports, relative to facts lying within the division of physical science, are not unfrequent. If, therefore, I were obliged to lay a wager, with liberty to choose my side, it would be on the negative side, and on that side I should be content to lay considerable odds.

By the comparative degree of intelligence prevailing in modern times, the range of the species of evidence here in question has been considerably reduced: the question now is,—not whether, upon the credit of this or that article of human testimony, the existence of a fact confessedly out of the ordinary course of nature shall be believed,—but rather, whether, of the fact said to exist, the existence would be out of, or (what comes to the same thing) repugnant to, the ordinary course of nature.

When credit was given to the existence of witchcraft,* sorcerers, and ghosts, and judicial decisions were grounded on evidence attesting or supposing the existence of such facts, the question concerning the intrinsic probability of such facts was a question of great frequency, and of the highest practical importance. In those times of terror, women were punished, and always with death, for acts of witchcraft; men for acts of sorcery; human creatures of both sexes for being possessed, or causing others to be possessed by devils: all were punished, or might have been punished, for all sorts of crimes, on the supposed evidence of ghosts.†

* The early English and Scottish statutes for the punishment of witchcraft, continued in force till the passing of 9 Geo. II. c. 5. In Ireland, the statute of Elizabeth, to the same effect, was only repealed by 1 & 2 Geo. IV. c. 18. In the Institute of the Law of Scotland, published by Professor Forbes, in 1730, the existence and criminalty of witchcraft is supported with great energy. The punishment of death on this charge was indeed inflicted in Scotland so late as 1722, by one of the remote local judges.—*Ed.*

† In some publication, I believe in more than one, of the earlier part of the 18th century, or the latter part of the 17th, I remember, in former days, to have seen a print of a scene, in which, on the occasion of a public trial, the ghost of a murdered person appeared in court to give evidence against the murderer. From such an appearance, no danger could ever be to be apprehended for truth and justice. But the mischief would be, if the reported testimony of the ghost of a murdered man should be received in evidence, and gain credit; as his reported testimony, said to be given *dum in vitâ*, does in actual practice.—[There have been several instances in which witnesses have detailed evidence in courts of justice, which they have alleged to be mere repetitions of the narratives of apparitions. Sir Walter Scott printed for the Bannatyne Club, a remarkable record of such a trial, under the title, "Trial of Duncan Terig *alias* Clerk, and Alexander Bane Macdonald, for the murder of Arthur Davis, sergeant in General Guise's regiment of foot, June A. D. M DCC LIV." Sergeant Davis, who had charge of a party for enforcing the disarming act in one of the wildest districts of the Highlands, had been murdered in a solitary spot, where his body was concealed. At the trial, a Highlander gave a distinct narrative of the appearance of the sergeant's ghost, which gave a very lucid account of the murder, and described the spot where the body was concealed. A woman, to whom this witness was servant, confirmed his testimony. All efforts to discover the real source or motive of this extraordinary representation, by cross-examination or otherwise, seem to have been baffled with much acuteness; but it was impossible to avoid one circumstance, which was dwelt upon as an incongruity viz. that the ghost of the English sergeant, who had known no Gaelic in his lifetime, was obliged to use that language to be intelligible to the witness. Though the other parts of the evidence were distinctly against the accused, the suspicion of the jury seems to have been roused by this transaction, and an acquittal was found.—In a case which happened in the Highlands, so lately as September 1832, evidence of a similar description was given, with this difference, that it passed through the medium of a dream. A pedlar had been murdered, and his pack concealed. An individual took the officers of justice to a spot where he said a voice had told him in a dream in Gaelic, that the pack would be found; and it was there discovered accordingly. Suspicion was naturally roused against the witness, but all attempts to discover the real ground of his knowledge were baffled. The accused was found guilty, and executed.—In a weekly periodical, called "The Opera Glass," for 3d February 1827, there is an unauthenticated account of a

If ever it should happen that a man should be in danger of suffering punishment, or injustice in any other shape, on the credit of any such supposition, it would then be necessary to enter into a serious comparison of the two counter-forces: the improbability of the alleged supernatural fact, on the one hand, on the other hand, the probative force of the testimony on which the probability of the existence of these supernatural facts rested Happily, in the present state of the public mind, this danger does not present itself as being seriously formidable On the last occasion on which the notion of a ghost presented itself upon the judicial stage, his existence was not brought to view in the character of a subject-matter of proof or argument, but his non-existence (I should have said, her non-existence — for it was a female ghost) was assumed, and the assertors of it considered as having, by the assumption of that character, subjected themselves to legal punishment

At present, the prevailing impression seems to be, that no fact, of a nature confessedly *supernatural*, is to be believed on the credit of human testimony, or, at any rate, of any such mass of human testimony as hath ever found itself outweighed by a preponderant mass of counter-testimony (composed, to wit, of an assemblage of witnesses superior in number and value taken together) in any court of justice

While this mode of thinking (if I am correct in considering it as prevalent) continues in force, — as often as the topic of impossibility, or improbability approaching to impossibility, is introduced, the question will be, — Supposing (for argument's sake) the existence of the alleged fact, would it be a supernatural one? or, in other words, a violation of any known law of nature? If it would, it is admitted on all hands that the fact (that is, the allegation whereby the existence of it is asserted) is not true but my proposition is, that, however extraordinary it may appear, it does not import the violation of any *law of nature* There is nothing, therefore, to prevent it from being believed on the credit of special human testimony and, in particular, of such testimony as on my side has been adduced Such, at this time of day, is the language of the party on whose side an article of testimony has been adduced, the probative force of which is on the other side encountered by the objection grounded on the intrinsic improbability of the alleged fact

The same progress of intelligence, by which the mind of the judge is rendered better able to defend itself against any deceptions that might be attempted to be put upon it by false evidence brought forward in support of impossible or improbable facts, operates as a bar to prevent the bringing forward of such facts, and preserves his judicial faculties from being exposed to the attempt Numerous as are the instances in which the discernment of the judge is put to the trial by false evidence, by evidence of false facts — facts which to the stain of falsehood add the characters of physical improbability, are seldom found of the number It is not at present as in the days of magic and witchcraft, when the extraordinariness of the fact (so it did but derive its characters from that source) would, instead of diminishing, serve but to increase, its chance of being believed False witnesses, in the planning of their tales of falsehood, take care to render them not unconformable in any respect, but, on the contrary, in all respects as conformable as possible, to what is understood to be the ordinary course of nature When all is done that can be done to varnish the false tale, is the taint of improbability still visible in it? — the counter-evidence opposed to it, is little in danger of operating with less than its due weight The reign of religious impostures, I mean impostures grounding their prospects of success on notions derived from religion, seems, throughout the field of scientific civilization, or (which happens to be the same thing) of Christendom, pretty well at an end Judges are nowhere prepared to give credence to them, and, this being understood, suitors are as little prepared to hazard them When, in the last century, the Cock-lane ghost afforded entertainment to an English court of justice, it did not present itself spontaneously — it was dragged into the light of day by persons who called down the hand of avenging justice upon the lying ape that gave it birth

§ 8. *An objection answered*

On a loose and hasty survey, the case of impossibility or improbability — of intrinsic impossibility or improbability on the part of the supposed fact in question — might be apt to present itself in a different point of view from that in which it has been above exhibited, in a point of view in which the objection to the fact might be apt to appear not to belong to the head of circumstantial evidence, but to be constituted by a body of distinct evidence brought forward on the other side. This conception is accordingly in a manner implied in the import of the term

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trial in the State of Maryland, of the year 1798 or 1799, in which it would appear that a witness in a civil case was examined as to communications which he said he had received from a ghost. The question regarded a testament, and the ghost in question, was that of the testator It had this peculiarity, that it wore a sky-blue coat The ghost had much communication with the witness on other matters, but the court overruled the proposal of the counsel to put questions beyond the subject-matter of the cause.— *Ed.*]

intrinsic, applied as above: it may seem implied in the words *impossibility* and *improbability*, even when taken by themselves. Impossibility, it may be said, is a property that may with propriety be ascribed to the fact itself. Look at it by itself—every one sees it at first glance to be impossible. Look at it in this point of view, you see it by itself: what you do see is the single fact in question: but, seeing this, what other facts do you see? what other facts do you look for? what other facts have you need to look for? Absolutely none.

This view of the matter is what seems likely enough to be entertained, it being presented to the mind, and in a manner warranted, by the turn of the language which, on the occasion in question, is commonly employed. Upon closer examination, however, the propriety of it will vanish: it will be seen that the nature of the case indispensably requires that other facts should be taken into the account: in which case, such other facts, not being brought forward by any direct testimony, or other evidence, cannot but come under the head of circumstantial evidence.

Take one of the vulgar cases of witchcraft, —at present in civilized countries a ludicrous one—in most Christian countries not very long ago, in some parts of some such countries perhaps even now, but too serious a one. An old man, or (to take the more common case) an old woman, travelling, at pleasure, with prodigious velocity, and in every direction, through the air, without any assistance at all for the journey, or none better than what may be supposed to be afforded by a broomstick.—Do you believe it? No. Why? Because it is impossible: it is a fact in itself impossible. Are you in your senses? you will say so too. Would you have us go out of the subject, call in other facts, and attempt to reason about it? The very attempt to reason would be an irrational one.

The firmness of my persuasion on the subject can hardly be exceeded by any that could be entertained by a person, who, speaking of it, should employ such language as is above. But as to the source of that persuasion, upon examining it, I do not find it quite so simple. Were a fact of the description in question to be reported to me, I should regard it as not true. For what reasons? Because (not to look out for any mere repugnancies) it stands in contradiction, for example, to two physical laws. One is, that no body ever changes its place without some specific cause of motion:* another is, that, even when exposed to the action of any such specific cause of motion, no body suffers any such change of place, unless the force of such specific cause be in a degree sufficient to overcome the impediment opposed by the attraction of gravity.

Such are the two laws in question: but, in alleging (as I do for shortness) the existence of these two ideal, and as they might be termed *verbal*, laws, what is it that I allege in substance? In truth nothing more, in either case, than an assemblage (though that an immensely multitudinous one) of facts agreeing with each other in a certain point of view—with which facts the extraordinary phenomenon in question is seen to be unconformable. All bodies that I know anything of, tend towards the centre of the earth. By what consideration is it, that I am led to form a proposition so general and exclusive? By these which follow. Every motion I make or experience, every minute of time I sit or stand without any considerable motion, every motion I feel or see on the part of other bodies, concurs in giving me a confirmation of the truth of it, so far as depends upon the evidence of my own senses. Do I apply for further information to the presumed experience and observation—to the actual relation and declaration, of other individuals, my fellow-creatures?—the information runs constantly, and without any the least exception, in the same strain. Oral evidence and written evidence—men and books—books touching on this particular subject directly and professedly—books touching on it incidentally and collaterally,—all concur in giving evidence on the same side. All this body of information, all this immense and continually accumulating body of information, may at any time, so far as it were worth while to pursue the thread of analysis, be resolved into so many distinct articles of evidence, ranged under the heads of distinction already exhibited in this work.

After all, what does it amount to? Not any direct evidence disaffirming the existence of the supposed magic journey. What then? So many articles of circumstantial evidence: neither more nor less. But this circumstantial evidence, this supposed disaffirming evidence (it may again be asked,)—how does it disprove the truth of the supposed affirmative evidence? In no other individual instance was motion ever produced without a distinct assignable cause, referable to some one or other of the enumerated heads—in no other individual instance was the force of gravity ever overcome by a force less considerable than its own: to come to the point at once, in no other individual instance was an old woman ever carried through the air, either without any assisting instrument, or with an instrument of no greater degree of appropriate efficacy than a broomstick, by the exertions either of her own volition, or by the exertions of the volition of any other being (such, for example, as a devil,) applying itself to her bodily faculties for that purpose.

* Of the causes of motion, an enumeration has been given, *suprà*, pp. 84, 85.

But, from the non-existence of any such extraordinarily produced motions in those instances, numerous as they are, how does it follow that no such motions have been produced in this instance? In none of those instances has there been any direct evidence affirming the existence of such extraordinarily produced motions. But in this instance such affirmative evidence does exist Continue then to disbelieve the existence of such extraordinarily produced motions in those several instances; but think not, from their non-existence in those instances, to prove their non-existence, much less their impossibility, in this. Think not that, because their existence is not to be believed without evidence, therefore their existence can be reasonably disbelieved against evidence

I should not expect to find in the person of any reader of these pages, an individual in whose mind a persuasion of the existence of any such aërial journey would, by the above train of reasoning, be produced On the other hand, neither do I see how it is possible to contest the truth of it, so far as concerns the position it rests upon, — to wit, that all the argument that is adduced, or can be adduced, in disproof of such supposed fact, amounts to no more than this observation, viz the want of consistency, conformity, agreement, analogy (take what word we will, it makes no difference,) between this extraordinary supposed fact, and the other ordinary facts above brought to view, of the truth of which we have been sufficiently persuaded by direct evidence Yet upon no stronger nor other ground than this disconformity, we scruple not to disbelieve such extraordinary facts, and that with so firm a degree of persuasion, as without difficulty, and almost without thought, to pronounce them to be *impossible*

So far, so good but this propensity in our minds, does it alter, does it influence in any respect, the nature of the facts themselves? By disbelieving the existence, past, present, or future, of any fact whatsoever, is it in our power to destroy, to annihilate, its existence? to cause a fact never to have existed, for example, that in truth has existed? Unquestionably not. Most certainly, not any influence on the existence of the facts themselves can be exercised by the opinion such beings as we entertain of their existence Yet, after all, when we come to inquire what is the nature of the effects which any such disconformity (or rather our observation of the existence of such disconformity, which is all we have of it,) is capable of producing, — the answer is, a disposition on our part to disbelieve the existence of the supposed extraordinary fact a tendency in our own minds, not any tendency in the facts themselves.

Thus much indeed may be added, viz. that so often as a man in his proceedings assumes the falsity of such facts, so often will he, in that respect, act rationally, and find his conclusions warranted by experience. so often as he assumes the truth of them, and acts upon that foundation, so often will he find himself deceived — completely and deplorably deceived This argument, after all, will, upon a strict scrutiny, appear to amount to nothing to be in appearance perhaps a distinct and additional argument, but, in truth, so much of it as is true, no more than the same represented over again in another point of view As to everything that is to come — as to all supposed future results — it is mere surmise, mere opinion, without facts, without evidence, a mere assumption of the matter in dispute As to all past results, it amounts to no more than the already alleged and admitted disconformity, served up only in another shape

What, then, is the true reply to the argument in question, supposing it adduced by a believer in witchcraft — adduced for the purpose of weakening our confidence in the proof afforded, by the disconformity in question, of the non-existence of that practice? It is this, — viz that whatever argument is capable of being brought forward for the purpose of weakening our confidence in the argument indicative of the non-existence of that practice, applies in like manner, but with much greater force, to every argument that can be brought forward in favour of its existence The travelling of old women, with or without broomsticks, through the air, is that sort of event which even you who affirm the existence of it in this or that particular instance, admit not to be a common one But the existence of persons who, by any one of a great variety of motives, are impelled, and eventually compelled, to exhibit relations of facts, ordinary as well as extraordinary, which, on examination, prove not to be true, is a fact unhappily but too often verified The action of old women in the character of witches, is a fact which, according to your own statement, has happened but now and then, at this or that particular time and place, but the action of men and women, old and young, with brooms and without, in the character of liars, is that sort of event which has been happening at all times and in all places of which we have any account This is so true, that a wager (for though a wager is no direct proof of any fact which is the subject of it, it is, however, a proof of the real confidence of him who joins in it, and a punishment for rash confidence on the part of him who loses it,) in the character of an argument *ad hominem* at least, a wager on this subject might be brought forward, not altogether without congruity. Show witches on your part, while I on my part show liars, for the space of a term in Westminister Hall, at so

many guineas a-head, and see whose purse will be fullest at the end of it.

When I have to choose between believing a common, and believing an uncommon, event, I believe the former, in preference to the latter. Why? Because, in the very words which I make use of, it is implied, that the event called common has hitherto been of more frequent occurrence than the event called uncommon: and to suppose that, having been hitherto more frequent, it will continue to be so, is only to believe, what all experience testifies, that the course of nature is uniform.

The conclusion seems to be, that, in support of a persuasion of the impossibility of any fact, the best and utmost proof which the nature of the case admits of, is the indication of its disconformity with some class of facts indicated by those propositions which, for the convenience of discourse, have been received under the appellation of laws of nature: and that such proof, so given, of such disconformity, may, with propriety, be referred to the head of circumstantial evidence.

Certainty, absolute certainty, is a satisfaction which on every ground of inquiry we are continually grasping at, but which the inexorable nature of things has placed for ever out of our reach. Practical certainty, a degree of assurance sufficient for practice, is a blessing, the attainment of which, as often as it lies in our way to attain it, may be sufficient to console us under the want of any such superfluous and unattainable acquisitions.

§ 9. *Untrustworthiness of the evidence by which facts disconformable to the course of nature have been attempted to be proved.*

The accreditation of anti-physical or supernatural facts is by no means a matter of indifference to justice, — even of facts which, with relation to the fact upon the carpet, have no other circumstance in common than their being (on the supposition of their truth) supernatural facts. Every such fact, if admitted for true, opens the door for the admission of every other: it establishes the precedent: it establishes this generally applicable proposition, viz. that repugnancy to the obvious laws of nature is no bar to credibility. Give credit to any one instance of witchcraft,—with what consistency or reason can you, on the mere ground of natural incredibility, refuse to give credit to any other?

Such being the tendency of credit given to supernatural facts — such the mischievous influence of supernatural facts, in themselves indifferent and innoxious, — it may be not unuseful to bring to view such considerations as tend to diminish the credibility of anti-physical facts in the lump.

I. No fact of this class was ever established by that sort of evidence which, under the best system of procedure in respect to evidence, is considered as the best evidence, extracted in the best manner; and which, though termed the best sort, is not to be considered as an extraordinary sort, but the sort which is ordinarily required and obtained in ordinary cases.

II. Accordingly, anti-physical facts are seldom represented anywhere — never in the face of justice — as having manifested themselves in the presence of divers persons at the same time.

In the instance of ghosts and apparitions, this has already been matter of general observation. Why so?

1. A persuasion of this sort has in many instances been sincere — the consequence of delusion. In the instance of a celebrated author of Berlin,* to whom we are indebted for a most curious and instructive account of his own case, the appearance was the result of bodily indisposition, and the unreality of the existence of a correspondent external object known by the patient at the time. The apparition appears not to two persons at once. Why? Because two persons are not subject to the same indisposition, bodily or mental, manifesting itself in the same manner, at the same time.

2. Where the reported perception has not had delusion, but self-conscious mendacity, for its cause, it has never happened that two persons have concurred in the utterance of such report, on any judicial,† or solemn — though extra-judicial, occasion. Why? Because of the extreme and manifest difficulty of carrying through any such plan of imposition with success. Subjected to examination, they could not hope to escape contradicting themselves, as well as one another. Accordingly, when a man embarks in a plan of this kind, he chooses the company and the occasion, and takes care not to expose his tale to contradiction, designed or undesigned, from a confederate.

III. The anti-physical facts thus reported are never of the permanent, but always of the evanescent, kind.

Why? Because, were they of the permanent kind, the production of the object constituting the material source of the *real* evidence would of course be called for: nor could credence be expected, unless it were produced. This case, when looked nearly into, is found resolvable into the preceding one. Why? Because, supposing the source of evidence produced, and the evidence extracted from it, under the eye of the judge, the anti-physical fact manifests itself in the presence of divers persons at once.

If, in any instance, the exhibition of the anti-physical fact in the presence of divers persons has been undertaken or attempted, it has been in the way of legerdemain and im-

* Nicolai: in Tilloch's Philosophical Magazine, and Hibbert's Philosophy of Apparitions.

† See above, p. 101, Note †.—*Ed.*

posture. What, then, is legerdemain? It is the apparent violation of some law or laws of nature; the circumstances which, if known, would show that no such violation existed, being concealed.

Upon this view of the matter, it should seem that those who maintain, in the character of a universal proposition, the non-existence of such physical facts as above described, may safely and even consistently admit their existence, in the event of their being deposed to by a considerable number of unexceptionable witnesses, some or all of them of good character, their testimony being extracted by a judicial examination, conducted with competent ability, in the best mode

That the evidence should be extracted in the best mode, is a condition altogether essential For, if you will accept of a bad mode —of a mode which English judges, knowing the best, and the value of the best, accept of, not only in preference, but to the exclusion of the best, — you may prove witchcraft, in the manner in which witchcraft has been proved, and conclusively, to the destruction of the defendant, in any quantity you please In the closet of a judge or other person having mercy or destruction in his power, you may transform old women into witches by confession, in any number that you please, and, by taking upon yourself the wording of the confession, leaving nothing to do to the witch besides the signing with her mark, you save her so much trouble. Of course, you will not in this case fall into any such inconsistency as that of calling for the personal evidence to be corroborated (as in other cases) by *real* evidence, that is, of the permanent kind, as above

§ 10. *Motives tending to produce affirmation of, and belief in, facts disconformable to the course of nature*

In the case of a fact in regard to which its apparent anti-physicality, its apparent incompatibility with the laws of nature, operates as a disprobative circumstance, — the probative force of the evidence on the other side — the probative force of the testimony deposing in affirmance of the fact — is, on various occasions, apt to be subjected to diminution from the same cause In determining whether any degree of credence ought to be given to an apparently anti-physical fact, regard must be had not only to the circumstantial evidence afforded by its apparent anti-physicality, but also to the probability of seductive motives acting upon the witnesses by whom the fact is affirmed.

Various are the occasions on which, by the inordinate and seductive influence of this or that species of motive, men are led to represent as true, facts which if they were true would be anti-physical, but which are not true. Various are the classes of anti-physical facts, to the truth of which men are, on those occasions, led to depose. Coupling together the nature of the fact and the nature of the occasion, I proceed to bring to view some of the principal instances in which this cause of deception has been observed to operate.

In all these several cases, it may be of use here to premise that the seductive power of the species of motive in question, applying as it were to two different quarters of the mind at once, the understanding and the will, operates upon it with a double influence What is not true, it prompts a man to regard as true, and what is neither true, nor so much as by him regarded as being so, it prompts him to report as if it were true.

I Facts promising wealth Transmutation of less valuable metals into gold Seductive motive, in the character of a cause of delusion applying to the understanding of the person addressed — the person to whom the report is made, — the love of the matter of wealth Seductive motive applying to the understanding of the original reporter (the supposed operator) in case of delusion (simple incorrectness, without mendacity,) — the same, also, the pleasure of curiosity, the pleasure of reputation, and of the power attending it Seductive motive applying, in case of mendacity, to the will, — love of the matter of wealth, viz the wealth to be gained by the sale of the false secret

Transmutation of a less valuable metal into gold, is in itself neither more nor less credible — a fact neither more nor less anti-physical, nor devious *in specie** — than transmutation of gold into a less valuable metal Yet, the probative force of a testimony asserting the transmutation of another metal into gold, would be less than that of a testimony asserting the reverse Why? Because the aggregate force of the seductive motives above mentioned is so much greater in the latter case than in the former In the latter case, the most powerful of all, the desire of wealth does not apply

II Cure of diseases by supposed inadequate means Seductive motives applying in the character of a cause of delusion to the understanding of the person addressed, —

* By transmutation, according to the sense in which it is understood, may be signified, either a pair of anti physical facts, or a fact simply devious *in specie* Understood in a literal sense, it involves two anti-physical facts. annihilation of the other metal — creation of the gold. On either of the two following suppositions, it is but a fact simply devious: — 1. Gold is a compound of two other bodies: they are transmuted into gold, by being mixed together, in the requisite manner and in the requisite proportions. 2. Gold is one of divers ingredients in the composition of another known body: by the separation of the other ingredients, the remaining ingredient is transmuted into gold.

aversion to the pains of sickness: love of life. Seductive motive applying, in the case of delusion to the understanding of the original reporter (the supposed operator,) — the same as in the case of the transmutation of metals. Seductive motive applying, in the case of mendacity, to his will, — the same as in the case of delusion.

In this case, the fact of the cure of the disease in question by the operation of the supposed remedy in question, is one of seven contending facts, of all which the comparative probability requires to be weighed

1. No real, or at least such, disease the symptoms really existing, but the result of the imagination

2 No real disease the symptoms mendaciously reported

3 The disease cured, but by the mere influence of the imagination, not by the operation of the supposed remedy, — or by some other remedy

4. The disease gone off of itself cured, without the assistance of the imagination, by the unknown healing power of nature, or by the cessation of the action of the morbific cause

5 The disease not completely cured, i. e not ultimately cured, but the symptoms mollified or removed for a time, viz by either of the two preceding causes, Nos 3 and 4

6 The disease not cured in any degree the cessation of the symptoms being falsely reported, whether through delusion or mendacity, and whether on the part of the patient or of the medical practitioner

7. Or, lastly, the disease cured, and by the operation of the supposed remedy

Of the delusive influence of the imagination, exemplifications may be found in the choice made formerly of medicines Gold, it was thought, must be a sovereign remedy and all the efforts of industry were employed to make it potable A remedy for diseases? Why? Because it was so valuable — because it was so rare Diamonds are still more valuable happily they were never employed for the cure of diseases partly, perhaps, because they were so much more difficult to come at than gold, partly, because there was no hope of rendering them potable

III Facts promising happiness, threatening unhappiness, both in the extreme The fact in question, spoken of as evidentiary of a commission given by a supernatural being to a man, to issue commands to any or all other men; those commands converted into laws, by threats as well as promises; by prediction of pains to be endured in this or a future life, in case of disobedience — of pleasures, in case of obedience. Take even the promises alone, without the threats, — the seductive force is already beyond comparison greater than in the case of the making of gold, or the supernatural cure of diseases: add the threats, it receives a further and prodigiously greater increase.

Prudence suggests and requires the yielding to the probative force of this fact, — the giving credence to it, without staying to inquire into the intrinsic credibility of it — into its coincidence or deviousness, in degree or specie, with reference to the usual course of nature — into its conformity or repugnancy to the obvious laws of nature.

In this way, — by the help of an instrument of seduction which seems to be ready made, courting the hand of whoever has confidence enough to take it up and use it, — any man (it might seem) would have it in his power to impose laws, and those irresistible ones, upon any and every other. Such, accordingly, might have been the result, if the operation had been confined to one person, or if the operators, in whatever number, had agreed among themselves Happily for human liberty at least (not to speak of happiness and virtue,) no such concord has existed. In different nations, sometimes even in the same nation, legislators seeking to rule men by this instrument have come forward, opposing and combating one another with this instrument, no less decidedly and strenuously than others with the sword Each has proclaimed to the world, — These of mine are the true wonders; all others — all those others that you hear of, are false these that I promulgate to you are the genuine commands, all others, all those others that you hear of, are spurious. Divided thus, and opposed to itself, the seductive force, how seldom soever effectually resisted, ceased to be absolutely irresistible.

Such are the motives by which a man may be urged to give credit to untrue facts. But how comes it to be in his power? Such is the force by which the will of man is subdued; but by what means is the understanding itself brought into subjection by the will?

I answer, — Judgment, opinion, persuasion, is in a very considerable degree under the dominion of the will, discourse, declared opinion, altogether. But it is the nature of opinion declared, truly or falsely declared, by one man, to produce real opinion on the part of another

Judgment in the power of the will? By what means? By these means: — To bestow attention on one consideration, to refuse it to another, is altogether in the power of the will. It is in the power of a judge to hear one man speak in the character of a witness, to refuse to hear another; to hear one paper read in the character of an evidentiary document, to refuse to hear another. The power which, in the station of a judge, a man thus exercises in relation to persons and papers, the mind of every man, sitting in the tribunal established in his own bosom, exercises at pleasure over arguments and ideas: over the

contents of evidentiary discourses, in the state in which, through the medium of the perceptive faculty, they have been introduced into the memory. An idea to which a man's attention refuses itself, is, to every practical purpose, during the continuance of such refusal, as completely excluded, and thence rendered as completely inoperative, as the testimony of a witness, whom, before he has begun to speak, the judge has sent out of court; or a paper which he has disposed of in the same way, before any part of it has been read *

That discourse of all kinds, more especially discourse declarative of opinion, is completely in the power of the will, is manifest enough But he who is completely master of men's discourses, is little less than completely master of men's opinions It is by the discourse of A, that the opinion of B is governed, much more than by any reflections of his own To take upon trust from others (that is, from the discourses of others) his own opinions, is, on by far the greater part of the subjects that come under his cognizance and call upon him in one way or other for his decision, the lot, the inevitable lot, of the wisest and most cautious among mankind how much more frequently so, that of the ignorant, the rash, the headstrong, the unthinking multitude!

How wicked (it is frequently said) — how absurd and hopeless the enterprise, to make war upon opinions! Alas! would it were as absurd and hopeless, as it is wicked and pernicious! Upon opinions, in an immediate way, yes To crush the idea in the mind, to act upon it by mechanical pressure or impulse, is not in the power of the sword or of the rod In an unimmediate, though, for efficacy, not too remote way, through the medium of discourses, no for what, in the case of opinions (unhappily for mankind) is but too much in the power of the sword and of the rod, is, to crush the enunciating and offending pen or tongue. to cut asunder the muscles by which they are moved

Unhappily, the power of the will over opinion, through the medium of discourse, is but too well understood by men in power Meantime, thus much is plain enough the more credible the facts in themselves are, the less need has a man to seek to gain credence for them by such means By such means, credit may be given to facts the most absurd, currency to opinions the most pernicious Facts which are true, opinions which in their influence are beneficial to society, have no need of such support If this be to be admitted, the consequence seems undeniable To employ such means for the securing credence to any fact, is to confess its falsehood and absurdity, to employ such means for the support of any opinion, is to confess its erroneousness and mischievousness To pursue such ends by such means, is to betray, and virtually to confess, the practice of imposture, the consciousness of guilt

The propensity to give credence to false facts, to give adoption and currency and practical influence to opinions howsoever absurd and pernicious, wheresoever reward or punishment is conceived as annexed, by supernatural and irresistible power, to the operation of giving credence or discredence to any alleged fact, is of itself too strong to need strengthening by any factitious means, — by the application of political rewards or punishments to that same purpose Ascribe merit to belief, — belief will naturally be upon the look-out for the most difficultly credible facts to attach upon In the belief of facts which present themselves as true, there can be no merit, since there is no exertion, no opportunity given to any one man to distinguish himself from any other — no opportunity to the

* If hope or fear are employed in influencing the discourse employed in relation to persuasion, — the discourse employed in giving expression to persuasion or the pretence of it, — they are thereby employed in the promotion or the subornation of mendacity For if truth, if veracity, be all that is desired, reward and punishment, hope and fear, are alike useless it is only by giving birth to falsehood — to wilful falsehood, to mendacity — that they are capable of producing any effect. If the persuasion which a man is about to declare will be on the side desired, whether reward be given to him in that event or no — whether punishment will be given to him in the event of his declaring it on the opposite side or no, — neither reward nor punishment can be of any use. The only supposition on which they can be of any use, is, that, if left free to declare his persuasion, he would declare it on the side opposite to that which is desired

Thus it is, that, whether hope or fear, expectation of reward or punishment, are employed in influencing persuasion itself, or discourse purporting to be the expression of it, they are employed in depraving the constitution of the human mind. If in influencing persuasion itself, then it is to the intellectual part of the mental frame that the poison is applied — if in influencing discourse purporting to be the expression of persuasion, then to the moral part.

But in general the poison operates upon both parts together. To be habitually occupied in the utterance of wilful falsehood, is a painful thought; to be thus occupied for lucre, is a reflection that renders the thought still more painful. To rid himself of it as far as possible, a man strives with might and main to believe what he stands engaged to say that he believes · he keeps his attention nailed to the considerations that operate in favour of that side; he turns it aside with horror from all considerations that operate in favour of the opposite side

Thus it is that the principle by which merit and reward are attached to belief, blame and punishment to unbelief, is irreconcilably hostile not only to wisdom, but to virtue. Folly, vice, and misery, are the fruits, of which, in proportion to its prevalence, it is productive.

most obsequious to distinguish himself from the most refractory. The difficulty (as far as there is any) consists in the giving credence to facts which, of themselves, present themselves as incredible: and the more incredible, the more merit; because without exertion there can be no merit, and the greater the exertion (whatever be the line) the greater the merit, as every man is ready to acknowledge. The more obvious and obtrusive the considerations by which, if attended to, the fact would be shown to be incredible, the greater the exertion necessary to keep them out.

Not that the difficulty, such as it is, is a difficulty which any one need despair or doubt of being able to surmount. It is a contention in which, in proportion to a man's weakness of mind, he will have the advantage over the strong, in proportion to his ignorance, over the knowing; in proportion to his folly, over the wise, in proportion to his improbity, over the upright.*

It is not wonderful that motives and interests should have the power of producing belief in anti-physical facts; since they are found by experience to have the power of producing belief even in self-contradictory propositions.

Upon the face of the matter, eyes being closed against experience, it would seem that belief in self-contradictory propositions is impossible. On the contrary, it is altogether natural and so natural as to be very generally exemplified.

It has already been shown in what manner the expectation of reward or punishment, as connected with particular opinions, operates upon the judgment, through the medium of the attention.

When the idea of merit comes to be attached to the act of belief, the degree of merit will naturally be supposed to be in proportion to the difficulty of believing, and the consequent exertion required for the production of belief.

But, to the eyes of an observer, the existence of exertion bestowed on the endeavour to produce belief has no surer test — the intensity of it in the character of an operative cause has no more correct measure — than the magnitude of the opposing forces which must have been overcome ere the effect has been accomplished. And the more repugnant to reason any proposition is, the more powerful are the obstacles which it opposes to any exertions that are made to cause it to be believed: consequently, if the obstacle has been overcome, the more powerful must have been the exertions by which it has been overcome — by which the effect thus aimed at has been produced: and the greater, it is therefore supposed, will be the reward attached to such meritorious exertions. Thus it is, that, the more absurd any proposition is, the greater efforts are naturally made to believe it.

Be the subject what it may, if the proposition proposed for belief be a proposition of the affirmative cast, belief will depend partly upon the probative force of the affirmative evidence, partly upon the weakness of the disaffirmative evidence, or the non-existence of any such evidence: meaning always by existence, relative existence — existence in the place in question — the judicatory in which the cause is heard, and is to be determined.

As to affirmative evidence: in the case here in question, an *authority* (that is, the opi-

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* In the field of theology (all history joins in proving it,) the attachment manifested by men to an opinion, and in particular by men in power, is strenuous and inflexible, in the direct proportion of its absurdity. The effect is the result of the conjoint influence of a variety of causes.

1. With the zealous and sincere; the more palpably and flagrantly absurd the proposition — the greater the reluctance on the part of a man's understanding to the adoption of it — the greater and more powerful the effort necessary to overcome that reluctance, — the greater is the difficulty, and thence the apparent merit, of the sacrifice. If the sacrifice of the body is an oblation acceptable to the more than canine appetite of a malevolent and jealous deity, — the sacrifice of the nobler part, the mind, the understanding itself, must be a still more grateful sacrifice.

2. Insincere, or even sincere; the greater the absurdity of the proposition, the greater the impossibility of obtaining in favour of it that complete and imperturbable serenity of mind which accompanies the conviction impressed upon the mind by real and familiar truths: the greater, consequently, the irritation produced by that presumptive evidence of the falsity of the proposition, the amount of which is swelled by every instance of disbelief on the part of other minds. Every such instance of dissent constitutes a sort of circumstantial presumptive evidence of the erroneousness of the proposition thus adhered to. Every such piece of evidence forms an obstacle to the formation, entertainment, or continuance of the persuasion which a man has it so much at heart to entertain (if sincere,) or (if insincere) to appear to entertain, without prejudice to his reputation for sincerity in the circle in which he moves.

3. Sincere, or insincere; the more palpable the absurdity, the greater is the triumph, the more entire the mastery, obtained over those minds from whom an assent, real or apparent, can be procured for it. *Swallow this poison*, is among the commands which impostors have been found impudent enough to issue, and fanatics mad enough to obey. Such (has the triumphant impostor said to the astonished strangers whom he meant to impress with the irresistible plenitude of his power) — such are the fruits of faith, when it is sincere. *Swallow this nonsense*, is the criterion of obedience imposed by each domineering dogmatist upon the proselytes, whose opinions, or whose language, the force of hope or fear has placed under his command. The more gross the nonsense, the more prostrate is the obedience on one part, the more absolute the power on the other.

nion, real or pretended, of some other person or persons, whose situation affords a ground more or less strong for supposing them conversant with the subject-matter in question) will always operate with more or less probative force in the character of affirmative evidence. But,—for the exclusion of all disaffirmative evidence, and thence of all disprobative force,—the power of the will, applied in that direction with the degree of exertion required by the nature of the case, will of course suffice Finding, therefore, no disprobative force to oppose it, the prevalence of the probative force of the affirmative evidence, and the production of the correspondent affirmative persuasion, become alike a matter of course

The probative force of *authority*, in the character of evidence, will be, on the one hand, as the plenitude of ascribed knowledge—on the other, as the completeness of self-conscious ignorance

If, by hope of reward alone, the effect in question (viz belief) is thus capable of being produced; how much more surely by punishment! an instrument, which, apparent proximity and certainty being the same in both cases, acts with so much superior force If by either of itself, how much more surely by both together! And if by either at an ordinary degree of apparent magnitude, how much more by both together, each at an infinite apparent magnitude!*

Thus stands the matter in regard to matters of fact in general, and in particular in regard to such as are improbable, these being the only ones (and that in proportion to their improbability) in respect of which there can be any need for applying, in this partial way,

* This very connexion between reward and punishment on the one hand, between opinion and declaration of opinion, on the other; between reward, and the belief, or expression of belief, of a wonderful fact,—between punishment and the disbelief, or expression of disbelief,—has, in the case of supernatural facts, been urged by some as a circumstance operating in proof of the fact, and which ought to have its influence in producing on our parts a persuasion of the truth of the fact, on our observing it to be reported as true by others In other words; the wonderfulness of a fact being given, its credibility will be *increased* by the circumstance of its having been announced as contributing to constitute the foundation of a religious system; *i. e.* of a system of commands, sanctioned by threats and promises, represented as emanating from an invisible supernatural being, as above. Increased? Why increased? For this reason. Because it is the nature of this circumstance to provoke scrutiny; and to operate as an advertisement to sceptics and disbelievers to come forward and inquire into the fact, and contest the truth of it.

If adequate means and motives for the performance of such scrutiny were at hand,—yes. But if not, what becomes of the security—the security for trustworthiness, thus supposed to be afforded?

In the case of a *future* fact, yes. Let it present itself as being of the wonderful cast, and let it be employed as an engine of power in the manner above mentioned, as an instrument for the support of this or that system of religion, new or old,—no doubt but the use thus made of it will have the effect of causing it to be more closely examined into, than if no such use had been made of it.

But in the case of a *past* fact,—what becomes of its tendency to promote scrutiny? Is it part of the supposition that it was *actually* subjected to such scrutiny? Applied to past facts, all supposition about *tendencies* is superseded. If it *was* subjected to scrutiny—in a word, to judicial examination, produce the minutes of the examination. this done, the question whether it be likely any such examination should have taken place, would obviously be frivolous If, on the contrary, it does not appear that any such scrutiny was performed, any such examination taken, then again the argument from tendencies assumes what is contrary to fact.

To judge of the force of this argument, take note of the securities for trustworthiness in evidence, as herein brought to view all of them exemplified in the practice of English judicature. Take, on the other hand, the book, whatever it be, in which the system of alleged supernatural precepts, threats, and promises is exhibited, together with the wonderful facts referred to as proofs of its authenticity Observe which, if any, of those securities have been applied or are represented as having been applied, to the establishment of these several facts Take the Koran, for example, with the several wonderful facts therein reported Whose testimony have you in proof of them? That of the writer, whosoever he were: Mahomet, his composer, or his scribe; but say Mahomet. On the occasion of this or that fact, he speaks of it as taking place in the presence of hundreds and hundreds of eye-witnesses—persons none of them likely either to have been themselves deceived, or to have harboured a wish to deceive others Instead of hundreds put thousands: what do you get by the multiplication? What testimony have you even now but Mahomet's? and who, at this time of day, shall cross-examine Mahomet? Instead of Mahomet both hero and historian, suppose Mahomet only the hero, and the historian somebody else, who, having been a hero to nobody, is himself unknown. Instead of one such historian, suppose half a dozen, sometimes agreeing, sometimes disagreeing: a wonderful fact, reported by one, omitted, as not being true—or, not being worth reporting, omitted or reported differently, by another: not one of these histories in print, till ages after the deaths of all supposed eye-witnesses: not one of them known so much as to have been communicated in manuscript, or so much as written, till after the deaths of all possible counter-witnesses: not one of them known to have passed for ages into the hands of any other readers than what were predetermined not to institute a scrutiny into the truth of any of the wonders. And suppose the desire of subjecting the facts to the test of a judicial examination ever so strong and general among these readers: what means of carrying any such desire into effect? Do the minutes of any such examination remain, or any trace or track of their having ever been in existence?

the force of the will to the operations of the understanding.

What remains to be shown is, why self-contradictory propositions, — which, when examined as above, are found to be, not improbable propositions concerning matters of fact, but propositions still less fitted to be credited upon rational grounds, — should find so much more easy and extensive evidence than propositions assertive of improbable matters of fact, even such as are so in the highest degree

The reason seems to be, that, if duly examined, every self-contradictory proposition would be found to be an assemblage of words void of sense — a mass of downright nonsense But, in proportion to the apparent respectability and trustworthiness of the authority of the instructor, will be the assurance of the pupil, that, from such a source, nothing that is capable of bearing so degrading an appellation can emanate What, in this case, he will therefore tacitly assume and take for granted, is, that under this veil of apparent nonsense there lies enveloped some exquisite sense, too valuable to be made manifest to eyes so impure and dull as his are

Issuing, or appearing to issue, from such a source, a proposition of this complexion will thus be upon a footing with a proposition taken from a foreign language, a language with which he has no acquaintance From an elderly man of good reputation, in the capacity of an instructor, suppose a young pupil to hear delivered, in the character of an incontrovertible truth, *La illah allah, Mohammed resoul allah.* To him it would in itself be so much nonsense, to a person acquainted with the Arabic language, if a pious Christian, it would present itself as a blasphemous falsehood — if a pious Mahometan, as a sacred and fundamental truth

Thus easy is it for a mass of nonsense, by which no matter of fact is in truth asserted, to become the subject-matter of a severe and unshakeable belief, and this for the very reason that it is nonsense

Compare, in this point of view, this nonsense, with any of those propositions which are enunciative of an intelligible matter of supposed fact, which we have the strongest reason that man can have for believing not to be anywhere realized, such as that of an old woman's moving in the air at pleasure on a broomstick, or a man's introducing his body into a quart bottle.

Though, in regard to either of these propositions, we have as full proof of its falsity, as, for the governance of human conduct, a man needs to have, — it is only by a mixture of ignorance and rash confidence, that either of them could be pronounced, in the strict sense of the word impossibility, *impossible*: since to the production of either of these effects, there needs but the existence of some power in nature with which we are not as yet acquainted.*

True it is, that, in my view of the matter at least, the existence of any such power would be a matter completely disconformable to everything that at present we are acquainted with respecting the established course of nature. Of this so full is my persuasion, that, in the way of wagering, I would, for the value of a shilling, stake upon it, without scruple, everything I possess but, for the reason above intimated, in the consciousness I feel of my not being in possession of universal science, I find a reason altogether sufficient to prevent me from regarding it as being, in the strict sense of the word impossibility, impossible.

§ 11 *Distinction between facts impossible* per se, *and facts impossible* si alia. *Of alibi evidence*

There are two occasions on which the evidence, or argument, indicated by the words *impossibility* and *incredibility*, are capable of presenting themselves.

1 On the one side (say that of the demandant,) a fact is deposed to by a witness: on the other side (viz that of the defendant,) no testimony is adduced, but it is averred that the supposed fact, as thus deposed to is in its own nature incredible; or, what comes to the same thing, improbable to such a degree as to be incredible. Say, for example, a fact pretended to have taken place in the way of witchcraft a man lifted up slowly, without any exertion of will on his part, or connexion with any other, from the ground into the air; or an old woman, by an exertion of volition on her part, riding in the air at pleasure on a broomstick

On the one side (say again that of the demandant,) a fact is deposed to by a witness, as before on the other hand, it is averred to be impossible — impossible not in its own nature, as before, but for this reason, viz. that the existence of it is incompatible with the existence of another fact, which in this view is deposed to by other evidence: say, the testimony of a superior number of witnesses. The defendant cannot, at the time alleged, have been committing the offence in London, for at that same time he was at York, a place above two hundred miles distant. The instance here given is that which is commonly known by the name of *alibi*. It supposes the incompatibility of a man's existing in one place at any given point of time, with the existence of the same man in any other place at the same point of time: or, in other words, of a man's existing in two places at once.

* Compare this with p. 86, and the Note at the bottom of that page.—*Editor.*

[For the purpose of the present inquiry, these two kinds of impossibility are exactly alike. The nature of the impossibility is in both cases the same. in both cases it consists in disconformity to the established course of nature. The difference is, that, in the first of the two cases, there is but one event mentioned, and that event is one which, taken by itself, cannot be true,—in the second case there are two events mentioned, either of which, taken by itself, may be true, but both together cannot

In the first case, therefore, the impossibility being supposed, we immediately set it down that the testimony of the affirming witnesses is false in the second place, we have to choose which of the two testimonies we shall disbelieve—that of the witnesses who affirm the one fact, or that of the witnesses who affirm the other fact

If I am told that, on such a day, at such an hour, John Brown leaped over the moon, I at once reject the assertion as being incredible: this is impossibility of the first kind If A tells me, that, on such a day, at such an hour, John Brown was in London, and B tells me, that, on the same day, and at the same hour, the same individual was at York, I pronounce with equal readiness that both stories cannot be true but it remains a question for subsequent consideration, which of them it is that is false and this is impossibility of the second kind]*

The plea of alibi, although the fact should be regarded as established by satisfactory evidence, will not always be regarded as conclusively disprobative with regard to the fact to which it is opposed Why? By reason of the uncertainty that may attach upon the point of time. The identity of the point of time in the two cases being assumed,—let it be proved, that at that time Titius was in the first floor of the house in question, it is thereby proved to be perfectly incredible that, at that same point of time, he should have been in the second floor. But, from the size of a second or third of time, enlarge the *temporal* seat of the fact to twenty-four hours—on that supposition, and in that sense of the word *time*, proof of a man's having been at London will not disprove the fact of his having been at York at the same time, as in the case of the celebrated flying highwayman

Hence it is, that, in the case of the plea of *alibi*,—though, admitting the truth of the evidence in support of it, the incredibility of the fact in the character of a fact incredible *in toto* never comes into dispute,—this is not the case with it in the character of a fact incredible in degree If it be satisfactorily proved, that on the 1st of January 1826, at noon, Titius was in the choir of Westminster Abbey,—it is out of dispute, that, on the 1st of January 1826, at noon, he could not have been in the choir of York Minster But if all that has been proved is, that, on the 2d of January 1826, at noon, Titius was in the choir of Westminster Abbey,—whether, on the 1st of January in the same year, at the same time of the day, he was at York Minster, is not put out of dispute the fact of his being at York Minster on the said 2d of January, if spoken of in the character of an incredible fact, will not be spoken of as being such *in toto*, but only in degree Titius is not said to have been in both places at once. what is said of him now is, that at the one time he was in the one place, at the other time in the other and the question is, whether the degree of quickness with which he is said to have passed from the one place to the other, be credible, under all the circumstances of the case?

Of the plea of alibi, the possible use is evidently without limit It may alike be employed in penal causes and in non-penal causes In both, the subject-matter of it may be the person of the defendant, the person of the demandant, or any other person—or instead of a person, it may be a thing

But the sorts of causes in which in practice it is most in use to be employed, are penal causes and the subject-matter of which the *alibi* is most in use to be predicated, is the person of the defendant It cannot be true, that, at the time charged, I committed the offence charged, for at that time I was in another place, and it is not so much as charged, that, at the place where I then was, any such offence was committed by me or by any one else

The system of procedure in which this plea occurs with a degree of frequency far beyond what is exemplified in any other, is the English,—more particularly in the case of the causes belonging to the higher penal classes, in which trial by jury is employed In these cases, for one instance in which it is true, there are perhaps some hundreds in which it is false The cases in which it is believed, I should not expect to find so numerous as those in which it is disbelieved, but (setting aside the one extraordinary case,) as often as it is advanced, perjury is employed in the support of it; and, as often as it is believed, so often is that perjury successful, and guilt triumphant, and the criminal taught by experience how he may proceed with impunity to the commission of other crimes. Should the prevention of crimes ever become a primary object with the powers that be, this source of turpitude, together with so many

* *N.B.*—The paragraphs within the brackets are inserted by the Editor. They appeared necessary to complete the section, which is composed of mere fragments, written at different times by the Author, and which the Editor was obliged to connect together as he best could.

others, might without much difficulty be dried up: but as yet, *fiat justitia, ruat cœlum*, has been the maxim: meaning by *justitia*, not the essence but the forms of justice.

1. One remedy that presents itself is, the not receiving any witnesses to a point of that sort, without their coming accompanied with a certain number of persons (of whom a part to be householders,) in the nature of the compurgators of the old law, to give an account of their character. There is no one, in such a country as this, be he who or what he may, who is not known to several.

An objection to this is, that there are many persons who have no good character, but who, for all that, may chance in good truth to have seen a man in one place, at the time when he is charged to have committed a crime at another. This is true; but, if the case with respect to their character be so, it is still fitting it should appear.

But he may be a stranger, either an absolute stranger, a foreigner, or a native just arrived from a distant country. But if this be the case, it is fitting it should appear, and the making it appear may be accepted in excuse for the want of compurgators. But how is this to appear? Not by the single oath of the witness himself, for he who will perjure himself in the immediate matter of the cause, where he is liable to confrontation, will still more readily do so in the preliminary matter, where he is not. The testimony, concerning him, of that person or those persons with whom he has lodged within a certain interval, should be required, in corroboration of his own; or, lastly, if he is an absolute vagabond, who has lodged nowhere, and is known to nobody, this also, it is very fitting, should appear.

2. Another remedy might be, the requiring notice to be given to the prosecutor, a certain number of days before the trial, of the names and places of abode of such intended witnesses—a practice already established as to all evidence on the side of the prosecution, in cases of treason—a practice much less liable to abuse in this instance than in that. In treason, there is always a common cause, and a common purse; a cause which sanctifies all means, and which, moreover, sets to work all means of obtaining acquittal, with at least as much alacrity in behalf of guilt as of innocence. In ninety-nine cases out of a hundred of ordinary prosecutions, the prosecutor has no wish to impress the judge with a persuasion of the guilt of the accused, any further than he is penetrated himself with that persuasion.

3. But the only adequate remedy, and one, perhaps, which may supersede the other two, is a power in the judge, after hearing all the testimony (but whether after or before the verdict given, may be made a question,) to adjourn the trial to a further day, or, what comes to the same thing, to appoint a new one; taking such securities as the nature of the case may require, for the forthcomingness of the defendant, by holding to bail, or by recommittal. In the mean time, all such particulars as may give a clue to the discovery of the situations and characters of such witnesses will have been drawn out of them by interrogation, and the prosecutor will be furnished with such lights as may guide him to the discovery of more numerous and unexceptionable witnesses, who may prove that the first set were themselves, at the time, in a place other than that wherein they pretended to have seen the accused; or may in some other way prove the falsity of their story.

Such a regulation being established,—men who now, for the sake of hire, or an unrighteous friendship, venture upon a perjury which rarely admits of detection, as knowing that it is but bearing on, and all is over, will shrink from the thought of encountering such a scrutiny as, after such lights, if well elicited, it is scarcely possible that anything but veracity should bear. I do conceive that the apprehension of such a scrutiny would, in by far the greatest number of those instances in which such machinations would otherwise be put in practice, prevent the attempt from being made at all, and, should it be made, from being unhappily successful.

Nor will these precautions, if rightly considered, be found to be less favourable, upon the whole, even to those at whose expense they are taken. The escaping by evidence of this suspicious kind, when unsifted and unexamined, never fails to leave a stain on a man's character, which a thorough discussion, with such assistance, would effectually wash out.

§ 12. *Of improbability, as regards psychological facts.*

On passing from physical facts to pyschological facts, a change of language becomes necessary. Where physical facts are concerned, the repugnancy between the alleged fact and the facts corresponding to the law of nature from which it is considered as deviating, or of which it is considered as a violation, is sometimes considered as existing in a degree which attaches to the alleged fact in question the character of improbability in this or that degree, sometimes in that superlative degree which stamps the alleged fact as *impossible*. In the case of the pyschological class of facts, this highest degree is not considered as having any place in the scale. In such and such circumstances it is *improbable* that a man should have acted or thought so and so,—thus much is said continually: but, that in any such case the improbability should have risen to the height of impossi-

bility, is a degree of intensity to which the assertion has seldom been raised by the utmost heat of altercation. For expressing the conformity, the uniformity, observable amongst physical facts, laws of nature have been long ago laid down, as above observed. To the purpose of denoting conformity among psychological facts, the application of that fictitious mode of speech appears not to have been ever yet extended. The cause of this difference is obvious and simple. Amongst psychological facts, no such close conformity is commonly observed as amongst physical facts. They are not alike open to our observation; nor, in so far as they have happened actually to be observed, has the result of the observation been such as to warrant the supposition of a degree of conformity equally close.

The sort of internal perception or consciousness we all feel of what is called the freedom of our will, is of itself sufficient to put a negative upon the application of any such term as *impossibility* to any of the facts which present themselves as flowing from that source. To assert the impossibility of any given act, is to assert the necessity of the opposite act. and, in a proposition asserting the necessity of this or that act on the part of any human agent, a denial of the freedom of his will is generally understood to be involved.

Examined to the bottom, this consciousness of the freedom of our will would, it is true, be found to amount to neither more nor less than our blindness as to a part, more or less considerable, of the whole number of joint causes or concurrent circumstances, on which the act of the will, and with it the consequent physical acts, depend: nor is this the only instance of a false conception of power, growing out of impotence. But the question is, not as to what sort of expression might be best adapted to the case, but what the expression is, that is in actual use. And here too we see a further confirmation of the observation already made, viz. that it is only by a sort of misconception and verbal illusion, that such attributes as necessity, impossibility, probability, improbability, are considered and spoken of as if they were attributes and properties of the events themselves. The only sort of fact of which they are really and truly indicative, is the disposition of our mind, of our own judgment, to be persuaded, with a greater or less degree of assurance, concerning their existence or non-existence: to entertain an assurance, more or less intense, that, at the place in question, at the time in question, the fact in question was or was not in existence.

Physical improbabilities — facts rendered incredible to enlightened minds by their deviation from the course of irrational nature, have seldom of late years come upon the carpet in any court of judicature. The alleged improbabilities, which, on that theatre, are so much more frequently brought forward and opposed to direct evidence, are of the psychological or mental kind. Alleged or supposed acts or states of the mind — consciousness or non-consciousness of this or that fact; recollection or non-recollection, intention or non-intention, operation or non-operation of the idea of this or that pain or pleasure, in the character of a motive, conduct of such or such a description, under the influence of such or such an intention — any of these acts or modes of being are alleged as having exhibited themselves in the mind of some individual, in circumstances in which, to an unbiassed mind, judging from the known constitution of human nature, the existence of such alleged phenomena would present itself as incredible. *Inconsistencies* — inconsistencies in thought or action — is the denomination in common use, under which these psychological improbabilities may perhaps with sufficient propriety be comprised. By the improbabilities of this description with which a narrative appears pregnant, it will frequently lose its credit — if not as to the entire substance of it, at least as to the particular points to which the improbability appears to extend: the credibility of it will in this case be said to be overthrown by its own internal evidence, without its being capable of being supported, or requiring to be opposed, by any external evidence.

In cases of this description, the apparent improbability, as in the above-mentioned physical cases, will be susceptible of an indefinable multitude of gradations. Insanity may be considered as marking the highest point in this scale. According to the degree in each case, will be the force with which it acts against the direct evidence — the persuasive force with which it operates upon the mind of the judge. Such as its relative force is in each instance, such, in that instance, will be its effect. In one instance, it will prevail over the direct evidence, and the direct evidence will be effectually discredited by it: in another instance, the decision will be governed by the direct evidence, though, in proportion to the apparent improbability, it is but natural that the persuasion on which the decision is grounded should be lowered and weakened by it.

To class these cases of psychological improbability under heads, each head being illustrated by apposite examples taken from the most remarkable causes that have been determined, on questions of fact, among the most enlightened nations, would be a work of considerable curiosity, and, notwithstanding the impossibility of marking out and distinguishing the different degrees and shades of

improbability, would be of no inconsiderable use. But the task would be a work of itself, too laborious, as well as voluminous, to be comprised within the limits of the present work.

The advances that, within the few last centuries, have been made in the study of these psychological laws of nature,—these advances, though not so describable, nor perhaps so considerable, as those made in relation to the physical laws of nature, have, however, been by no means undiscernible in their effects. To weigh evidence against evidence—to weigh particular evidence against general probability—requires a proportionable skill in the science of psychology. It is to a deficiency of skill in this useful science, accompanied with a consciousness of this deficiency, that the system of procedure may ascribe so many altogether inapposite or imperfect and now exploded contrivances for the investigation of legal truth: trial by ordeal, trial by battle,* wager of law, oaths expurgatory and suppletory.

To the same cause may moreover be ascribed those defects which may still be observed in such abundance in the system pursued with respect to evidence among the most enlightened nations. To investigate these defects, step by step, is the direct object of the present work: but, in the meantime, a presumptive only, but not unimpressive, proof of their existence, is the diversity of the courses pursued on this ground, as between nation and nation, in the pursuit of the same end, and not only as between nation and nation, but between province and province, nay, between court and court, in the same nation and the same province †.

CHAPTER XVII

ATROCITY OF AN ALLEGED OFFENCE, HOW FAR A GROUND OF INCREDIBILITY.‡

A CRIME is the more improbable (it has been said,) the more atrocious; and the practical inference is—

The more atrocious the offence, the greater the force of evidence requisite to prove it.

Thus nakedly given, as we see it frequently, without the requisite explanations, the observation is fitter for a play or a novel than for a treatise on jurisprudence. It proceeds from an indistinct view of the subject; and, in respect of the practical conclusions pointed at, it requires explanation, and distinctions to be made, to prevent it from being productive of pernicious errors in practice.

The imputation is an incredible one: Why? Because the man on whom it is cast bears so excellent a character—such is the argument, in the case mentioned in a preceding chapter. The imputation is an incredible one: Why? Because he is a man—such is the argument in the present case. This is what is called sentiment, and being so, is addressed, it is said, to the heart.

The depravity of human nature, and the dignity of human nature, are among the topics on which the practitioners in the arts of rhetoric (that is, of deception) have been fond of skirmishing: some on the one, others on the other, some on either or both, according to the purpose.

Of a man who brings forward this observation, the first question to be asked is, what he means by *atrocity*? But this is that sort of question which the sort of writer in question takes care not to put to himself, his readers would not thank him for it. Nothing is more troublesome to a man, than to be obliged to know what he means: no error so pernicious, that he would not rather adopt and give currency to, than load himself with so much trouble. To explain or to inquire what it is a man means, is metaphysics.—light is an object of hatred to all owls and to all thieves, definitions, under the name of metaphysics, to all rhetoricians. "I hate metaphysics," exclaims Edmund Burke, somewhere: it was not without cause.

What then is, on this occasion, meant by *atrocity*?—the atrocity of the offence—no,

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* In the year 1818, in an appeal of death, in the King's Bench, the appellee waged his battle. After very lengthened, and very learned arguments, the Court decided unanimously in favour of the trial. Subsequently, however, the appellant, by his counsel, stated that he prayed for no further judgment, and the Court ordered judgment to be stayed on the appeal. Ashford *v.* Thornton, 1 B. & A. 405. In the following year all such appeals were abolished, as well as wager of battle, and trials by battle, in writs of right, by the 59 Geo. III c. 46.—*Ed.*

† As it was before remarked that there are two kinds of physical improbability, so there are two corresponding kinds of psychological improbability. An alleged psychological fact may be improbable in itself,—that is, improbable, because incompatible with the ordinary course of nature; or it may be improbable, because incompatible, in a greater or less degree, with some other fact which has been established by independent evidence; for instance (in the case of delinquency,) with the character of the supposed delinquent.

What is said in this section on psychological improbability is equally applicable to both these species of it. Several of the modifications of the latter species have been treated of at considerable length in the former part of the present book.—*Editor.*

‡ This has appeared to the Editor to be the most proper place for the present dissertation; which clearly belongs to the head of pyschological improbability, though apparently not intended by the Author to serve as an illustration of the probative force of the species of evidence indicated by that term.

not of the *offence;* that would not be sentimental enough: — of the *crime.* The word *crime,* being incurably indistinct and ambiguous, is the word to be employed upon all rhetorical occasions.

Does it mean the *mischievousness* of the offence? If it does, the proposition is in a great degree erroneous Of all offences, by far the most mischievous are those which owe their birth, or tend to give birth, to civil war treason, rebellion, sedition, and the like — Suppose a civil war. — subject of dispute, title to the throne question on which the title turns, legitimacy The nation is equally divided: to-day, one half are traitors, to-morrow, the other half Whichever half is, for the time being, on the unsuccessful side, and composed thereby of seditionists, rebels, traitors, it is on that side that you find the most disinterested, the most generous, the most heroical of mankind If, then, by atrocity we mean mischievousness, the proposition, that an offence is the more improbable the more atrocious it is, is not true

By *atrocity* is not unfrequently, perhaps most frequently, meant, neither more nor less than *odiousness,* meaning of course by odious, that which is so (no matter for what reason, no matter whether with or without reason) to the individual by whom the appellation is employed. in a word, that which is the object of his antipathy To one set of men, the man who differs from them in some peculiarly tender point bearing relation to religion, is the most atrocious character, to another, or to the same, the man who has been drawn into some devious path by the impulse of the sexual appetite The existence of the Christian, the Theist, the Atheist, I have thus heard successively denied by their respective abominators In printed books I have observed doubts, next in force to denial, expressed with relation to the existence of those non-conformists who, in company with the wearers of linsey-woolsey, are consigned to destruction in the second edition of the Mosaic law All passions are cunning, antipathy not less so than any other On the part of the antipathist, the profession of incredulity is but a pretence and a disguise, to enable him with more decency to give vent to his rage, and with more effect to point the rage of others against the odious object. If the existence of these monsters is so incredible, the practical consequence should be, not to be so ready to devote to perdition this or that individual, under the notion of his being one of them. But the antipathist knows better than to be thus cheated of his prey. The existence of the monster is to be incredible, or next to incredible, for the purpose of rendering him proportionably odious. The odiousness, being the medium of proof for the demonstration of the improbability, is assumed of course; and, forasmuch as an attempt to prove supposes the necessity of proof, and assumption the non-necessity of proof, assumption of a fact is still more persuasive than the strongest proof of it To screw up the odium against a man to the highest pitch, you begin with declaring his existence — the existence of so odious a character — next to impossible having thus pointed against him the rage of the judge, you make use of that rage for disposing the judge to believe him guilty While Louis XIV was persecuting the Huguenots, it was an established maxim, a fiction of French law, that there were no such persons in existence

By *atrocity* may, again, be meant *cruelty* — cruelty displayed in the commission of the offence This sense is, of all, the most literal and proper sense But, if the import given to the word *atrocity* is thus confined, the application of the maxim, the description of offences to which it is applicable, is proportionably confined It is almost confined to personal injuries, homicide included If wilful destruction by fire or water be included, it will be either because homicide, or the imminent danger of that mischief, and upon a large scale, are involved — or because, in its application to property, the amount of the mischief or danger is so indefinitely extensive

Consider, then, the maxim in this sense In the case of an offence characterized by cruelty, the seducing motives have to contend with the motive of humanity, sympathy, general benevolence (take which name you will,) — to contend with it in its character of a restraining, a tutelary motive * The disposition of the individual in question being given (that is, the effective force with which it habitually acts upon his mind,) — the greater the degree of cruelty said to be displayed in the offence said to be committed, the greater the force with which, on that particular occasion, the motive in question must have opposed the perpetration of it

But the principle of humanity is but one of several principles, which, on every such occasion, are acting upon the human mind, in the character of tutelary and restraining principles There are, besides this, the three respective forces of the political, the moral or popular, and the religious sanctions Neither is this by any means the most intense and uniform in its operation, of the four tutelary forces. It may or may not be stronger than the force of the religious sanction — it may or may not be stronger than that of the moral, — but it never can be accounted comparable in strength to that of the political sanction. Many men fear the wrath of Heaven, many

* "*Introduction to Morals and Legislation,*" Chap. X. *Motives,* (Vol. I. p. 46.)

men fear loss of character: but all men are acted upon, more or less, by the fear of the jail, the scourge, the gallows, the pillory, and so forth. In this point of view, whatever improbability is given to the supposed offence in question by those other restraining motives, the additional improbability given to it by the circumstance in question seems scarce worth taking into the account.

On the other hand stands a circumstance which must not be overlooked. The force of the political and moral sanctions acts upon a man in the character of restraining motives, only upon the supposition of discovery. The force of humanity has this in common with that of the religious sanction, that the supposition of discovery is not necessary to the application of it; and, besides the comparatively greater extent of its operation when contrasted with the religious sanction, the principle of humanity (whatever may be the force with which it acts,) is surer to be present to the mind. The suffering, of which the injury meditated threatens to be productive, can scarcely fail to be present to the mind of the offender, especially where the pleasure of enmity — the pleasure expected from the suffering of the intended victim, constitutes the motive to the offence. This is what cannot fail to be in a man's thoughts, whereas the fear of God may be altogether out of his thoughts.

But whatever may be the degree of cruelty displayed in the commission of the offence, or even on whatever other score it may appear psychologically improbable, a most material consideration is this. Supposing the imputation unfounded,—does the innocence of the defendant import, as of necessity, consciousness of such innocence (and consequently mendacity, criminative perjury) on the part of any person in the character of an accusing witness? If yes, the presumption operating in favour of the defendant from this source seems completely destroyed by the counter-presumption in favour of the witness. For (as there will be more occasions than one for observing) with the exception of the imaginary offences invented by superstition, there is no offence so improbable (because in practice so unfrequent) but that the offence of him who by criminative perjury seeks to fasten upon another the imputation of that offence, is still more so. Thus, if (for example) it be always improbable that murder should be compassed in any of the ordinary ways in which that crime is perpetrated,—it seems at least as much so, that it should (which it would be by a false accusation of that crime) be so by this hazardous expedient of calm and deliberate malignity.* Within the compass of the last and present century, the number of persons who have committed robberies has been many thousands; but there will scarce be found ten who have given false evidence of that or any other capital crime.

There remains, therefore, for the only case in which this maxim (whatever may be the force and value of it) can have any application, that in which the evidence operating in criminatio of the defendant is purely of the circumstantial kind: unless it be worth while to add those sorts of offences (witchcraft, and so forth) which are not capable of being rendered probable by any quantity of testimonial evidence.

What degree of exculpative force may be proper to be given to the circumstance thus denominated, will rest for a judge to determine, upon a review of all the other circumstances belonging to the case.

The essential practical consideration—the essential warning, is this: not to think of employing it as the foundation for any inflexible rule, requiring as necessary to conviction, this or that particular dose of evidence. such as the testimony of two witnesses, the confession of the defendant, or, in a word, any other determinate mass of criminative evidence.

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* An exception is to be made respecting those times when the contagion of some extraordinary fanaticism has given to certain accusations, well or ill founded, the colour of virtue—at least, has indisposed the people against the ordinary expedients for sifting out their truth; and when the end to be compassed by their taking effect is looked upon to be of such importance, as to sanctify almost any means. Such were the times of epidemical perjury and Titus Oates.

BOOK V

OF MAKESHIFT EVIDENCE.

CHAPTER I

OF MAKESHIFT EVIDENCE IN GENERAL

§ 1 *Makeshift Evidence, what*

THUS much concerning that description of inferior evidence, the inferiority of which consists in this — viz that the fact, the existence of which is immediately indicated by it, is not the very fact in question — the fact, of the existence of which, a persuasion is endeavoured to be produced in the mind of the judge, — but some other fact, which, though distinct from that principal fact, is so connected with it, as that (with a greater or less degree of assurance) the existence of such principal fact is *inferred*, and considered as being rendered more or less probable by the existence of the evidentiary fact

We come now to that description of inferior evidences, the inferiority of which consists in this — viz that, be the fact what it may (principal or evidentiary,) the information which it conveys has some circumstance belonging to it, which — by rendering inapplicable to it some one or more of the securities that are applicable to ordinary evidence — renders its probative force in a greater or less degree inferior to that possessed by ordinary evidence when those securities (such of them as are applicable to it) are actually applied to it

Of the different powers, qualities, and operations, serving as securities for correctness and completeness — securities against deceptitious incorrectness and incompleteness — a view has been already given * By the inapplicability or non-application of these several securities, and the groups which, by ringing the changes, might be formed out of them, may be constituted so many species of evidence of inferior shape, — of evidence, the probative force of which is lessened by the imperfection thus produced in the shape in which it presents itself to the mind to which it belongs to judge

When the non-application of them has for its cause the mental weakness or corruption of the man in power — of the legislator or the judge, — the principal of the shapes in which this imperfection has displayed itself, have, under the head of *Extraction*, been already brought to view.†

But cases exist, — and cases the exemplification of which is abundantly frequent, — in which this imperfection has for its cause, not any failure on the part of the man in power, but the unchangeable nature of things. In the imperfect shape in question, the article of evidence is to be had, in any other shape it is not to be had — at least as matters stand at present

Agreeing in this one common character — viz that of *imperfection*, and of imperfection the origin of which is traceable to the source just indicated — being employed only because, from the same source, better evidence, evidence of a more trustworthy complexion, of greater probative force, is not be had, — these several species of evidence, how dissimilar soever in other respects, may be brought together and designated by one common appellation, — viz that of *makeshift* evidence

On this subject three distinguishable tasks present themselves to the eye and conscience of an honest and intelligent legislator — 1 To take an inventory of those species of inferior, yet not the less indispensable, evidence; 2 For the information of the judge, to hold up to view their several features of infirmity; and 3 By apposite powers and instructions, to do whatsoever the nature of things admits of, towards the removal of their several infirmities, by completing in each instance the requisite assortment of securities, or by so ordering matters that testimony in a more trustworthy shape may in future take place of testimony in these less trustworthy shapes.

§ 2 *Of the different species of makeshift evidence*

Under the denomination of makeshift evidence are comprehended two divisions or subclasses, the contents of which, as compared with one another, have nothing in common, except the infirmity in consideration of which the term *makeshift* is alike applicable to both

These are, unoriginal evidence, and extrajudicially written evidence

I *Extra-judicially written* evidence Susceptible alike of this common denomination will be found three sorts or genera, viz 1. Casually written, 2 *Ex-parte* pre-appointed, 3 Adscititious or imported.

II *Unoriginal*, or (as supposed) transmitted evidence Susceptible of this common denomination will be found five distinguishable sorts or genera 1. Supposed oral, delivered through oral, 2 Supposed written (or say scriptitious) delivered through written (or say scriptitious,) thence termed transcrip-

* Book II. Vol. VI. p. 278, *et seq.*
† Book III. Vol. VI. p. 383, *et seq*

titious or transcriptural; 3. Supposed oral, delivered through written; 4. Supposed written, delivered through oral; 5. Reported real evidence.

The different modifications, for the expression of which these denominations have been devised, will all of them receive further explanation, each of them in its place.

In every instance, that inferiority in respect of probative force, in consideration of which the term *makeshift* was found applicable with equal propriety to them all, will be seen to have for its cause the absence of one of the principal securities for correctness and completeness — viz. interrogation *ex adverso* at the hands of a party, whose interest, in the event of its being incorrect or incomplete, may, in proportion to that incorrectness or incompleteness, be made to suffer by it.

In the case of unoriginal evidence, the word *supposed* forms, in the instance of each of the genera contained under it (as above,) an indispensable adjunct. If not expressed, it must at any rate be borne in mind, or confusion and misconception will be the result.

In the case of every such article of evidence, there are at least two different statements in question: one, the existence of which is certain; the other such that, though the existence of it is asserted (viz. in and by the statement which, as above, is certainly known to exist,) it may happen, notwithstanding, in the whole or in any part, not to have had existence.

That which is certain, is that which, to a certainty (viz. by the very supposition,) is presented to the mind of him to whom it belongs to judge — to his hearing, if it be oral, to his sight, if it be scriptitious.

Titius, standing before the judge, say — "I heard Sempronius say so and so." This is supposed oral through oral evidence. The oral evidence is that which is said by Titius: the supposed oral evidence is that which by Titius is said to have been said by Sempronius. By the judge it will naturally be supposed to have been said by Sempronius, because, generally speaking, it will be more likely that what was said by Titius was true, than that it was false. But, in speaking of this supposed statement, to employ the same unqualified expression as that which (as above) is employed in speaking of the statement made before the judge, would be to assume as indisputable that which, in general, will, in case of litigation, be among the matters in dispute. That, in the presence of the judge, Titius said to the judge, "Sempronius said in my hearing so and so," is out of dispute. But what may happen is, that, in saying thus, what Titius said was altogether false; Sempronius not having, in his hearing, ever said anything at all, or at least not having said anything to any such effect.

Omitting the adjunct *supposed*, had the denomination been, in this case, oral evidence through oral, — in this case, the truth of what was supposed to have been said by Sempronius would not, indeed, have been represented as out of dispute; but the truth of that which was said by Titius, in saying, "Sempronius in my hearing said so and so," would have been represented as being out of dispute: whereas, in the nature of this species of evidence, this point is no less open to dispute than the other.

Of the three sorts of evidence here comprehended under the general denomination of extrajudicially written evidence, the points of coincidence and difference may be thus stated —

Whatever a man writes, that is capable of being employed in evidence, but without any expectation (unless with a fraudulent intention) of its being so employed, — if, being addressed to any other person, it is designed to be communicated to him, — comes, in common language, under the denomination of a *letter*, if it be not so addressed, it may be, and is, included under that of a *memorandum*.

In both cases, if it happens to the document to be employed in the character of judicial evidence, it may be designated by the common appellation of *casually written* evidence.

But there are cases in which, — not wearing the form of evidence, nor, as such, antecedently to their creation, called for by authority of a court of justice — letters, as well as memorandums, are written for a purpose analogous to that for which evidence is so called for, that is, for the giving effect to rights and obligations, and not altogether without a view towards them being made (in so far as the established rules respecting evidence will admit) subservient to the purposes of evidence.

Of this genus, the most striking, and, in respect of their extent and application, the most important species, are, — in the shape of memorandums, all those entries which form the matter of a mercantile book of account, — in the shape of letters, those which are written or received by mercantile men, in the course or for the purpose of their commerce.

These, therefore, being written not without a view to their being eventually made subservient to the purposes of evidence, may appear in that consideration to rank themselves under the head of *preappointed* evidence: — but, not being endowed with either of those qualities, by one or other of which whatsoever has been ranked under that head stands distinguished so much to its advantage (viz. the being produced by the concurrence of every party whose rights would be injured

either by spuriousness or by any deceptitious incorrectness or incompleteness in its tenor; or else by some party whose situation, bating casual fraud, places him out of all danger or suspicion of any sinister interest capable of engaging him in the design of giving to it any such deceptitious character,) — it becomes necessary that this inferior sort should, by a term expressive of the distinguishing circumstance, be distinguished from that superior sort of evidence. It has therefore been called evidence preappointed *ex parte*

By the term *adscititious* or *imported* evidence, is meant to be expressed any statement in writing, which, on the occasion of its being written, was *not* designed to be employed in the character of evidence in the cause in question, but *was* designed to be employed (whether actually employed or not) in the character of evidence, viz. in some other cause: and it is with reference to such other cause that it is termed *adscititious* or imported, as having, for the purpose of the cause in question, been borrowed (as it were) from that other cause.

In the case of evidence borrowed from another cause, it may happen that some or all of the appropriate securities for the trustworthiness of evidence were applied to it in that cause. But it will scarcely happen that a set of securities was applied to it, the same in all respects as that which, in the cause in question, might be applied to it. Interrogation, for example, yes. but not at the instance of all the same parties, or, even if at the instance of every one of those same parties, yet one or more of them, perhaps, were not at that time possessed of all the material sources of information, and consequent grounds for interrogation, which they possess at present.

This is the most favourable case. But, in respect of probative force, this species of evidence (which at the worst seems to have all the advantages of both the extra-judicially written species of evidence just mentioned) may be rendered by any number of degrees weaker and weaker, by the several defects which, if the judicatory be different, are liable to have place in the course of procedure pursued in such other judicatory, in relation to evidence.

With imperturbable composure we shall see judges after judges employing (and in the English system, which judges shall we not see employing?) and taking for the sole grounds of decision, modes of collection, of the unsuitableness of which to the purposes of justice, they are themselves, and ever have been, perfectly and confessedly convinced — evidence altogether uninterrogated, in the shape of *affidavit* evidence: evidence interrogated, not by any of the parties, nor yet by a judge, but by a clerk, who, being alone with the witness in a private room, makes him sign what he pleases. Under these circumstances, supposing the procedure of the judicatory directed to any such ends as the ends of justice, it may be imagined with what varied degrees of distrust it cannot but regard whatever masses of evidence may have been imported into it from any of those judicatories in which the convenience of the judge is substituted to the ends of justice.

Aliâ in causâ — inter alios — alio in foro — alieno in foro by these adjuncts, an idea may be given of so many obvious specific modifications of the genus *adscititious* evidence

Casually written evidence, evidence preappointed *ex parte*, and adscititious evidence; these form, as it were, a class apart from that for the designation of which the term *unoriginal* is employed Not but that evidences, partaking of the qualities in consideration of which they have been designated respectively by those several denominations, are capable likewise of partaking of that quality for the designation of which the word unoriginal is employed Not that casually written evidence, evidence preappointed *ex parte*, and the evidence termed adscititious evidence, are less capable than any other sorts, of adding to the qualities designated by those several appellations the quality of unoriginality; in which case they will add, each of them, to its own characteristic infirmity, the infirmity that forms the character of that fourth species But, of all evidence here comprised under the appellation of unoriginal evidence, this of non-originality constitutes an essential and inseparable quality whereas, in those several other cases, if it be present, it is but as an accidental one

§ 3 *Properties common to all the kinds of makeshift evidence — Topics to be touched upon in relation to each species.*

Of every one of the several objects comprehended (as above) under the common denomination of makeshift evidence, the following propositions seem capable of being predicated with equal truth —

1 Of the information respectively conveyed by them, the truth has not been provided for by any, or at least not by all, of the securities, which (as above) are capable of being, and ought to be, applied to evidence — ordinary evidence, when presented in its best shape

2 The shape in which the information contained in them is presented, renders them respectively inferior, in point of trustworthiness, to ordinary evidence.

3. By the circumstance by which they are respectively distinguished from ordinary evidence, each of them is liable to have been employed as an instrument of a particular species of fraud: a particular modification of

what, in speaking of all or any of them, may be termed the *characteristic fraud*—the characteristic fraud incident to makeshift evidence.

4. This fraud consists in the fabrication and utterance of the evidence, the pretended information, in question,—in contemplation, and under the assurance, of the inapplicability or non-application of the securities for trustworthiness; viz sanctionment, or interrogation, one or both of them.

5. Though the more formidable part of the mischief is composed of the deception and consequent misdecision of which the characteristic fraud may be the instrument, it is not the whole: since, for want of the security afforded by the safeguard in question against incorrectness and incompleteness, the same evil consequences may take place through temerity, or even without blame

6. They are all of them indicative of the existence (present, or at least past) of ordinary regular evidence, such as is, or at least at one time was, or ought to have been, obtainable in the best shape from the same source; *i. e.* either from the same thing (as in case of *real* evidence,) or from the same person (as in case of personal evidence.)

7. They are, therefore, unless for special causes, not fit to be admitted, any of them, by itself, in its essential shape: the information conveyed by them is not fit to be admitted, unless, being drawn from the same source, it be presented (provided it be capable of being so presented) in the ordinary,—*i. e.* in the superior and more trustworthy, shape.

8. The information respectively contained in them may, in such its inferior shape, be presented, and by itself, if in its regular and ordinary shape the presentation of it is either altogether impracticable or not practicable without preponderant inconvenience, viz. in the shape of delay, vexation, or expense

9. By and after the indication and warning thus given of the characteristic fraud of which they are respectively liable to become the instruments,—if it be in the *will* as well as in the *power* of the judge to possess himself of it, the danger of deception by means of such fraud is lessened: the probability of succeeding in any attempt, and thence the probability of the attempt itself, is diminished.

Shall it, in any and what cases, be admitted? The danger of deception attached to the admission of it, can it, by any and what means, be diminished? Such are the subjects of inquiry which present themselves as proper to be considered in relation to each of the several species of makeshift evidence hereinabove brought to view.

Previous explanation of their respective natures and sub-modifications, will, in so far as deemed necessary, come in of course.

CHAPTER II.

OF EXTRAJUDICIALLY WRITTEN EVIDENCE.

§ 1. *Of casually written evidence.*

To a private letter or memorandum this appellative is applied, for the purpose of distinguishing this from other species of written evidence, widely different in point of trustworthiness, viz preappointed written evidence at large, and judicially written evidence;—to which last belong, ready written evidence delivered spontaneously; ditto delivered *ex interrogato* (delivered in the epistolary form, on being called for by interrogation in the same form,) and evidence judicially delivered in the oral form, whether spontaneously or *ex interrogato*, and thereupon forthwith consigned to writing on the spot.

Evidence preappointed *ex parte*, though extrajudicially, can scarcely with propriety be said to be *casually* written; it being written for particular purposes, and those always uniform in their nature.

Of the characteristic fraud, as above considered under a general aspect, the particular modification of which extrajudicially and casually written evidence is liable to become the instrument, may be thus described:—

Under the assurance of not being exposed by it to punishment (no punishment being, in case of mendacity, attached to it, through the medium of an oath, or otherwise,) nor yet to ill repute, or at any rate not of the degree of public shame, the author not being about to be subjected to interrogation in respect of it,—a man utters in this form a fallacious statement, adapted to a deceptitious purpose It is either incorrect, or incomplete, or both, incomplete in the way of partiality, and thereby calculated to produce deception, and misdecision in consequence.*

Fraud is not the only source in which the inferiority of extrajudicially written evidence, as compared with ordinary evidence judicially extracted from the same source, is to be looked for. Neither of the main securities against incorrectness and incompleteness—neither the fear of eventual punishment in case of falsehood, nor the scrutiny of interrogation

* *Objection:* If such be the design of it (it may be said,) the epithet *casually written* cannot with propriety be applied to it.—*Answer:* The denomination here given to this species of evidence, considered in the aggregate, is taken from the consideration,—not of what, by fraud, it may, on this or that particular and rare occasion, happen to it to be,—but of what in its ordinary condition it is, and what even in the extraordinary case of fraud it purports to be; for, in case of fraud, if known to be directed to the object to which in that case it really is directed (viz. that of operating in the character of evidence,) the object of it would be by such knowledge frustrated.

and counter-interrogation—have been applied to it. Without other blame than that of temerity, or even without any blame at all, both sources of deception, incorrectness and incompleteness, more particularly incompleteness, may therefore have crept into it

Whose is the discourse which it conveys, or purports to convey?—that of an extraneous witness, or that of a party in the cause?

If that of a party, at whose instance is it tendered or called for?—that of the party whose discourse it is? or that of another party on the same side? or that of a party on the adverse side?

According as it happens to it to stand in one or another of these different predicaments, the propriety of giving admission to it will (it is evident) stand upon a different footing, as well as, in case of admission, the expedients to be employed for reducing the danger of deception, and consequent misdecision, to its lowest terms

In what case, if in any, shall evidence of this description be admitted?

When admitted, by what expedients may the danger of deception, considered as producible by the admission of a species of evidence thus liable to be vitiated by incorrectness and incompleteness, be diminished?

To provide an answer to the above questions, is the object of the following rules —

I. Case the first. He whose discourse the script appears to be,* not a party in the cause the evidence, therefore, which it contains, *extraneous*

Rule 1. Except in the cases excepted in the next rule, admit it not

Question Why not admit it?

Answer Because, by excluding it (deduction made of the cases in which it is proposed to give admission to it,) no information stands excluded The person whose discourse it purports to be, being forthcoming and interrogable in a mode less exposed to incorrectness and incompleteness, it rests with you to obtain whatever information it contains, and more Read by itself, he not forthcoming or not interrogated in respect of it, the substitution will naturally be a cause of incorrectness and incompleteness, and misdecision the more or less probable consequence he interrogated, and this supposed written discourse of his read notwithstanding, the addition is superfluous; inconvenience, in the shape of delay, vexation, and expense, all useless,—the certain consequence

Rule 2 The evidence extraneous as before, in the following cases admit it

1 On him whose discourse it purports to be, the process of interrogation (viz oral interrogation) rendered either physically or prudentially impracticable physically, as by death or incurable mental infirmity, physically or prudentially, as by expatriation or exprovinciation the interrogation effectible either not in any terms, or not without preponderant inconvenience in the shape of delay, vexation, and expense

2 On him whose discourse it purports to be, the process of interrogation performable and performed, the reading of it called for on either side, viz either for an affirmative or a confirmative purpose, for the purpose of showing that, at the time of framing the written discourse in question, the statements contained in it were in any point discordant, or on the whole concordant, with the testimony now, by interrogation and counter-interrogation, extracted from the same source †

Question Why give admission to evidence in a shape thus liable to be vitiated by incorrectness and incompleteness

Answer Because, were it excluded, whatsoever information were not attainable from any other source would thereby stand excluded Here, then, supposing that the information is necessary to a decision in favour of that side, here would be deception, and consequent misdecision, to a certainty, whereas, by admission given to it, certainty of being credited would not be given to it, even supposing it true, still less, supposing it false, not being (unless in case of fraud, which is comparatively an improbable case) framed for the purpose,—the probability is, that, taken singly, how correct soever, it will be (in relation to the whole of the facts in the cause taken together) more or less incomplete, that, accordingly, it will be composed, in great part, if not in the whole, of circumstantial evidence, and since, without danger or suspicion of danger, circumstantial evidence is received, how slight soever, how weak soever, its probative force, so, therefore, may evidence of the description here in question, not to speak of any other

Note,—that, if the species of makeshift evidence here in question be incorrect or incomplete, to the degree of utter or material

* A more natural as well as concise mode of designation would have been to say, *the writer*, or *the author* But what may have happened is, that he whose discourse it is, was not the writer of it, as in the case of dictation or transcription and, by the word *author*, the conception is apt to be exclusively directed to a long and studied discourse; whereas the roughest and minutest scraps are capable of being produced in this character, and in practice are actually so produced. Besides that who the real author is, is a point not always ascertained, or even ascertainable.

† In a preceding Book (*supra*, Vol. VI. p. 386,) mention was made of memory-assisting memorandums. Employed for that purpose, they would require to be under the eye of the deponent, during and antecedently to the time of the delivery of his evidence: applied to the purpose here in question, they would require to be kept out of his sight till after the delivery of his evidence.

falsity, it will of course be counter-evidenced by the direct and strenuous evidence of the party against whom it operates.

Instruction to the judge for avoidance of deception, considered as producible by the observance of rule second in the first of the two cases therein contained.—

It will on this occasion be matter for inquiry, whether, at the time of the utterance of the written discourse in question, he whose discourse it is, was not exposed to the action of some interest, of a pecuniary or in any other way of a self-regarding nature, and whether his interest did not at that time stand connected by some special tie of dependence or affection, with the interest of the party by whom, in the character of evidence, the paper in question is produced, and this in such sort and degree (the quantum of profit being moreover taken into consideration) as to render the practice of the characteristic fraud more or less probable in this case.

A book-keeper,* for example, charges with goods a customer or supposed customer of his master's, knowing that by the person so charged the goods were neither received nor ordered. The book-keeper (not to speak of death, an event not likely to have been intended) ceases (viz. by expatriation or exprovinciation) to be forthcoming for the purpose of justiciability. Joined to the fabrication of the written document,—the expatriation or the exprovinciation, may it not have had for its cause the design of putting the undue profit into the pocket of the master? The testimony delivered by the paper is incorrect, to the degree of total falsity, and the falsehood is endeavoured to be screened from detection, by the non-interrogation of the author, while the author himself is effectually secured from punishment, by his non-forthcomingness, and that non-justiciability which is the result of it.

In a case of this sort, against the probability of the characteristic fraud, note this dilemma. If the claim (the unjust claim for the support of which it was designed) be made soon after the fabrication of the evidence, the expatriation or exprovinciation must have taken place in the mean time, and, being so timed, the non-forthcomingness of the fabricator will operate in the character of circumstantial evidence, giving probability to the supposed actual fraud:—if the claim be not made till long after, the non-demand for such a length of time is another article of circumstantial evidence, pointing the same way. And here, as above, note, that this disprobabilizing circumstantial evidence will be seen to have for its support the direct testimony (if received, as it ought to be) of the party against whom the fraud in question operates. And not only the particular account-book in question, but all the others kept by the same dealer, will be, or at least ought to be, producible at the instance of the party so charged.†

II. Case the second. He whose discourse the script appears to be, a party in the cause; the person at whose instance it is called for, a party on the opposite side, the tendency of the evidence consequently *confessorial*, or otherwise self-disserving.

Rule 3. In this case, let the script be admitted, but upon condition that the party, on recognising the discourse as his, shall be at liberty to deliver his own testimony (subject to interrogation) in explanation of it.‡

Question 1. Why give admission to evidence of this description, thus liable to be rendered, in respect of incorrectness or incompleteness, an instrument of deception?

Answer. Because, in so far as its tendency is to operate against him whose discourse it is (*i. e.* in so far as its tendency is confessorial,) it is the most trustworthy and satisfactory species of evidence that can be produced; no person being so little in danger of prejudicing a man in this way (either purposely, through mendacity, or heedlessly through temerity) as the man himself, and that the tendency of it (true or false, justly or unjustly) is not (in the opinion of the person best qualified to judge) to operate to the prejudice of him by whom it is called for, is sufficiently proved by the circumstance.

Question 2. Why annex as a condition, that at his own instance he may, subject of course to interrogation, be admitted to testify in explanation of it?

Answer. Because evidence of this description is in a particular manner liable to be, if not incorrect, at any rate incomplete. To admit it to receive explanation, is to allow what misstatements it may contain to be corrected—what deficiencies it may contain to be supplied. To refuse to it the faculty of receiving such explanation, is to keep it, by force of law, in a state, the tendency of which

* This is an instance taken from *ex parte* preappointed evidence; but it is equally good as an illustration of the application of the characteristic fraud to casually written evidence also.

† According to English practice, the books must be produced, if notice is given. If the shopman who made the particular entry be alive, he must be called as a witness, when he may refresh his memory by looking at the entry, and may explain the circumstances attending it. If the person who made the entry is since dead, upon proof of his handwriting, the entry will, under certain restriction, be received as evidence. Digby *v.* Stedman, 1 Esp. N. P. C. 327; Price *v.* Lord Torrington, 1 Salk. 285; Cooper *v.* Marsden, 1 Esp. N. P. C. 2; Evans *v.* Lake, Bull N. P. 282.—*Ed.*

‡ Interrogation, viz. in the oral mode, or in the epistolary mode (where the epistolary mode is allowed,) or in both, according to the circumstances of the case. See Book III. *Extraction.*

is to produce deception, misdecision, and injustice.*

Rule 4. Although, by death or other cause (such as incurable infirmity of mind, or expatriation,) he whose discourse this self-disserving testimony is, be incapable of testifying in explanation of the script,—admit it notwithstanding

Question. Why admit it, under the danger of incorrigible incorrectness and unsupplyable incompleteness, as above?

Answer. First, because the danger of misdecision *for want* of information, in case of exclusion put upon the evidence thus circumstanced, appears in this case to be preponderant over the danger of misdecision *by reason* of information rendered deceptitious for want of such explanation as, had the party been forthcoming, it might have received Suppose the information necessary to warrant a decision in favour of that side,—from the exclusion of it, misdecision takes place as a certain consequence, whereas, on the other hand, it is not certain that the information contained in it will be either incorrect or incomplete; and, if either incorrect or incomplete, it is not so likely to be so to the prejudice of the author's side as to the prejudice of the other, nor, though it should be both incorrect and incomplete, is it certain but that the effect of the incorrectness may be corrected, and the deficiency supplied, by *inferences*, drawn partly from the script itself, partly from whatsoever other evidence there may be in the same cause.

The safety with which admission may be given to evidence of this description, seems to be indicated by experience. Even without any such security against deception as is here proposed, self-disserving evidence is admitted in this shape—admitted without reserve—in English practice Even thus, the mischief (though, doubtless, it cannot be unfrequent) seems never yet to have become prominent enough to have been presented as an object of notice to the public mind much less considerable would it be, were the means of amendment suffered to be applied to it as above.

III. Case the third He whose discourse the script appears to be, a party in the cause, as before, but he himself the party at whose instance it is proposed to be produced the tendency of it, consequently, self-serving

Rule 5. In this case, likewise, let the script be admitted; the party being of course subject to interrogation on the subject of it, and in explanation of it; viz. by interrogatories propounded on the other side, and having, consequently, the effect of counter-interrogation.

Question. Why give admission to evidence so obviously liable, in so high and manifest a degree, to be mendacious, or (through bias or temerity) incorrect or partially incomplete, and thence to become an instrument of deception?

Answer. In the case of an extraneous witness, interest can never be, in any case, a sufficient ground for exclusion † Moreover, in the same case, interests, as strong as any that are most apparent, may exist without being known, without a possibility of being brought to light, while, of the interest which a party has in the cause, the existence is known of course In the case of a party, the sinister mendacity-promoting interest may in itself be no greater than in the case of an extraneous witness, and in particular in one of those instances in which, being undiscoverable, it cannot be taken for a ground of rejection But in the case of a party, the interest, whatsoever be its effect in respect of the production of *mendacity*, is much less liable to be productive of *deception*, than in the case of an extraneous witness because, being more manifest, presenting itself the more readily to the observation of every, even the most undiscerning, observer, the suspicion it excites will be stronger,—its probative force, consequently, weaker

Whatsoever may be the danger, the probability, of mendacity, self-serving mendacity, and consequent deception, attached to the admission of the testimony of the party in his own behalf, deposing in the ordinary mode of oral response to oral interrogations,—that danger cannot, from the admission of a written discourse of the same tendency, though of a prior date, receive any increase he is subject to counter-interrogation in the one case, and, by the supposition, so he is in the other. His extrajudicially composed written statement will, in his conception at least, operate in confirmation of the testimony he has to deliver in answer to interrogatories But so, and without prejudice to his veracity or title to credence, it very well may, especially when so it happened that, at the time of his framing it, he had not, either in fact or in prospect, any such interest as that in virtue of which he became, at a subsequent point of time, a party in the cause

Rule 6. Although, by death or other cause (as above,) he whose discourse this self-serving testimony is, be incapable of testifying in explanation of the script; admit it here also, notwithstanding.

Question. Why give admission to evidence

* Refusal of such faculty of explanation is among the rules of English practice. [When the latter is from either of the parties to the suit, no explanation can be given by the writer, inasmuch as neither party can be produced as a witness. But it is competent to the counsel to give any explanation in his address to the jury.—*Ed.*]

† See Book IX. *Exclusion*; Part III. *Deception*, Chap. III. *Interest.*

liable, in a degree still so much higher, to be mendacious, or (through bias or temerity) incorrect or partially incomplete, and thence to become an instrument of deception?

Answer. For the same reasons as those brought to view in support of rules 2, 4, and 5, though not operating with so great a force. In some cases, as above, it may be as well entitled to credence as evidence from any other source, and at the same time of material and indispensable use towards bringing to light and explaining the facts that have application to the cause. And in this case, as in the case mentioned under the last preceding rule, so palpable are the considerations that operate in diminution of the probative force of the evidence, that the danger of its being estimated at a value over and above that which properly belongs to it, does not present itself as naturally preponderant.

No doubt but that, in general, a man will be more strongly disposed to make false evidence to serve himself, than to serve another. But, under the impression of his remaining under the eventual obligation of being counter-interrogated on the ground of this extrajudicially written self-serving evidence, no less sharply than on the ground of oral evidence of the same tendency delivered on the spot,—counter-interrogated, and with time in abundance to frame the plan of interrogation; or (in the case here supposed) under the assurance that such counter-interrogation cannot be escaped from definitively but by death, nor for a time but by expatriation or exprovinciation—both of them facts operating in the character of circumstantial evidence, to the discredit of such his written testimony, the sort of fraud in question does not present itself as likely, either to succeed if attempted, or so much as likely to be attempted.

Where exclusion of evidence would be improper, precautionary regulations, to diminish the chance of deception from such evidence, are very often proper, and in a high degree.

Let the danger of misdecision, the result of deception produced by casually written evidence, be, in comparison with the danger of misdecision from exclusion, ever so inconsiderable, whether in point of magnitude or probability,—still no expedient ought to be neglected by which, without its being productive of preponderant inconvenience in any other shape, the danger from admission promises to be diminished.

To an effect thus desirable, the following regulations present themselves as promising to be conducive:—

1. In every instance in which evidence of the description here in question is, in any of its possible modifications (as herein above enumerated,) produced,—let it be an instruction from the legislator to the judge, to state, at the time of his giving judgment, the infirmity of so much of the evidence as comes under this description, and (in the case of his having given credence to it notwithstanding) the consideration by which such his credence has been determined: and this, if judging without a jury, for the satisfaction of the parties, the audience, and the public at large; if sitting with a jury, for the instruction of the jury.

2. Whensoever, in consequence of the non-forthcomingness and non-interrogability of him whose discourse the script appears to be, it is admitted notwithstanding,—the judge having thought fit rather to give admission to it at that time, than to put off the decision in expectation of the forthcomingness and interrogation of the supposed author of such testimonial discourse, let it be a rule of law, that, so soon (if ever) as the means shall exist of performing the interrogation, without preponderant inconvenience in the shape of vexation and expense, such interrogation shall, at the instance of any party in the cause, be performable.

3. If, upon admission and consideration given to any such article of makeshift evidence, it shall seem good to the judge to determine in favour of the party at whose instance such evidence was received,—power should be given to the judge, on the declared ground of the infirmity of this part of the mass of evidence, to require, at the hands of the party in whose favour such judgment is pronounced, such security for eventual restitution *ad integrum*, and to take such other measures of precaution, by sequestration or otherwise, as may in his judgment be necessary and sufficient to prevent the happening of irreparable damage: such damage as might afterwards be found to have taken place, if, in consequence of the facts brought to light by such subsequent interrogation or any other means, it shall have turned out that the provisional decision so pronounced (as above) was, in point of fact, ill-grounded.

In ancient French law, casually written evidence appears not to have been considered in the light of makeshift evidence: it was considered, on many occasions at least, as more trustworthy than ordinary testimonial (viz. judicially exhibited testimonial) evidence. It appears to have been designated by, or at least comprehended under, the term *commencement de preuve par écrit*, mentioned in one of the fundamental codes, the business of which is, in certain cases, to exclude testimonial evidence, as insufficient in itself—insufficient, unless fortified by the support of an article of this species of written evidence.

The impropriety of this preference was not quite so great, under that actually established technical system, as it would be under a natural and rational system. In testimonial evidence, under that system, an infirmity

produced by the insufficiency of the mode of receipt and extraction there employed, has been already brought to view (vol vi p. 399) It might be superior in trustworthiness to testimonial evidence so extracted, and yet deserve no better appellation than that of a species of makeshift evidence The species of written evidence in question is what it is—is the same thing, under all systems, but, under the original Roman, the Romano-Gallic system, testimonial evidence was bereft of part of its natural trustworthiness

Another circumstance that helps to give colour to the preference, and operates even in diminution of the impropriety of it, is, that, in a certain point of view (*i e* with reference to a matter of fact of a particular description,) casually written evidence is really better than testimonial evidence What it does not prove so well is, the *truth* of any of the matters of fact, asserted in and by the assertion made by the script What it does prove, however, and still better than any testimonial evidence (prove, viz upon the supposition of the authenticity of the script,) is the fact that assertions to that effect were, by the person in question, actually *made*—viz made in and by the script at that time In itself (supposing always the authenticity of it) it has, as to this point, all the trustworthiness that belongs to the best sort of preappointed evidence the difference lies only in the property of authenticity, the proof of which is, in the case of preappointed evidence, made the object of special care, instead of being left to chance, as in this other case

In respect of the source, and therefore of the grounds of comparative untrustworthiness or trustworthiness derivable from that quarter, casually written evidence is (it has been seen) susceptible of whatever modifications testimonial evidence is susceptible of It may be extraneous, it may be self-regarding self-regarding, it may be self-disserving, or self-serving; extraneous as well as self-regarding, it may be lowered by particular exposure to sinister interest, or by habitual improbity To all these differences, important as they are, French practice, grounding itself on the Ordonnance, was in a manner insensible A *commencement de preuve par ecrit*, a something upon paper, there must be but what that something should be, seems scarcely to have been considered as worth thinking about

Even a lot of judicial testimonial evidence* appears to have been considered as constituting a *commencement de preuve par écrit*

Judicial evidence, and casually written evidence, were thus completely confounded So loose, in French law, was men's conception of the different species of evidence!†

§ 2 *Of* ex parte *preappointed written evidence.*‡

The order adopted requires that something should now be said on the subject of *ex parte* preappointed written evidence But it is only in respect of its not being with propriety comprisable under the same denomination as extrajudicially and casually written evidence, that it demands a separate head For, in respect of trustworthiness (*i e* of probative force,) it partakes of the same nature, and the same natural infirmities, as have been seen operating in diminution of the probative force of casually written evidence.

Preappointed it is, preappointed it cannot therefore but be denominated but, in respect of probative force (not to speak of other properties,) it partakes not, in any degree, of the trustworthy character of the great mass of preappointed evidence, viz that which is the work, either of all parties concerned in interest, acting in conjunction, or of some single, but naturally impartial, and commonly highly-stationed, hand

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* A lot of self-regarding, self-serving and disserving evidence: the testimony of the party, extracted, at the instance of the adverse party, by *interrogation sur faits et articles*.—Causes Célèbres.

†Plaidoyers de Languet, vii 409 D. Gouy's case "Quelles preuves écrites invoque-t-elle pour les démentir? Un prétendu certificat arraché à un domestique timide, qui n'en a pas prévu les conséquences, et démenti par elle-même dans sa plainte" A curious certificate indeed! The witness, for anything that appears, still alive; his testimony not allowed to be judicially extracted, but, in the form of this extrajudicial script, and under the notion of a *commencement de preuve par écrit*, exhibited and argued upon! By the same rule that the testimony of this servant was thus extracted in the form of what is called a *certificat*, so on any occasion might that of any other witness, and the security afforded by judicial examination discarded altogether

Gouy's case, vii 339 "La justice, instruite du danger de la preuve testimoniale, surtout dans ces sortes de matieres" (disputes between husband and wife,) "redoute de livrer a l'incertitude et au hasard l'état des conjoints"

Barthelemi's case, vii 62 "Quand cet acte, muni de leurs signatures, a subsisté pendant huit ans entiers, sans la moindre apparence de suspicion, il est inutile, il est dangereux de prétendre invoquer des temoignages étrangers, et d'ecarter une deposition muette mais irrecusable, pour en admettre de verbales, *toujours plus que suspectes en matiere civile*"

Ib 63 "De deux preuves qui se combattent, la plus forte subsiste sans contredit, or, sans contredit aussi, la preuve par écrit est plus forte que la preuve par temoin"

‡ This and the following section were left by the Author in the state of mere fragments. Several *memoranda*, far too incoherent to be inserted, prove it to have been his intention to enter more fully both into the subject of *ex parte* preappointed evidence, and into that of adscititious evidence. It does not appear, however, that he carried this intention into effect.—*Editor.*

In comparing *ex parte* preappointed with casually written evidence, the reader cannot but observe, that unintentional incorrectness is more probable in the case of casually written than of *ex parte* preappointed evidence, for exactly the same reason which renders such incorrectness still more probable in the case of common conversation than in either, viz. the greater probability of a deficiency of attention

On the other hand, intentional incorrectness, for the purpose of the characteristic fraud, is, for this same reason, more probable in the case of *ex parte* preappointed, than it is in the case of casually written evidence of the same import because, if a man sets himself to forge evidence, the greater apparent trustworthiness of *ex parte* preappointed evidence, arising from the cause above brought to view, would naturally induce him to give that form, rather than the form of casually written evidence, to the forged document.

The practical rule in regard to *ex parte* preappointed evidence is the same with that which has been already laid down as applicable to casually written evidence

Is the person by whom it was committed to writing in existence, and accessible for the purposes of justice? Let him be examined *viva voce* in open court, subject to counter-interrogation, and let not the written evidence be admitted, otherwise than in the character of notes, to assist the memory of the deponent Is the writer deceased, or the subjecting him to interrogation physically or prudentially impracticable? Admit the document, making allowance for all the circumstances which can operate in diminution of its credibility, hear everybody who can tell you anything concerning the document that can afford you any help in judging of the degree of confidence which it deserves, and make the same provision as in the case of casually-written evidence, for the ultimate interrogation of the writer, should it at any future period become practicable.

The grounds of all these arrangements being precisely the same in the case of *ex parte* preappointed, as in that of casually written, evidence, it would be superfluous to present them a second time to the reader.

§ 3. *Of adscititious evidence;* i. e. *evidence borrowed from another cause.*

What is meant by adscititious evidence, as also in what its characteristic infirmity consists, has been seen in the preceding chapter. It remains to show, what is the part which ought to be taken in relation to it, by the legislator and by the judge.

Adscititious evidence divides itself into two kinds; which are not indeed mutually exclusive of one another, but which, for reasons that will appear as we advance, require to be distinguished.

1. Evidence *inter alios:* evidence already exhibited *coram judice*, in the character of judicial evidence, but in a cause between other parties, *i. e.* in which the list of the parties on both sides was (either in the whole, or as to some one or more of the persons contained in it) different from the list of the cause in question, the posterior cause.

2. Evidence *alio in foro:* evidence already exhibited in the character of judicial evidence, but in a cause which (whether carried on by the same list of parties, or by a list in any respect different) was carried on before a different tribunal. understand, by a tribunal in which the rules of evidence are known or suspected to differ more or less from those observed in the tribunal in question.

But the other tribunal, before which the evidence in question had thus on a preceding occasion been exhibited, may either have been a tribunal acting under the government of a foreign state, or a tribunal acting under the same government and, in the latter case, a tribunal of a different province, or a tribunal of the same province and in either case, a tribunal governing itself by the same rules of evidence, or a tribunal governing itself by rules of evidence in any respect different.

Between these two last-mentioned modifications of makeshift evidence — viz. evidence *inter alios*, and evidence *alio in foro* — there exists a very wide and material difference Of evidence *inter alios*, the inferiority, as compared with the opposite case, that of evidence *inter eosdem*, is produced by an universally operating and irremoveable cause — viz a deficiency, more or less considerable, in respect of that interest, on which the efficiency of the instituted securities for trustworthiness is apt to be in so considerable a degree dependent

On the other hand, in the case of evidence *alio in foro*, the inferiority, real or supposed, depends altogether upon the accidental difference between the rules of evidence actually observed in one court, and those actually observed in another court. Its root lies in the diversities of practice that prevail as between court and court, in matters in which, if it were rational in all, the practice would, with very slight differences, be the same in all. It lies in the wretchedly imperfect state of this branch of procedure (not to speak of any other,) in every nation hitherto existing upon earth.*

The course proper to be taken, in respect to adscititious evidence, will be found to vary

* Here ends all that Mr. Bentham had written on the subject of adscititious evidence, with the exception of some loose memoranda. What follows was chiefly made up from these memoranda by the Editor.

according as the document in question is a previous *decision*, or the whole or some part of the *minutes of the evidence* delivered in a previous cause.

In respect of the propriety of admission, both these species of adscititious evidence stand nearly on the same ground Neither of them ought to be admitted, when better evidence from the same source is, without preponderant inconvenience, to be had, neither of them ought to be rejected, when it is not

There is not, probably, that system of judicial procedure in existence (how bad soever the mode of taking evidence that it employs,) which does not afford a greater probability of right decision than of wrong, and in general the presumption of right decision is a very strong one True it is, that no decision of a court of justice, certifying the existence of a fact, affords ground for believing it, any further than as such decision renders probable the existence, at the time when it was pronounced, of *evidence* sufficient to support it · and if the original evidence, on which the decision in the former cause was grounded, were forthcoming in the present, that evidence would be preferable, as a foundation for decision, to the mere opinion formerly pronounced on the ground of that same evidence by a judge But it scarcely ever happens that evidence which has once been presented, admits of being again presented in as perfect a form as before All that important species of evidence which is constituted by the deportment of the witness in the presence of the judge, is, in most cases, irrecoverably lost such evidence as can be obtained now, might not be sufficient to warrant the former decision, and yet the decision, when pronounced, may have been perfectly borne out by the evidence on that occasion adduced. On the other hand, it is true that, in very many cases, by recurring to the original sources, sufficient evidence of the fact might even now be obtained, not, however, without more or less of delay, vexation, and expense for the avoidance of which, it is often proper that the previous decision, though an inferior kind of evidence, should be received as a substitute, in the place of a superior kind.

As to the minutes of the evidence delivered in the former cause, it is sufficiently manifest that they ought not to be admitted, if recurrence to the original sources of evidence be practicable, without preponderant inconvenience,—if the witnesses in the former cause be capable of being examined, or such written or real evidence as it may have afforded be capable of being exhibited, in the present: unless when there may be a use in comparing two testimonies delivered by the same witness on two different occasions. But if (no matter from what cause) recurrence to the original sources be either physically or prudentially impracticable, the minutes of the former evidence should be admitted, and taken for what they are worth. If the evidence in question be oral testimony, being generally upon oath, subject to punishment in case of intentional falsehood, and to counter-interrogation, it is at any rate better than hearsay evidence, which, at its origin, had none of these securities if it be real evidence, the official minutes of it are the very best kind of reported real evidence — of which hereafter

A question of greater nicety is, whether in any, and, if in any, in what cases, adscititious evidence shall be taken for conclusive?

In the case of minutes of evidence, the short answer is, never The testimony of a witness, or of any number of witnesses, even if delivered in the cause in hand, and under all the securities which can be taken in the cause in hand for its correctness and completeness, ought not to be, nor, under any existing system of law that I know of, would be, taken for conclusive much less a mere note of the testimony which they delivered on a former occasion, subject perhaps, indeed, to the same set of securities, but perhaps to a set in any degree inferior to those which there may, in the cause in hand, be the means of subjecting them to

The case of a *decision* is more complicated. For the purpose of a prior cause, a decision has been given which supposes proof made of a certain fact, and the question is, whether, on the ground of such decision, such fact shall be taken for true — shall be considered as being sufficiently and conclusively proved — for the purpose of the decision to be given in a posterior cause?

It must of course be assumed, that the prior decision *necessarily* supposes evidence of the fact in question to have been presented to the judge, sufficient to create in his mind a persuasion of its existence for there would be manifest impropriety in making the decision conclusive evidence of any fact not absolutely necessary to its legality, with whatever degree of *probability* the existence of such fact might be inferred from it

1 Let the parties be the same, and the tribunal either the same tribunal, or one in which the same or equally efficient securities are taken for rectitude of decision In this case, unless where a new trial of the former cause would be proper, the decision in the former cause ought to be taken as conclusive evidence (for the purpose of the posterior cause) of every fact, proof of which it *necessarily* implies A lawyer would say, *Quia interest reipublicæ ut sit finis litium.* Not choosing to content myself with vague and oracular generalities, which are as susceptible of being employed in defence of bad arrange-

ments of procedure as of good ones, I place the propriety of the rule upon the following more definite ground: that, as every person who would have an opportunity of applying the security of counter-interrogation in the second cause, has had such an opportunity in the first, — and as the rules of evidence which were observed in the former trial, were, by supposition, as well calculated for the extraction of the truth, as those which would be to be acted upon in the present, — the judge on the second occasion would have no advantage, in seeking after the truth, over the judge on the first, to counterbalance the disadvantage necessarily consequent upon lapse of time: and the decision of the first judge (though strictly speaking it be only evidence of evidence) is more likely to be correct, than that which the second judge might pronounce on the occasion of the posterior cause.

The case is different if fresh evidence happen to have been brought to light subsequently to the first trial, or if there be any reason for suspecting error or *mala fides* on the part of the first judge But, in either of these cases, a new trial of the former cause would be proper. If the fact be sufficiently established for the purpose of the first cause, it is sufficiently established for the purpose of any subsequent cause between the same parties. It is only when there appears reason to think that it was improperly considered as established in the first cause, that there can be any use in going through the trouble of establishing it again in the second.

The above remarks apply also to the case in which the parties to the second cause are not the actual parties to the first, but persons who claim in their right — then executors for example, or heirs-at-law, or even persons claiming under the same deed, or, in any other way, upon the same title, all those, in short, who in English law language are quaintly called *privies* in blood, in estate, and in law for though these have not had an opportunity of cross-examining the witnesses in the former cause, other persons representing the same interest have.

2. Suppose the parties different, that is, with different interests, and the same reasons do not apply. The deficiency in respect of securities for trustworthiness, which constitutes the inferiority of adventitious evidence, may now have place to an indefinite extent, and is always likely to have place to some extent. It will very often happen that there was some part of the facts, known to the witnesses in the former cause, which would have made in favour of one or other party to the present cause, but which did not come to light, because, there being no one among the parties to the former cause in whose favour it would have made, it found no one to draw it out by interrogation. The former decision, therefore, although conclusive against the parties to the former cause, and all who claim under them, ought not to be conclusive against a third party. If it were, an opportunity would be given for a particular modification of the characteristic fraud: a feigned suit instituted by one conspirator against another, and judgment suffered by the latter to go against him, with the view of establishing a false fact, to be afterwards made use of in a suit against some other person.

The above observations constitute what foundation there is for the rule of English law, that *res inter alios acta* is not evidence: — of which hereafter. Note, *en passant*, the character of jurisprudential logic: a decision *inter alios* is not *conclusive* evidence, therefore not *admissible*.

3. Lastly, suppose the tribunals different, and governed by different rules: and let the rules of the tribunal which tried the first cause be less calculated to insure rectitude of decision than those of the tribunal which tries the second. In this case, with or without the deficiency in point of security arising from the difference of the parties, there is at any rate the deficiency which arises from the imperfection of the rules: the impropriety, therefore, of making the decision conclusive, is manifest. Its probative force will evidently vary, in proportion to the imperfection of the rules which govern the practice of the court by which it was pronounced, always considered with reference to the main end — rectitude of decision.

The probative force will be greater, *cæteris paribus*, when the court from which the evidence is borrowed is in the same, than when it is in a different, country; on account of the greater difficulty, in the latter case, of obtaining proof of the existence of the characteristic fraud. But this presumption is much less strong than that which arises from a difference in the mode of extraction.

We shall see hereafter to how great an extent nearly all the above rules are violated in English law.

CHAPTER III.

OF UNORIGINAL EVIDENCE IN GENERAL.

THE quality of unoriginality seems applicable to an article of evidence in either of two cases. 1. Where it is so with relation to persons, — to persons considered as sources of the evidence; 2. When it is so in respect of *signs*.

It is so as to persons, wherever the perceptions stated by the person whose evidence is rendered present to the senses of the judge, are stated by him as being not his own perceptions or opinions, but perceptions or opinions communicated to him by some other

person, as and for the perceptions of that other. Had the perceptions or opinions been stated by him as his own, they might have been termed original: not being stated by him as his own, they cannot with propriety be termed *original* — they are termed not original, but *unoriginal*. In himself, if he says truly, they did not originate, but in the other person so spoken of.

The evidence is unoriginal in respect of *signs*, when the signs (*i. e.* the collection of visible and permanent signs, viz. written characters) presented to the senses of the judge, are not the same collection of signs by which the discourse in question stood expressed, when consigned to writing for the first time not these, but some others. which, — having been transcribed from those, in the design of rendering (so far as both go) the signification of the copy thus made exactly the same as that of the original, — may accordingly be termed *transcriptitious*.

The evidence orally delivered, and of the nature of what is called hearsay evidence; — the evidence delivered in writing, and of the nature of a transcript. — in both these cases, it may alike be termed unoriginal.

In both instances it is understood at once, that, in point of probative force, the unoriginal evidence will be in a greater or less degree inferior to the original. But, in the two cases, the defalcation made by the circumstance of non-originality from the probative force of the evidence, will immediately be seen to be, generally speaking, widely different.

Such as our conceptions are, such ever must language be. In vain, on any subject, will that man seek to add anything material either to the correctness or to the amplitude of the current stock of conceptions, who fears the reproach of the endeavour to make additions to the language. A subject must have a name, before anything can be predicated of it: and of the subject, be it what it may, till something is predicated, nothing will be understood.

Among non-lawyers, as well as among lawyers, the word *hearsay* is already in use Among lawyers, the word *original*, and the word *copy*, are in use. With so slender a stock of the instruments of discourse, has the business of argumentation and thence the business of judicial decision, been hitherto carried on in this part of the field of law.

Even of so slender a stock — a stock comprised of three words, and no more — there exists one which is not fit for use. By reason of its ambiguity, the word *copy* is not fit for use. Does it mean *transcript*, in contradistinction to the original script? or does it mean *exemplar*? as in the case when, in a mass of letter-press, all may be equally originals, or all equally transcripts.

Such as yet is the supply: here follows a part at least of the demand.

In the case of want of originality (it has already been observed) the seat of the defect may be in the person by whom the evidence is delivered, or (in the case when at the time of delivery it wears the form of writing) in the collection of signs of which the writing is composed.

When the seat of the defect is in the person — when, upon his own showing, the deposing witness is a different person from him by whom the matters of fact in question were observed, — in this case there are, at least, two persons, upon whose trustworthiness the probative force of the testimony depends — two persons so connected, that, by the reduplication, the probative force, far from being increased, is lessened

Of the deposing witness the existence is, by the supposition, certain. of the alleged percipient witness — of any percipient witness, the existence is necessarily and constantly a matter of doubt On this account it is, that, without some such prefix as the word *supposed*, he ought never to be mentioned.

Instead of supposed *percipient* witness, the occasion may sometimes require us to say, the supposed *extrajudicially stating* or *narrating* witness for neither are the terms synonymous, nor the persons in every case the same

In the character of a percipient witness, a man will not, generally speaking, have made himself known to the deposing witness, unless by having made himself an extrajudicially narrating, reporting, or stating witness. But, in the character of an extrajudicially narrating, reporting, or stating witness, a man may easily have certified himself to the deposing witness, without having been a percipient or observant witness.

Notions other than such as can, strictly speaking, be termed perceptions, may moreover be not altogether without their use in evidence and, useful or useless, they may serve to constitute the matter of which evidence is composed.

Of the persons through whose mouths the supposed statement of the supposed percipient or originally extrajudicially narrating witness may, from one to the other, have passed, or be supposed to have passed, the number may, to any amount, be great. Under French judicature, in the famous case of Calas, between the supposed precipient and the deposing witness there were no fewer than five.

So many of these supposed successive narrators (including the deposing witness,) so many *media* through which the supposed perception has been transmitted, in its way to the ear or the eye of the judge; so many

media; of which one alone is judicial, the others extrajudicial.

By every extrajudicial medium, the evidence is removed — removed by one *remove* — from that degree of proximity which it were desirable it should possess, and which in the case of ordinary evidence it does possess, with reference to the eye or the ear of the judge.

Equal to the number of media, as above, may be said to be the number of *degrees* equal to the number of media and degrees *minus* one, may be said to be the number of *removes*.

Media, degrees, removes with equal propriety, and in the same sense, though with very different effect, and with much less force, does this nomenclature apply to the case of *transcriptitious* evidence

And thus it is, that, in either case, constitutive of so many modifications or species of unoriginal evidence, we have unimedial, bimedial, trimedial and so forth. in a word, *multimedial* evidence.

The two sources or causes of inferiority, the two modes of unoriginality, may be combined in the same lot or article of evidence.

Thus, for species or modifications of multimedial evidence, we have *simple* (composed either of multi-personal alone, consisting of person supposed to have spoken after person, or of transcriptural alone) and *complex*, composed of both those modes of unoriginality put together.

Not of personal evidence alone, but of *real* also, may originality and unoriginality be both predicated

Real evidence is original — is originally delivered — when the thing which is the source of it is itself presented to the senses of the judge: unoriginal, when all the conception he can entertain concerning it is that which is conveyed to his mind through the medium of the testimony of a witness — commonly a deposing witness

The shape in which the testimony of the deposing witness is conveyed to the senses of the judge, may be either the oral or the written shape Hence it is that, when there has been no transcription, scriptitious may stand exactly upon a footing with hearsay, as well as with original evidence

When the testimony, being unoriginal, is composed of that of two persons, one as it were behind the other, — the *form* in which the respective testimonies have been delivered, viz. oral or scriptitious, is a circumstance by which differences, which require to be noted, may be produced in the probative force of the compound testimony.

In the case where the supposed original evidence is of the *real* kind; in that case, the species of inferiority which, in the case of personal evidence, requires two persons, two witnesses, to the production of it, is produced by the testimony of a single witness, interposed between the thing which is the source of the evidence and the senses of the judge.

After these explanations, the following modifications of unoriginal evidence may, it is supposed, be rendered sufficiently intelligible by the denominations here employed for giving expression to them.

1 Supposed oral through oral: supposed orally delivered evidence of a supposed extrajudicially narrating witness, judicially delivered *viâ voce* by the judicially deposing witness.

This is the only species of unoriginal evidence which the term *hearsay* evidence is, strictly speaking, competent to the expression of

2. Supposed oral through scriptitious.

3 Supposed scriptitious through oral.

4. Supposed scriptitious through scriptitious. in other words, *transcriptitious* evidence.

In all four cases, the supposed original testimony must, in whichever shape delivered, be supposed to have been extrajudicially delivered

In all these four cases, an interval of considerable length must, moreover, be supposed to have intervened between the supposed extrajudicial statement and the judicial one. Suppose no such interval, and the evidence stands, to every practical effect, undistinguishable from original evidence.

1. Thus, in the case of supposed oral through oral A perceipient witness, being in or near the judicatory, delivers his testimony in a low tone and this evidence, not being sufficiently audible, is, by some other person (suppose an officer of the court,) repeated in a more audible tone, for the convenience of the judge

2 So again in the case of supposed oral through scriptitious. This would be the common case of note-taking Deposition of a perceipient witness, extracted *viâ voce* before a judicatory, notes or minutes thereof taken by a clerk, and the minutes delivered in to another. In this case, the word *supposed* would (it is evident) be regarded as superfluous or ill-placed The note-taker, unless specially interrogated, would not be considered in the character of a distinct deposing witness.

3 So again in the case of supposed scriptitious through oral. This would be no more than the common case of written evidence read in court. for example, an affidavit. Here, too, the use for the adjunct *supposed* vanishes.

4. Lastly, in the case of supposed scriptitious through scriptitious. The witness having read to himself on one day a document capable of being adduced in evidence, parts with it immediately out of his hands. On the next day, from memory, he, in a judicial

form, interrogated or not, writes an account of what, according to him, are the contents. This is supposed scriptitious through scriptitious; and he, the writer, is a witness. But while he is thus writing his account of the contents, suppose the paper to be lying before him. This is no longer the case of a reporting witness, simply reporting (if extrajudicially,) or deposing (if judicially,) to the contents of a statement made by another person, who is considered in the character of a percipient and extrajudicially narrating witness. It is the case of a scribe, and according as in his script words the same as those employed in the original, or words more or less different, are employed, his script is a transcript, an extract, or an abridgment.

Thus various and thus faint are the shades of difference by which one modification of unoriginal evidence is distinguished from another.

All modifications of unoriginal evidence that are of the nature of, or bear similitude to, hearsay evidence, as above, have this in common,—that for every remove (mendacity and fraud out of the question) they afford an additional chance of incorrectness and incompleteness.

But besides this,—supposing admission to be secured to them, and known to be so,—they afford, all of them, invitation to one and the same plan of fraud; which fraud is moreover equally applicable to casually-written and *ex parte* preappointed evidence. Secure, not only against punishment, but against adverse interrogation, the extrajudicial narrator and supposed percipient witness delivers his statement *vivâ voce*, or in writing, as the case may be; that statement being tinctured with mendacity, in the shape that seems best adapted to the sinister purpose, whatever that may be. The extrajudicially narrating witness has contrived, for the purpose, to place himself (if he be not so already) out of the reach of punishment. The judicially deposing witness, so long as he reports nothing but what has, to his knowledge, been expressed by the extrajudicially narrating witness, is not punishable; since, by the supposition, he says nothing that is not true.

CHAPTER IV.

OF SUPPOSED ORAL EVIDENCE TRANSMITTED THROUGH ORAL, OR HEARSAY EVIDENCE

So many features belong in common to extrajudicially written and to hearsay evidence, that what would have been necessary to have been said on the subject of this last-mentioned species of evidence, had it been considered before the other, is, by what has been already said on the subject of the other, rendered unnecessary to be said here.

It is of the essence of hearsay evidence to present to the notice of the judge two distinct persons in the character of witnesses: a supposed percipient and extrajudicially narrating witness, stating, at some antecedent point of time, in the hearing of any person not on that occasion invested with the authority of a judge, some matter of fact as having had place, and a deposing, or say judicially narrating witness, who bears testimony, not to the truth of that matter of fact, but to its having actually been asserted, on the extrajudicial occasion in question, by the extrajudicially stating or narrating witness.

So distinct are the two characters, and, to the purposes of truth and justice, so material to be distinguished, that, while the one (viz. that of the deposing witness) is in every individual instance filled by a really existent person,—the other (viz. that of the percipient or extrajudicially stating or narrating witness) may happen to be a character altogether fictitious. The person, it may happen, is fictitious; or, though the person be at the time in question a person really existing, the statement or narration, and alleged perceptions, attributed to that really existing person, may on the whole, or as to any part, be fictitious.*

To the statement or narration judicially delivered by the deposing witness, and to that alone, belongs therefore, in propriety of speech, the denomination of *hearsay* evidence.

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* The testimony given by the deposing witness may, if false, be false *in toto*, or false *pro parte*.

It is false *in toto*, if so it were that, to any such effect as that deposed to, no such extrajudicial statement was made by any person: the whole being purely the invention of such deposing witness.

If, as to any part, a statement to any such effect as that deposed to, was, at the time and place deposed to, made by any person in the character of a percipient witness, though not the very person deposed to in that character,—even in this case it may be too much to consider the testimony as false *in toto*. In point of effect, the difference between one person and another, in the character of an extrajudicially narrating witness, may be altogether immaterial, or, according to the character and situation of the two persons, may be material to any the highest degree.

Person of the supposed percipient or other supposed extrajudicially narrating witness,—time of the supposed extrajudicial narration or statement,—place in which it was made;—in respect of any or all these several circumstances, the deposition may be determinate, or in any degree indeterminate; more or less indeterminate, not only in respect of time and place, but even as between person and person: *ex. gr.* whether it was one out of two determinate persons, some one out of three or more; and so on in regard to degrees of persuasion as to the question which of them it was; or the person may have been altogether unknown and indeterminate.

Supposed extrajudicially stating or narrating witnesses may have stood in a series of any length, one behind another. The causes of untrustworthiness applying to every human being, and, to every being of which nothing more is known than that he or she is human, with equal force,—it is evident that, the longer the line of these supposed witnesses, the less is the probative force of their supposed testimony.

Of the case which exhibits more such supposed extrajudicial witnesses than one, what little requires to be said, will be said in another place.* throughout the course of the present chapter, no more than one will be supposed. Of whatever is said under this head, it will be easy to make application to the whole possible series of those other cases

Supposing (as above) one, and no more than one, supposed extrajudicially stating or narrating witness,—the character of the testimony will be found to admit of nine variations: the supposed testimony of the supposed extrajudicial witness, under each of three characters, being capable of being deposed to by the deposing witness under each of the same three characters. Thus,

I. By an extraneous deposing witness may be related the supposed extrajudicially delivered testimony of the three sorts of extrajudicial witnesses, viz

1. Another extraneous witness

2. A party on that side of the cause on which the hearsay evidence is not called for.

3. A party on that side of the cause on which the hearsay evidence is called for.

II. By a party on that side on which the hearsay evidence is not called for, may, in like manner, be related the supposed extrajudicially delivered testimony of the same three descriptions of persons, viz.

1. An extraneous witness.

2. Another party on that side of the cause on which the testimony of the hearsay witness is not called for

3 A party on that side of the cause on which the hearsay evidence is called for.

III. Lastly, by a party on the side of the cause on which the hearsay evidence is called for, may, in like manner, be related the supposed extrajudicially delivered testimony of the same three descriptions of persons, viz.

1. An extraneous witness.

2. A party on that side of the cause on which the hearsay evidence is not called for.

3. Another party on that side of the cause on which the hearsay evidence is called for.

In the case of hearsay evidence, the particular description of the characteristic fraud above mentioned (the fraud applying in common to every species of makeshift evidence) is as follows. Under the assurance of his not being subjectable to eventual punishment or to counter-interrogation, a man utters *viva voce*, on some extrajudicial occasion and place, a statement or narration, of the incorrectness or partial incompleteness of which he himself is conscious †

In regard to admission, and the terms on which it shall take place, the rules which have been seen applying to extrajudicially written evidence, will be found to apply to hearsay evidence, without any difference considerable enough to render it worth while to exhibit those rules in the case of hearsay evidence, at the same length as those regarding extrajudicially written evidence.

The considerations from which, in the character of reasons, these rules were deduced, being the same, so of course will be the rules.

The only difference which there is, turns, so far as concerns admission, upon the magnitude of the danger (the danger from admission) under the two species of makeshift evidence of which difference the delineation will constitute the matter of a following chapter.

In rule the sixth and last may be seen that

* Chap. X. of this Book.

† A supposable case of mendacity, and even of fraud, is this:—Mendax, in support of a claim of his own, comes forward in the character of a deposing witness, supporting it by hearsay evidence, which hearsay evidence consists in deposing that in his hearing (on an extrajudicial occasion) Umbra spoke of herself as having, at a time mentioned by her, seen, in the character of a percipient witness, a certain fact which, had it really happened, it would have fallen in her way and in her way alone to have so witnessed: assisted, for instance, in the character of a midwife, at the birth of Titius. Here we have an article of hearsay evidence, which, though by the supposition false, is of essential use to its fabricator; rendering to the plan of falsehood a service which perhaps could not have been rendered by any evidence of the nature of ordinary original untransmitted evidence. But this is not among the cases that come within the description of the characteristic fraud as above described. Wherever the characteristic fraud, employed in the shape of hearsay evidence, has place, the extrajudicial statement (though false) is really uttered and delivered. The case here supposed, is a case not of hearsay evidence, operating by means of the fraud in question, there not having been in fact any extrajudical statement or narration, any extrajudicial witness. It is a case of false original untransmitted evidence, pretending to be, but not really being, hearsay evidence.

An article of self-serving evidence to any such effect as the above, is, obviously, of itself a suspicious and weak article of evidence. But there is nothing to hinder it from being true, and, at the same time, supported by a body of truly reported circumstantial evidence.

It would be possible to exclude evidence thus constituted, and at the same time without comprehending in the exclusion either self-serving evidence as such, or hearsay evidence as such. It would be possible: but there seems not to be any adequate reason for the doing it.

which presents itself as the only instance in which the reasons in favour of the admission recommended by it seem to require, in the case of hearsay evidence, ulterior delineation, over and above such as correspond with those that have been already brought to view under the head of extrajudicially and casually written evidence.

Insulated, the alleged extrajudicial statement or narration of an alleged percipient witness will be little in danger of obtaining credence to such a degree as, if false, to be productive of deception. In connexion with other evidence, it may be necessary for the explanation and completion of an aggregate body of connected evidence: as in the case of a chain of facts following each other in a series, and composing together a body of circumstantial evidence.

Such may, in some degree, be the use of the makeshift document, even in the case of extrajudicially and casually written evidence. But more particularly it may be observed, in favour of the proposed admission of hearsay evidence, that if, on the occasion of what passed in a conversation between two interlocutors, the discourse of one be excluded, that of the other will frequently be unintelligible: an incident, the probable frequency of which is the same, whether (relation had to that one of the interlocutors whose discourse it might be proposed to exclude) the tendency of the discourse were self-disserving, or self-serving.

CHAPTER V.

INSTRUCTIONS CONCERNING THE PROBATIVE FORCE OF EXTRAJUDICIALLY WRITTEN AND HEARSAY EVIDENCE.*

THAT which ought in scarce any case to be done, and is most abundantly done (it has already been observed,) is, to put an exclusion upon evidence, on the ground of danger of deception. That which ought throughout to be done, and nowhere has been done, is—if legislation be the work of reflection, and reflection pointed to right ends—to give the benefit of it, in the form of instructions, to the judge.

To bring to view such considerations as, on the occasion in question, present themselves as capable of being, in that character, assistant to the judge, if not in the way of information, in the way of reminiscence,—is the object of the present section.

I. Supposing admission given to both, and on the same conditions,—hearsay evidence is less likely than extrajudicially written evidence to have originated in the characteristic fraud: and (in so far as its incorrectness or incompleteness is regarded as not to be apprehended otherwise than as the result of such plan of fraud) is less untrustworthy—may with propriety be considered as acting with a greater degree of probative force.

The only case in which, from either species of makeshift and thence uninterrogable evidence, any advantage would be to be hoped for, is that of a posthumous advantage—an advantage not looked to as capable of accruing during the lifetime of the contriver, to be reaped by the contriver himself, but, after his death, to his family, or some other person whose interests are dear to him. For as to the man himself, if he be *in esse*, a reasonable condition to require of him (wheresoever he be, at home or abroad) is, that he submit to counter-interrogation; which if he do, his doing so makes, in both cases, an end of the makeshift evidence.

In this case, to make a species of evidence which shall be exempt from counter-interrogation as well as eventual punishment, he has his choice between casually written evidence and hearsay evidence.

Suppose him to choose casually written evidence. This (it being by the supposition admissible) is that one of the two that will afford him the best chance.

If he writes it himself, in the name of another person not privy, this will be an act of forgery; a punishable offence, committed, in the first instance, in prospect of a benefit expected to accrue to others, and at a time when he will not be able to enjoy it.

If for the writing it he engages an assistant, who is privy to the fraud, and who writes it in his own character,—here, indeed, is no forgery, but here is a fraud with an accomplice, in whose power the contriver puts himself.

If he writes it himself in his own person,—here is no forgery, nor is there any person in whose power he puts himself. This, supposing both species of makeshift evidence receivable (viz. casually written and hearsay,)

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* As a general principle of English law, hearsay evidence and statements in writing are inadmissible in evidence. There are various exceptions to this exclusionary rule: for example, the testimony given on oath by a deceased witness on a former trial may be proved by a person who heard him give his evidence. It has been, however, laid down, that the witness must not be allowed to swear to the *effect* of what was said, but must recollect the very words. R. *v.* Carpenter, 2 Show. 47; Ennis *v.* Donisthorne, Cornw. Sum. Ass. 1789, MS.—Statements made to medical men in answer to questions, are received in evidence. Aveson *v.* Lord Kinnaird, 6 East, 195, 198.—Letters written by the payee of a promissory-note, to the maker, at the time of the making of the note, are admissible in evidence. Kent *v.* Lowen, 1 Campb. 177, 180.—Declarations of the deceased, in cases of homicide, after the mortal blow has been given, are received in evidence. 1 East, P. C. c. 5. s. 124; Woodcock's case, 1 Leach, 502.—*Ed.*

is, in both points of view (probability of success, and security against punishment,) the most eligible.

Thus stands the plan of fabrication by means of makeshift evidence, on the supposition that casually written evidence is to be the instrument employed in it.

In this way, a man may use his endeavours to render an undue service to persons dear to him, even without subjecting the evidence to the discreditive observation of its being self-serving evidence. If it be a case in which their title cannot be derived but through himself, they taking in quality of his representatives, no: but the right which he thus fraudulently conveys may be drawn by him from another source. A father, for example, may, by a fraud thus shaped, convey to his son an estate derived, not from the father's side, but from the mother's.

Suppose revenge, or gratification of causeless enmity, the posthumous benefit — the sole benefit — in view. Here the testimony stands not exposed to any such discreditive observation as the above.

In this may be seen by far the most promising, in other words the most deceptitious, shape, which the characteristic fraud can assume. If in this it be not too deceptitious to be admitted, in no other can it be.

Hearsay evidence renders an assistant necessary. The contriver of the fraud utters the statement or narration in the hearing of the assistant. so long as the contriver lives, the assistant is silent, for such silence is what (as above) the nature of the fraud requires. the contriver dead, then, for the purpose of giving effect to the benefit which (though to him a posthumous one) the contriver had in view, comes the assistant forward with his hearsay evidence.

The inferiority of this species of makeshift evidence, in comparison with the other, may be seen in more points of view than one. If the assistant dies before the contriver, or (though not till afterwards) before his hearsay evidence has been judicially derived, — the plan is defeated. so if he expatriates, or forgets his lesson, or quarrels with the contriver. So much as to comparative probability of success. Meantime the contriver exposes himself to loss of character, and (if the law has done its duty) to punishment, through the infidelity of his assistant.

The assistant, it is true (so it may easily be managed,) need not be privy to the fraud. to the intended assistant the false story is narrated as if it were true. In this way, danger of punishment through infidelity is avoided; but danger of ill success, by reason of death and expatriation, remain the same; danger of ill success through quarrel, not much less. But the danger from forgetfulness is much greater, the cause of remembrance being wanting. Taking a memorandum might, it is true, be recommended by the contriver to the intended innocent assistant, or a memorandum put into his hand. But this circumstance would be still more likely to be remembered than any other; and in the mind of the judge, if not in that of the innocent assistant, in his character of deposing witness, it would cast a shade of suspicion upon the scheme.

The number of innocent persons thus taken for intended assistants, might be multiplied to any amount, but by no such multiplication could hearsay evidence, in the character of an instrument of this fraud, be raised to an equality with a letter or memorandum in writing, framed with a view to its officiating in the character of an article of extrajudicially written evidence.

Of the authenticity of a script, framed for any such express purpose, proof cannot, in the nature of the case, be wanting. Where adequate cause of remembrance is wanting, a story told is liable to be lost, whatsoever be the number of the hearers. In point of probability of remembrance, the difference between the seeing of a fact, and hearing a relation of it, is plainly infinite.

II. Setting aside, in both instances, the characteristic fraud, and purposed mendacity, to whatever purpose directed, hearsay evidence seems in general more likely to be tainted, and moreover in a higher degree, with material incorrectness and incompleteness, than extrajudicially written evidence is.

Extrajudicially written evidence presents but one witness in whose person the causes of untrustworthiness, intellectual and moral (sinister action of interest included,) are liable to have place. It requires, indeed, to be authenticated, a distinct purpose, for which evidence is necessary: but, in general, authentication is a matter little exposed to doubt; and, moreover, proveable by witnesses in abundance, none of whom are exposed to the action of any of the causes of untrustworthiness.

Hearsay evidence presents always two witnesses, viz. the deposing witness, and (unless when the deposition is a mere fiction) the supposed extrajudicially stating or narrating witness: two witnesses, and the causes of untrustworthiness repeatable upon each.

In case of mendacity on the part of the deposing witness, the evidence is exposed to a cause of falsehood, against which the extrajudicially written evidence is comparatively secure. The fact, that, by such or such a person, such or such words, or words to such or such an effect, were spoken, is a fact of the evanescent kind, — not of a nature to leave behind it, in any case, any physical traces, capable of operating (if it be true) in confirmation of it, in the character of circumstantial evidence.

Even in case of veracity on the part of the deposing witness, the evidence is exposed to a cause of error to which extrajudicially written evidence is not exposed. In the case of extrajudicially written evidence, the discourse being in written or other permanent characters, the tenor of it is fixed; whereas, in the case of hearsay evidence (especially if the discourse run into length,) it is frequently impossible for the deposing witness to speak to the very words; and then comes the uncertainty whether, of the words really spoken, the purport attributed to them by the deposing witness be a faithful representation — whether, and how far, the interpretation put upon them by the deposing witness is correct.*

To multiply in this way the number of hearers, not under any engagement of secrecy, will be to multiply the number of persons by whose conversation the story may be conveyed to some who will know it to be a lie, viewing at the same time in the person of the contriver the author of that lie. Thus, of a story which can be of no use to his purpose till after his death, the credit will have been destroyed in his lifetime.

Upon the whole, it appears that, so long as the supposed extrajudicial witness is not exempted from cross-examination, mischief in the way of misdecision would often ensue from the exclusion either of casually written or of hearsay evidence, and no adequate danger is to be apprehended from the admission of it.

If, indeed, the extrajudicial witness were exempted from cross-examination, and his unsanctioned and unscrutinized statement (or, in the case of hearsay evidence, his supposed statement) were received during his lifetime in the place of his judicial testimony, much danger of misdecision would be the result, — for, in this case, as any sort of man, the most untrustworthy, might, for the purpose of any suit whatsoever, without any the smallest danger to himself, make evidence, either for his own purpose, or for the purpose of any one who suborned him, — such evidence, being on every occasion at the command of any person, would, in point of trustworthiness, in the eye of reason, be worth nothing.

If, then, on this consideration, it were never to receive credence in any case, justice would be deprived of the benefit of it in all such cases in which, had it been adduced, it would have been true, and (as such) conducive to the ends of justice. If, on the other hand, it were in general to be admitted, and receive credence, it would be but too apt to be received in cases in which it would be false and deceptitious, the known security with which it might be manufactured and exhibited, would occasion its being manufactured in a multitude of instances without stint. False claims, in a number altogether unlimited, would be set up on the mere ground of the support to be given to them by this evidence. and, since the nature of the evidence admits scarce any means or chance of distinguishing false from true, the number might be so great, that, in every instance in which credence were given to this sort of evidence, deception and consequent misdecision on the part of the judge would be a result more probable than the contrary.

Here, then, would be a double mischief: the two opposite mischiefs of undue credence and undue discredence, running on at the same time. Out of twenty false claims, set up on the ground of this evidence, suppose it to obtain credence in one only, and to be discredited in the nineteen others. The amount of the injustice thus done in the one case out of twenty, would itself be an enormous evil: this evil would be the result of undue credence. But the nineteen instances in which it were discredited, would be sufficient to throw a general, and to a considerable degree indiscriminating, discredit upon this species of evidence the consequence would be, its being discredited in a number of instances in which, it being true, the discredit thus cast upon it would be productive of misdecision and injustice.

True it is, that — on the supposition that it were generally known to be admissible, when, from death or other causes, the extrajudicial witnesses were no longer exposed to cross-examination — motives for the fabrication of it, in the hopes of its serving a man's purpose after his death, would not be altogether wanting. But as, in such case, the inducement for the fabrication of it would, in comparison, be extremely feeble. the quantity of it fabricated, if any, would be proportionably inconsiderable. The instances, if any, in which it were thus fabricated, and false, would scarcely be equal in number to the instances in which it would be true, and conducive, or even necessary, to the fulfilment of the ends of justice. But in the instances in which it were false, it would not follow by any means, that because admitted it must obtain credence and be regarded as conclusive. The possibility of its having ori-

* In this particular, however, what ought not to escape observation, is, that the meaning of words spoken on an extrajudicial occasion, in the way of statement or narration, concerning a fact to which it may happen to form the subject of an article of evidence, is not more liable to be misconceived, than the meaning of any set of words to which it happens to be considered as constituting the matter of an offence: words, for instance, in respect of which the utterer is charged with defamation; or words by means of which the utterer is considered as having instigated to, or, by instruction, assisted any other person in, the commission of that or any other offence whatever.

ginated in the characteristic fraud, would be an obvious objection — a species of psychological circumstantial evidence, that could never fail to be opposed to it: and, being by the supposition false, it would find itself counter-evidenced and opposed at the same time by as many true facts as happened to be brought forward by whatever true evidence the cause happened to afford. Under these circumstances, there seems little danger of its being taken for more in each given case, than in that same case it were really worth: no more in the case of this *transmitted* evidence, than in the case of immediate evidence.

CHAPTER VI.

OF SUPPOSED WRITTEN EVIDENCE, TRANSMITTED THROUGH ORAL, OR MEMORITER EVIDENCE.*

THE supposed written evidence may either be of the nature of casually written evidence, or of written preappointed evidence (private or public, contractual or official.)

Its trustworthiness will accordingly be varied according to the nature of its supposed source: the medium through which it is transmitted, being supposed the same in both cases.

When the alleged writing (supposing it oral) is of the nature of casually written evidence, the report thus made of it from memory, it is evident (be the reporter who he may, be he in all respects ever so trustworthy,) must in trustworthiness be inferior to what the article of casually written evidence would have been, had it itself, and without passing through any such medium, been presented to the senses of the judge.

In the case of memoriter evidence of this description, the characteristic fraud is this:— For his own advantage, or for the advantage of a person dear (privy or not privy,) Stellio, having fabricated or altered a script, puts it in the way of Memor, and then withdraws it again; to the end that Memor, having informed himself of the contents, may, on being judicially examined, report them in the character of a memoriter witness.

In respect of trustworthiness (the characteristic fraud out of the question,) in a general point of view, this species of transmitted evidence may be apt to appear scarce distinguishable from the more ordinary modification, supposed oral through oral, *i. e.* hearsay evidence. In the supposed source of information consists the only difference: the *medium*, the chief source of deception, is the same.

On a closer examination, it will present some not altogether inconsiderable differences, resulting principally from the nature of the script, as above diversified.

To understand the relation, and measure the difference, a distinction must be made between the danger of mendacity, and the danger of incorrectness.

In the case of a supposed script amounting (if genuine) to no more than an article of casually written evidence, much of course will depend upon the particular nature of the script. If it be altogether anomalous, such as a letter, or a loose memorandum made not in the way of any regular business, — the difference in this respect between feigned memoriter evidence, and feigned hearsay evidence, will be scarce discernible. If it belong to any regular class of scripts, such as the shop-book of a shopkeeper, or any book of accounts kept in regular form, though by a person not embarked in any profit-seeking occupation, — the sphere of mendacious invention will be proportionably confined. To obtain credit, the supposed script, according to the mendacious account given of it, must wear a certain degree of conformity to scripts of the like sort. It must be so far consistent with those true facts which the nature of the case cannot but afford, as not to be exposed to receive contradiction, on the ground of improbability, from circumstantial evidence.

In the case where the script was, or (if it had been really existing) would have been, an article of preappointed evidence — say an article of contractual evidence (a deed of conveyance) — the field of mendacious invention is in general still more narrowly limited: though, in this respect, much of course will depend upon the nature of the deed: and so in the case of official evidence.

In the case of an article of contractual evidence, a man's chance for succeeding in his plan of imposition will depend not only on his acquaintance with the circumstances of the parties or supposed parties, but on his acquaintance with the dispositions made on that subject by the law.

In like manner, in the case of an article of official evidence, his success will naturally be more or less dependent on his acquaintance with the course of business as carried on in the particular office.

By this necessity of appropriate information, as a condition *sine qud non* to the plan-

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* In its original import, the term *memoriter* is not more properly applicable to this modification of transmitted evidence, than to hearsay evidence: since the subject of recollection, or pretended recollection, may as well be a supposed oral, as a supposed written, discourse.

But, in the language of classical education, the term *memoriter* is already in use, to designate the sort of exercise which consists in getting by heart, committing to memory, a portion of a book — a portion of a poem, for example.

Even in the age of original Latinity, *memoriter habita oratio*, says Cicero (*Academ. Quest.* iv. 9.,) to express a speech composed and got by heart.

ning and carrying on an imposition of this kind with any promising prospect of success, — not only is the source of danger reduced to the testimony of a comparatively narrow description of persons, but to that sort of description of persons who, by reason of mental culture and situation in life, may naturally be expected to be above the ordinary level in point of trustworthiness.

In respect of the danger of incorrectness (mendacity out of the question,) where, as here, the source of the evidence is a discourse fixed by the permanent signs of written discourse, it seems to possess a probative force considerably stronger than ordinary hearsay evidence never consigned to writing

In the case of a purely oral discourse, the original received its birth and death at the same instant: the impression left by it on the conception, however faint, cannot at any subsequent time be strengthened however incorrect, it can never afterwards be corrected. In the case of a discourse committed to writing, what is possible, indeed, is, that the glimpses caught by the eye may have been as faint or as incorrect as the glimpses caught by the ear, in the other. On the other hand, nothing hinders but that the view taken of it may have been as attentive, as correct, and as often repeated, as could be desired

For the reason given above, the chances in favour of correctness may naturally be expected to be in general somewhat greater in the case of the preappointed, the contractual or official script, than in the case of the purely casual article of written evidence In the case of the contractual species of script (the deed of conveyance more especially,) the memory of the idiosyncratic particulars will naturally (to a professional, or in other words practised, mind) be assisted, and the field of recollection narrowed, by the general form of the species of deed — by those parts of the context which belong in common to deeds of that sort.

CHAPTER VII.

OF SUPPOSED ORAL EVIDENCE, TRANSMITTED THROUGH WRITTEN; OR MINUTED EVIDENCE.

If the person by whom the minute is supposed to have been taken, be an official person, acting in virtue of his office, — and the discourse which he is committing to writing be the discourse of a person by whom, on the delivery of it, he is addressed in his official character, — such evidence is a species of preappointed evidence — preappointed official evidence: and, in a word, if the purpose for which, or occasion on which, the minute is thus made, be a judicial purpose or a judicial occasion, the discourse thus orally exhibited and minuted is neither more nor less than a mass of judicial testimony. The minutes taken of the deposition of a judicial witness, whether spontaneously exhibited, or extracted by interrogatories, — taken whether by the judge himself, or by a scribe of his in his presence, — belong to this head of evidence.

If the person by whom the minute is supposed to have been taken, be not an official person, this species of evidence is of a nature that presents itself as having been already included (or at least as capable of being included) under the denomination of casually written evidence.

If, in a memorandum or letter, mention be made of a supposed fact, that fact may as well consist of a discourse supposed to have been holden by another person, as of anything else. If mentioned as being holden by another person, it may be mentioned as being holden by him either at the very time of its being thus committed to writing (as in the case of a judicial deposition or examination, as above mentioned,) or at any preceding point of time, separated from *that* point of time by any distance.

In general, the judicially scrutinized testimony of any given person will, in all points taken together, be more trustworthy than the casually written evidence of the same person — a memorandum or letter written by him Yet instances are not wanting in which casually written evidence will present a preponderant probability of standing the closest to the truth

In the presence of Oculatus, a transaction takes place, of which, on that same day, he gives an account in a letter to a friend. Suppose Oculatus a man of probity, and either not exposed to the influence of any sinister interest, or too firm to be drawn aside by it; and suppose, at the same time, that either discernment or accident has rendered his account of it, not only correct as far as it goes, but complete, nothing can be more evident, than that such a letter will present a much more satisfactory account of the matter than could reasonably be expected from the judicial testimony of the same person, examined, though in the best mode, at a distance say of twenty or thirty years after the event.*

Cæteris paribus, the chance which an article of casually written evidence has of being superior in trustworthiness to the judicial testimony of the same person, will be in the direct ratio of the interval of time elapsed between the day of the event and the day of the examination.†

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* A witness would be allowed to refresh his memory by looking at such a letter, although the letter itself would not be allowed to be given in evidence, as proposed by the Author, below.— *Ed.*

† Or, to speak more correctly, instead of the day of the examination, we should rather put the

The length of time, as above, being given, —the advantage of the casually written evidence, in comparison with the judicial testimony, will be inversely as the apparent relative importance of the transaction, the importance which it possesses in his eyes. The real absolute importance will no otherwise contribute to strengthen in his mind the impression made by it, than in as far as its eventual importance happens to be apparent to him, and to be the same in the instance of that particular individual as it would be to an average individual in his place.

Nor, in ordinary instances at least, will the importance of the fact, any other than its relative importance with respect to the percipient witness himself (that is to say, its connexion, real or supposed, with his own happiness,) afford security for permanence and accuracy of recollection.

The state of the witness's mind at the time is another circumstance by which the strength of the impression made by the transaction at the time, and thence the strength and accuracy of his recollection of it, cannot but be in a very considerable degree influenced. If, by business of a more interesting nature to himself, his attention be pointed another way, —especially if, by the urgency of it in point of time, his mind have been put into a *hurry*, —the impression made by the transaction in question may be slight, indistinct, and fleeting, and his recollection of it proportionably uncertain and confined; although, in other circumstances, the impression made by a transaction of that same nature might have been sufficiently strong, distinct, and permanent.

A still better, and in every case without exception a more trustworthy, lot of evidence, than can be constituted by judicial testimony alone (how well soever the examination be conducted,) is that which consists of the judicial testimony of the same person, with an article of casually written evidence of his inditing (a letter or memorandum of his penning) at the time (or, if after, the sooner after it the better) for his assistance, the script being at the same time produced, or, at the demand of either party, ready to be produced. Against incompleteness on either side, there is the security afforded by examination and cross-examination against mendacity and bias on one side, there is the security afforded by cross-examination, against simple incorrectness on either side, there is the security afforded by the fortunate script, the fortunate letter or memorandum, the article of casually written evidence.

This composite sort of evidence, when the written element happens to present itself, may be regarded as a sort of super-ordinary lot of evidence, still better than that which in general passes under the denomination of the best. But, eligible as it is when it is to be had, it would evidently be a vain arrangement to exact it in all cases, or even to place it upon the footing of regular and ordinary evidence, since the existence of it is merely fortuitous, depending altogether upon the free pleasure and accidental disposition, as well as literary endowments, of the witness. If it could be required by law, it would come under the notion of preappointed evidence.*

day on which the recollection of the witness came to be pointed to the subject, by the information that his testimony, in the judicial form, would be called for.

CHAPTER VIII.

OF SUPPOSED WRITTEN EVIDENCE, TRANSMITTED THROUGH WRITTEN; OR TRANSCRIPTITIOUS EVIDENCE.

§ 1. *A transcript, what — Modes of transcription.*

ON the occasion of this, as of other modifications of transmitted evidence, the main objects of inquiry are still two: — 1. What shall be received? and, 2. Whatever comes to be received, by what consideration shall the estimate formed of it, in respect of comparative trustworthiness, be directed?

But, previously to our entrance into this inquiry, the bounds of the object must be previously fixed, and its several modifications distinguished.

By a *transcript*, taken in its largest sense, may be understood any discourse which, being expressed by permanent signs or characters, is proposed as capable of producing, in the way of evidence, the same effect as another discourse, which, being also expressed by permanent signs, is with reference to it termed the *original*.

Under this most general description are comprehended three modifications. —

1. A transcript which is such *in tenor*: a copy taken *verbatim et literatim*.

2. A transcript *in purport only*, without being such in tenor. Couched in a set of words more or less different, it contains what is looked upon as conveying precisely the same sense. To this head belong *translations* made into other languages.

3. A transcript *in effect only*. Not professing to contain so much as the purport of the original, at any rate not the whole of the purport, it professes to contain that which, with reference to the purpose in question, is sufficient for the purpose. To this head belong *extracts* and *abridgments*.

* A mass of evidence of this description may be considered as constituting either one complex lot of evidence, or two simple ones emanating from the same source: whether it be to be spoken of under the one denomination or the other, is manifestly a mere question of words.

A transcript in tenor is a transcript both in purport and effect: a transcript in purport is also a transcript in effect.

A transcript in tenor is that modification which seems the most apt to be presented by the word; but the others have little less claim to consideration, and they also may be naturally expected to be considered under this head. Let this be examined in the first place. Whatever is said in relation to this principal and most proper modification, will serve as a model and standard of reference for whatever there may be occasion to say of the two others.

For making transcripts (understand transcripts in tenor,) the word transcript being taken in the most extensive sense, there are divers modes, performed by so many correspondent operations. Not being altogether upon a par in respect of probability of correctness, they require on that account to be distinguished:—

1. One is, writing, in the more common and confined sense of the word writing with pen and ink. This is the most in use, except in the case where transcripts of the same original are required in large numbers, as in the case of

2. Printing: including the old-established mode by moveable types, and the mode o modern invention in solid masses, called stereotypage.

3. Engraving, in the case where the characters are to be taken off in the way of impression: as in the ordinary case of engraving on copper, pewter, wood, glass, &c.

4. Sculpture: in the case where no impressions are meant to taken off.

5. Painting in various ways · which is but an elaborate mode of writing, comparatively of little use.*

In the case of the recently invented mode of writing with two or more pens at once, the distinction between original and transcript has, it is evident, no place: except in so far as, by an independent act of authentication, one or more of such draughts or copies should come thus to be distinguished from the rest.

So in the case of the anteriorly invented mode of taking off impressions from writing.

As between one mode of transcription and another, the probability of correctness, fraud apart, will depend on the following circumstances:—

1. The number of persons employed in the making and verification of the transcript.

2. The degree of attention requisite, and naturally to be expected, on the part of each.

3. The degree of publicity with which errors in general will, in the instance of each, be likely to be known and noticed.

On all these accounts taken together, printing seems to present a superior chance for correctness, in comparison with writing.†

As, by writing, a transcript may, for practical purposes, be, by means of due examination and verification, put upon a level with the original; so may printing, and with still greater facility and certainty

In the case of laws, and all other documents of a public nature that are consigned to print, the printed copies ought to be placed, by appointment of law, upon the same level as the original.

Reason. In the case of laws, the printed copy is the only standard to which access is rendered possible to the people, who, at their peril, are bound to pay obedience to them.

In whatsoever cases forgery in the way of writing is made punishable, forgery in the way of printing, for the same purpose, ought to be made punishable in the same manner.

Examples:—

1. Forgery of laws, whether in the way of fabrication or falsification.

2. Forgery of a deed of administration; such as proclamations, nominations to offices, orders issued to public functionaries.

3 Forgery of articles of intelligence, or

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* Add to these *lithography*, which, when this work was written, had scarcely been applied to the multiplication of copies of a written document.—*Editor.*

† Why so? 1. Because in the natural state of things, the printer, having no particular interest in any legal use to which it may happen to the document to be applied, occupies in this respect a station analogous to an official one. By a printer, I mean a person exercising his function in the ordinary way of trade: not to speak of a printer employed in the printing of laws or other legal documents, by authority of government. 2. Because the printer is in every instance either actually known, or capable of being known, as the workman of his own works: his livelihood depends upon the reputation of them in point of correctness; and the correctness or incorrectness of them is subjected to the eyes of a number of witnesses and judges, greater beyond comparison than usually has place in the case of any transcript performed by hand.

Superior as this mechanical mode of imitation is in the character of a security against incorrectness, it is, at the same time, deficient in the character of a security against spuriousness:—but, in this character, nothing is more easy than to put it upon a level with the manual script or transcript; whatever mark of authentication (signature of the name, for instance) serves for impressing the character of authenticity upon the whole tenor of a sheet of manuscript, will serve, in a degree not inferior, for impressing the like character upon a sheet of letter-press: will serve, and in a degree considerably superior. On an instrument written in manuscript, interpolations and other alterations are introducible but too easily, especially if performed by the same hand: in the case of letter-press, any such alterations are as yet, perhaps, without example; and might, at any rate, be made impracticable.

advertisements, in a newspaper published under the direct orders of government.

4. Forgery of articles of intelligence, or advertisements, in any private newspaper, the appearance of the paper current under that title being counterfeited by a person other than the accustomed publisher

Reason: In the case of fraud, if any one of the possible modes of transcription were left unincluded in the penal consequences, fraud in that shape would be without a check, and being, as often as it succeeds, alike mischievous, in whatever shape, there is no reason why it should be exempted in one shape, more than in another.

In regard to a transcript professing to be such in tenor, a distinction must be taken between a transcript verified, and a transcript unverified, or (which comes to the same thing) not known to have been verified

By a transcript verified in tenor, I understand a transcript, the conformity of which (*i. e.* of the tenor of it) to the tenor of the original, has been sufficiently established for every judicial purpose, at least for the judicial purpose to which, on the occasion in question, it is proposed to be applied.

Verification is to a transcript what authentication is to an original. By what means this effect may most advantageously be produced, is a topic of consideration that may be posted off to a separate head, with as much advantage, and with as little inconvenience, in this case as in that other, and for the same reason *

Supposing the transcript verified — verified according to the import of the term as just fixed, — it thereby becomes dismissed in effect from the present subject. It is *alter et idem*, a perfect equivalent for the original, it can no longer be considered with propriety — with consistency at least, in the light of makeshift evidence

What follows is, therefore, to be confined in its application to the case of a transcript not verified either not known to have been verified by any means, or at least not known to have been verified by sufficient means.

§ 2. *Sources of untrustworthiness in transcriptitious evidence. Hearsay and transcriptitious evidence compared, in respect of probative force.*

Applied to transcriptural evidence, the description of the characteristic fraud — the fraud liable to be practised without detection, if the transmitted evidence were to be received on the same footing as the original — is as follows. A man falsifies a real original, or fabricates a spurious one, to the end that, a transcript (here understand in tenor) being made of it, the effect of a forged script may be produced; at the same time that, the falsified or spurious original being destroyed, and thence no longer producible, the fraud may by that means pass undetected.

In the case of the characteristic fraud, as above described, the falsity, so far as the written evidence is concerned, is confined to the extrajudicial part of the evidence. The object is distorted, or a fallacious object is fabricated, or the true one falsified; but the medium (for anything that appears) is correct and pure

Here, however, as elsewhere, though complicity on the part of the writer of the transcript (privity, which is as much as to say complicity) is not of the essence of the fraud, neither is it excluded by it. The fraud may have been committed, and, having been committed, may ultimately, or for the time, have succeeded, whether the vice of the original was or was not known to the maker of the transcript, at the time of his making it.

Setting aside the characteristic fraud, — in the case of this, as of other transmitted evidence, for one source of true information, there are two sources of untrustworthiness and deception 1. If there be an original from whence the transcript was made, that original may have been spurious, fraudulently altered, or simply incorrect, 2. The pretended transcript may have had no original, or, being taken from an original, may by fraud or by accident be incorrect

To be spurious or incorrect, whether from mendacious design or from accident, is what may have happened (it may be said) to any single script, considered in the character of an original, or pretended original; and on that account, these causes of untrustworthiness ought not to be set down to the account of the supposed transcript as such. True: but in the case of a script purporting to be an original, and chargeable either with spuriousness or incorrectness, it may happen to it to wear upon the face of it marks of the spuriousness, or marks of the incorrectness, such as upon the face of a transcript would not be equally open to observation.

Moreover, — in the case where the script, to present the appearance of an original, would require to present the appearance of being authenticated (for example, by the person or persons whose discourse it purports to be, with or without the signature of any other person or persons in the character of attesting witnesses,) — if the supposed transcript were, without having been verified, to be received on the same footing as an original, — a person intending fraud would find a much better chance of success and safety in the making of a pretended transcript of the tenor in question, than in the fabrication of a spurious original, or the fraudulent alteration of a really existing one, since the means of

* See Book VII. *Authentication.*

detection capable of being afforded by the spurious signatures in the one case, and the obliterations, additions, or substitutions, in the other, would all be avoided by the expedient of the pretended transcript.

So far as simple incorrectness, the result of accident, clear of design and mendacity, is concerned, this species of transmitted evidence, supposed written through written, will appear much superior in trustworthiness to hearsay evidence, and that whether the supposed script which is the supposed source of the evidence, or the indubitably existing script constituting the medium through which the other is supposed to be conveyed, be considered.

1. As to the supposed original (whether really existing or not,) it may either be of the nature of preappointed evidence, or of the nature of casually written evidence. If it be of the nature of preappointed evidence, the trustworthiness of the discourse contained in it, is, by the supposition, placed, in one way or other, upon a superior footing. The lowest footing on which it can stand, is that of casually written evidence and this (as hath already been seen) presents, in the nature of it, a security against incorrectness, superior to that which naturally belongs to oral discourse. Writing, in the very nature of the operation, requires a degree of attention and recollection more than is required in speaking.

2. On the part of that one of the two persons concerned, whose writing constitutes the medium through which the supposed tenor of the original is transmitted, — the superiority of this modification of transmitted evidence, as well over supposed oral through oral, as supposed written through oral, is easily discernible.

1. In the case of supposed oral through oral, — the judicially reporting witness, at the time when the supposed extrajudicial statement presented itself to his ear, caught it as he could — caught it as it flew. He may have misconceived it from the first — he may have forgotten it in any part, or misrecollected it afterwards. The writer of the transcript has the original all along before him, and commits not to writing so much as a word till he is satisfied that his conception of it is just: and no sooner is a word thus fixed, than the preservation of it is placed on a ground much stronger than any that could be given to it by the firmest memory.

2. In the case of supposed written through oral, — the judicially reporting witness may or may not have had his own time for the forming of his conceptions in relation to the contents of the script. But, let the time actually taken by him have been ever so sufficient, — whether with any, and what, degree of correctness those conceptions have at the time of his deposition been preserved, depends altogether upon the power, the relative power, of his memory.

Supposing fraud entirely out of the question, — in a practical view, the trustworthiness of a transcript will be but little inferior to an original. There are two cases in which an error is of no practical importance: 1. When the words it falls upon are of no practical importance 2. When, though the importance of the words it falls upon be ever so considerable, the correction requisite for it is sufficiently indicated by the context.

The oftener a series of words comes to be repeated, the less probable it is that an unintentional error in respect to any given words should be repeated in each instance: and if there be but a single instance in which it fails of being repeated, the true reading remaining in that instance will commonly serve for the correction of the false readings in all the others. This, of course, will hold equally good, whether in the original script the repetitions were, or were not, necessary to the purpose. Hence an advantage resulting from repetitions that otherwise would be useless: an advantage, though such a one as shrinks to nothing when compared with the disadvantages.

The more rare it is for a mere unintentional error of the transcriber to be productive of an incurable error in the sense, the stronger the indication given of fraud, where the error is material, and material in such a way as to be subservient to any assignable sinister purpose.

On the part of the transcriber, the faculty of conception being so amply assisted, and the use of the faculty of remembrance superseded, — whatever danger of incorrectness from this source remains open, depends upon the accidental deficiency of the faculty of *attention* From the consideration that this is the faculty most exposed to fail, some light may be thrown on the question, which of the three shapes, omission, substitution, addition (in case of honest incorrectness,) the inaccuracy seems most likely to take

1. Omission presents itself as being the most natural. On the part of any given word in the original, a momentary failure of attention to that word may have a correspondent omission for the result: and in this case (if a failure of the conception be altogether out of the question,) a larger portion of a line may with almost equal probability — an entire line with still greater probability, be the result.

2. Substitution of one word for another (in general by means of the substitution of this or that particular letter for another,) seems nearly, if not altogether, as probable as simple omission. What renders it the more probable is, that this species of inaccuracy is

more apt than the preceding to originate in misconception. It may be referable in a greater or less degree to misconception, if, the transcriber being a man sufficiently acquainted with the subject to form a judgment, the transcript, deviating in this way from the original, presents, notwithstanding, an intelligible sense. If the sentence altogether presents either no sense at all, or none but what is plainly absurd and irrational, the transcriber not being altogether disqualified from judging, it is to a failure of attention, and that alone, that the inaccuracy seems referable.

3. Addition of a word—insertion of a word to which no correspondent word exists in the original—is a mode of inaccuracy not altogether without example, but much less frequently exemplified than either of the two others. Judgment, attention, applied to the subject, applied to the original script, cannot be the cause of an inacuracy of this nature: the cause of it, when it does take place, must be sought for in the imagination: it must be considered as a product of the imagination, a production which finds its way into the transcript for want of that attentive comparison with the original, which, by showing the original to have no such part in it, would be sufficient to prevent it from being admitted into the transcript.

The use and object of the above distinctions, in so far as they may be found just, is to give facility to the detection of fraud—to serve for the distinguishing of a case of fraud from a case of honest incorrectness. If, in general, insertion be in any degree less apt to originate in accident than either omission or substitution,—then—if in any individual instance insertion should happen to have been discovered,—in that instance, should any marks of design (which here is as much as to say of fraud) be discovered, this particularly may perhaps be added to that side of the account.

§ 3. *In what cases, and on what conditions, shall a transcript be received in evidence?*[*]

A script being tendered in evidence in the character of a transcript from another, that other spoken of in the character of an original,—shall it, or shall it not, be received?

For the purpose of an answer to this question, seven cases must in the first place be distinguished:—

I. The alleged original is in existence, producible or consultable, and known to be so.

II. The alleged original is in a state of *expatriation*.

III. The alleged original is in a state of *exprovinciation*.

IV. The alleged original is known to have existed, but is known to be no longer in existence.

V. The alleged original is known to have existed; but whether it be still in existence or not, is uncertain.

VI. It is not known whether the alleged transcript be a transcript or not, *i. e.* whether there ever existed a script, from which, in the character of a transcript, its existence was derived.

VII. The alleged original is known to be in existence, but in the power of the adverse party.

To meet these possible modifications in the relative situation of the lot of evidence, there are three modifications of which the conduct of the judge in relation to it is susceptible:

1. It may be received absolutely and unconditionally.

2. It may be rejected absolutely and unconditionally.

3. It may be received conditionally, or according to circumstances, say received *sub modo*.

This last course will, upon the whole, be found, in most cases, the most advantageous one.

Case I. The original known to be producible or consultable.

Rule 1. Where the original is, at the time, producible or accessible, no transcript or alleged transcript ought to be received without some special reason.

Reason. Because, in point of trustworthiness, and with a view to the danger of misdecision, no transcript can ever be, strictly speaking, exactly upon a par with the original. If, then, the original be produced at the same time, the transcript (except in the cases immediately following) is superfluous, and the

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[*] The rule of law relating to transcripts is thus laid down by Phillips:—"Examined copies, and the parol evidence of witnesses, are the ordinary and regular proof of the contents of lost writings. But when a written paper has been traced into the possession of one of the parties to the suit, who does not produce it after receiving a notice, something less than an examined copy may reasonably be admitted as sufficient, at least to oblige the party to give better evidence, by producing the paper itself, if he finds the secondary evidence incorrect." 1 Phil. Evid. p. 439, 440. In the case of Pritt *v.* Fairclough, 3 Campb. 305, an entry by a deceased clerk, in a letter-book, was admitted as evidence of the contents of a letter, the receipt of which was acknowledged by the defendant, but which letter was not produced at the trial when required. This case was remarkable for the following dictum laid down by Lord Ellenborough:—"The rules of evidence must expand according to the exigencies of society." It is much to be lamented, that the Judges, as a body, have not courage enough to act upon this dictum, and sweep away these exclusionary rules, which are in such direct opposition to the exigencies of society,—in other words, to the ends of justice.—*Ed.*

vexation and expense incident to the production of it, uncompensated: if the original be not produced, the transcript may be deceptitious.

Rule 2. Where, on the occasion in question, the original cannot, without a considerable degree of difficulty, be referred to and perused,—in such case, a transcript in tenor, purport, or effect, as the case may be, may be exhibited in addition to the original, and at the same time.—Examples:

1. The original, in respect of obsoleteness of language, or handwriting, or both, difficult to be conceived or perused, and read with fluency.

2. The original conceived in a language (dead or living) other than the current language: (in this case, the transcript will be a transcript not in tenor, but in purport or effect.)

3. Where not the whole of the original, but a particular part or parts only, are applicable to the purpose in question, in the character of evidence: especially if the relevant portions be more or less scattered, and distant from each other. In this case, the transcript is of the nature of an extract or abridgment: a transcript neither in *tenor*, nor (throughout at least) in *purport*, but only in *effect*.

Rule 3. So, where, on the hearing of the cause, for the convenience of consultation, a number of copies are wanted at the same time.

Rule 4. For special preponderant reason, a transcript may, in every instance, under appropriate conditions, be received *instead* of the original.

Rule 5. Such reason will, in every instance, be reducible to some one or more of the modifications of collateral judicial inconvenience (viz. delay, vexation, or expense,) considered as resulting from the production or consultation of the original, over and above what would result from the production or consultation of the supposed transcript.

Rule 6. Of the cases in which it may happen that the production of the original in the first instance shall be productive of preponperant inconvenience in the shape of delay, vexation, and expense, the following may be examples:—

1. Where, at the time in question, it happens to be lodged in a place out of the dominions of the state.

2. Or in a place within some province beyond sea, or other widely distant province—(viz. with reference to the seat of the tribunal to which the evidence is to be presented.)

3. Where the original script in question forms part of a volume, which cannot conveniently be removed from the repository in which it is kept, by reason that other parts of its contents are requisite to be kept in that same place for other purposes.

Rule 7. When (for the avoidance of delay, vexation, or expense) a transcript is received in the place of the original, its faithfulness ought to have been previously established in the most trustworthy manner, or—if (for the avoidance of delay, vexation, and expense) not in the manner the most trustworthy of all—in the manner the next most trustworthy that shall be compatible with the avoidance of a preponderant degree of such collateral inconvenience.

Rule 8. With reference to the adverse party—the party against whom the lot of evidence is produced,—its fidelity will have been established in the most satisfactory manner, when such adverse party, by himself or his more competent agents, having (upon sufficient opportunity of access) compared the transcript with the original, finds the transcript equivalent in every respect to the original, in point of *effect*.

Rule 9. But no script ought ever to be received (except as by the next rule) in the character of a transcript, in lieu of the original (as above,) from the hands of any suitor, without a declaration upon oath, on the part of him or his law-agent, declaring the fact of his having examined it by the original, and of the persuasion he entertains of its fidelity.

Rule 10. If the transcript—having been examined by the original, and appearing upon the face of it so to have been, by some appropriate official person,—has thereupon been certified to be correct,—the party so tendering it in evidence is not bound so to re-examine it: but neither in this case should the declaration of his own persuasion respecting the fidelity of it be omitted; although such persuasion have no other ground than the general consideration of the security afforded by this species of preappointed evidence.

Reason 1. A possible case is, fraud on the part of the official examiner, by collusion with the party tendering the evidence.

2. Error on the part of the official examiner, viz. to the advantage of the party, and discovered by him by accident.

Case II. The original known to be in a state of expatriation.

This case is, upon the very face of it, a modification of the first case. but, presenting a demand for an appropriate set of arrangements, it requires to be arranged under a separate head.

In the case of transcriptural evidence, expatriation of the script is analogous to expatriation of the person in the case of casually written and hearsay evidence. The arrangements demanded—though, by reason of the different nature of the subject-matter, they will not *in terminis* coincide with the arrangements suitable to those two preceding cases—will, under the guidance of analogy, be naturally indicated by them.

Rule. Where, in regard to a script proffered in the character of a transcript, it is ascertained or believed that the original is in a state of expatriation, — let the following arrangements await the option of the judge. —

1. To cause the transcript to be sent abroad (viz. to the place where the original is kept,) for examination, and attestation of verity.

2. To cause a fresh transcript from the original, duly verified, to be imported and produced.

3. To cause the original itself to be imported and produced, if practicable, and without preponderant inconvenience.

Any one of these arrangements to be taken, or none, according to the importance of the cause, the importance of the article of evidence in question in relation to the cause, the degree of persuasion respecting the faithfulness or unfaithfulness of the transcript, and the comparative degrees of inconvenience, in the shape of delay, vexation, and expense, attached to the three respective courses

A time to be declared, subject to abbreviation or enlargement for sufficient cause, at the expiration of which, if the intended operation chosen (as above) be not performed, it shall be regarded as impracticable.

The provisional decision to be in favour either of the party proffering the evidence, or of the adverse party, and in either case, with or without security taken for eventual reinstatement.

Observations Unless the non-existence of the alleged original, or the unfaithfulness of the transcript in all material points, be believed — even although there should be no other direct evidence of the existence of the original than the judicial testimony of the party, nor of its faithfulness, than his declared belief, — the judge will scarcely refuse to pronounce the provisional decision in favour of the faithfulness of the transcript, taking security for reinstatement in case the result of the reference so made to the original should prove unfavourable For the reasons why, see the examination of Case VI further on.

Case III. The original known to be in a state of exprovinciation.

This case is, also, upon the face of it, a modification of Case I.: a modification closely analogous to the last preceding case, the case of expatriation. The arrangements requisite to be taken will, in their general description, coincide with those already brought to view in that last-mentioned case, but, in detail, the description of them will obviously require to be, in various particulars, different. In the case of expatriation, everything that can be done is more or less dependent upon the facilities given or withholden by the government in the foreign state: in the case of exprovinciation, it depends upon the arrangements taken in that behalf by the government in the state in question — in the same state.

Rule. Where, in regard to a script proffered in the character of a transcript, it is ascertained or believed that the original is in a state of exprovinciation, — let the same arrangements as in the case of expatriation await the option of the judge, subject to such arrangements, if any, as may have been taken in this behalf by the legislator, the common sovereign of both provinces.

Observations. As far as local distance is concerned, the quantum of delay, vexation, and expense, attendant upon that circumstance, may be as great in the case of exprovinciation as in that of expatriation; — the only uniform difference between the two cases consists in this, viz that, in the case of exprovinciation, access to the original, or the production of it, will be at the command of the government of the country in which the transcript is thus proffered, in the case of expatriation, not

Case IV. The original known to have existed, but to be no longer in existence.

Rule Where, in regard to a script produced in the character of a transcript, it is known that an original script from whence it was transcribed was once in existence, but that it is no longer in existence; let the transcript be received in place of the original, subject to whatever considerations may be alleged in diminution of its trustworthiness.

Reason. Neither fraud, nor material incorrectness, are to be presumed both cases are, in comparison, extremely rare. In this case, forgery in the way of fabrication is by the supposition out of the question An original to the transcript there really was the only question is, whether the representation given of it by the transcript be substantially a faithful one. If for every thousand transcripts there have been one unfaithful one, and no more; on this supposition, the probability of misdecision, even supposing the unfaithful transcript to obtain credence, is but as a thousand to one, whereas, on the other hand, if the transcript be necessary to warrant the decision prayed for on the side of him by whom it is proffered, and being so, is rejected, misdecision, in case of rejection, is a certain consequence.

Or say thus If, in every ten transcripts of each of which the original has ceased to be in existence, whereupon the transcript has been proffered in evidence in its stead, there has been one unfaithful and no more; then, in case of admission, the probability of misdecision is, at the utmost, but as one to ten; whereas, in case of rejection, it is certain.

Previously to the deperition of the original, no fraud in any shape can have existed, unless at the time of the fraud the deperition

had been foreseen; which it could hardly have been, unless an intention of procuring such deperition had formed a part of the fraudulent contrivance: no fraud in any shape, either by, or by the help of, purposed infidelity on the part of the transcriber, or by the like on the part of an examiner; or by forgery in the way of falsification, committed by another person at a time posterior to the examination. always understood and supposed that, according to the known dispositions of the law, so long as the original is in being, the transcript cannot be received on any terms; or not but upon the terms of being confronted with the original, in case of dispute.

No sooner, however, is the deperition known, than the check which the existence of the original opposed to forgery in the way of falsification is at an end. The transcript becomes, in that event, at that period, exposed to falsification; to wit, as much as an original would have been, but no more. the transcript, as such, is not on this score less trustworthy than an original would have been in its place.

Here, if the author of the falsification was the party by whom the transcript is proffered in evidence, the most natural case is, that, for the purpose of giving room for the falsification, it was by him, or by his means, that the deperition of the original was procured: but another possible case is, that the deperition took place without his participation, for example, by accidental fire, or in some other way by mere accident; and. the opening to fraud being thus made, then it was that it occurred to him to take advantage of it.

If it be clear that, from the time of the deperition of the original down to the time of the production of the transcript, the transcript has never been either in his custody, or, to any such purpose, in his power, — all suspicion of fraud on his part of course falls to the ground.

As to mere *accident;* in one point of view it should afford no reason at all for the rejection of a proffered transcript in this case. For (design being by the supposition out of the question) an incorrectness, even supposing it material, is not more likely to operate to the prejudice of one party than of another. the chances of advantage and disadvantage being, therefore, equal, and that with reference to each party, their situations are respectively the same as if there were no chance either of advantage or disadvantage on either side.

But this circumstance is not altogether destructive of all probability of misdecision from this source. Whether the incorrectness be taken advantage of or no, will depend upon that one of the parties in whose custody or power the transcript is; if the error be to his disadvantage, and he aware of it, he will either not produce the transcript at all, or not without pointing out the error, and claiming the benefit of its being corrected; if it be to his advantage, and his disposition be to such a degree dishonest, he will in that case take advantage of the error, although he had no part in the production of it.

If, from the above considerations, the cases on which the investigation turns seem far-fetched and improbable, — the more far-fetched and improbable the cases appear on which the investigation turns, the clearer will be the impropriety of any rule, which, in the case supposed, should pronounce the exclusion of transcriptural evidence

Case V The alleged original known to have existed; but whether it be still in existence or no, is uncertain

Rule. When, in regard to a script produced in the character of a transcript, it is known that an original script from whence it was transcribed was once in existence, but whether it be still in existence is uncertain, — let the transcript be received in evidence: but, in the framing of the decision grounded on the evidence, for the avoidance of irreparable injustice, let the same arrangements await the option of the judge, as in the case where (as above) the original is known to be in a state of expatriation.

Case VI. A script purporting upon the face of it to be a transcript, is proffered as such, but the existence of the supposed original has not been ascertained

Rule. It may sometimes happen that a script, purporting or appearing upon the face of it to be a transcript taken from some original of the same tenor, purport, or effect, shall be proffered in evidence to serve in place of the supposed original, at the same time that no other direct evidence of the existence of such original is producible In such case, let such supposed transcript be received in evidence for what it appears to be worth; subject always to the double uncertainty whether any such original as it purports to have been transcribed from, ever existed, and whether, supposing such original to have existed, the supposed transcript in question be a sufficiently faithful transcript of it.

In some modifications of this case, the persuasive force of an article of evidence of this description may be of itself very slight and inconsiderable. At the worst, however, it will operate as a lot of circumstantial evidence, evidentiary of the existence of a correspondent original; and it is of the nature of circumstantial evidence to be susceptible of any degree of persuasive force: and, as circumstantial evidence, be it in what shape it may, cannot be too slight to be received, in company with other evidence, so neither can it in this.

If the supposed original be an article of casually-written evidence, it may be extremely difficult to determine whether the script in question be a transcript of an original of the same tenor or effect, or whether it may not itself be an original, not having been transcribed from any other (See below, § 5.)

In the case where the supposed original (supposing it to exist) must have been an article of preappointed evidence, it will in general be sufficiently apparent that the script in question—the alleged transcript, if it had not an original, could not itself be an original. Why? Because the original, being by the supposition an article of preappointed evidence, (for example, an instrument of agreement or conveyance,) will have been furnished with some intrinsic marks of authentication, prescribed or customary, such as could not, without forgery, be given to a transcript.

In this case, another doubt may also arise concerning the alleged transcript,—viz. whether it be a transcript from an original actually authenticated, or only a preparatory sketch or draught of an instrument to the same effect, not at that time authenticated. In the former case, a correspondent original must, by the supposition, have existed: in the other case, though intended, it may never have existed. In the former case, it is of the nature of that species of circumstantial evidence, distinguished on a former occasion by the name of *posteriora priorum* evidence, on the other, of the opposite nature, *priora posteriorum* evidence.

If, upon the face of an original of the nature in question, a certain formulary of attestation (whether by positive appointment of law, or by custom) be generally to be found,—the difference between a transcript and a preparatory draught will, in general, not be difficult to decide. If it be a transcript, the formulary of attestation will hardly have been omitted in it; if it be but a preparatory draught, no such formulary can make part of it.

The most suspicious modification of this case is where a party proffers in evidence a script, which, according to his account of it, is a transcript, in tenor, purport, or effect, made from an original instrument, of the nature of preappointed evidence (contractual, for instance, or say an agreement or conveyance;) which instrument, he says, was once in his possession (or in the possession of some person to whose interest he succeeds in quality of representative—suppose his ancestor or testator,) but is now, to use the common expression, *lost*: i. e. not that he knows of its having perished, or has any particular reason for supposing it to have perished; but that, after every search he can make, he has not been able to find it, nor can think of any place, as yet unsearched or uninquired at, at which he sees any probability of its being found.

This sort of case lies obviously open to the characteristic fraud. It may be, that no such original instrument was ever in existence; and that the party, not choosing to run the hazard of forging, in the way of fabrication, any pretended original to the same effect, makes and produces this pretended transcript, regarding the fraud in this shape as being more promising in point of success, or less exposed to danger.

What, on the other hand, may also be, is, that a genuine original to that same effect was once, and perhaps still continues to be, in existence, but, by the operation of some cause altogether out of the reach of his knowledge or conjecture, either was destroyed, or was concealed or removed out of his knowledge. But, as neither judicial mendacity, nor fraud in any other shape, ought to be *presumed*—i. e. regarded as certain, without special inquiry and consideration into the idiosyncrasy of the case,—the state of things in question, though a ground of suspicion, forms no sufficient ground for the absolute rejection of the evidence.

This, in the most suspicious form that it can assume, is but a modification of self-serving evidence, of which, even in its most questionable and least trustworthy shape, it has already been in some degree, and will hereafter* be more fully, shown, that it ought not in any case to be absolutely excluded; much less where, as here supposed, the party is subjectable to *viva voce* cross-examination upon oath.

By whose hand was the alleged transcript made? By that of the party by whom, in the character of a transcript, it is proffered in evidence? It is in this case so obviously exposed to suspicion, that it seems little in danger of being accepted for more than it is worth. Is it in the handwriting of another person? Then there must have been some other person concerned in the business, and (if not imposed upon) privy to the fraud. If, in respect of punishment, a fraud of this kind is placed (as it ought to be) upon a level with ordinary forgery,—in such case, the danger incurred by the admission of this transcriptural kind of evidence differs but inconsiderably from the danger inseparably attached to the admission of preappointed but unregistered contractual evidence in general; since all such evidence, being unregistered, is liable to be forged.

If the party disguises his hand, to make it look like that of another person, a question that cannot fail to be put to him is, who the writer is. In this case, whether he names a particular individual, or declares that he

* Book IX. *Exclusion.*

knows not who it is, here at any rate is a case of judicial mendacity, superadded to a fraud which ought likewise to be considered as a modification of forgery. If the person named by him be a living individual, then the individual is living to contradict him. if an individual now dead, there will be other writings, the genuine writings of that same individual, to confront with this forged and spurious script: if it be an individual of whose hand no specimens are to be found, then comes the species of counter-evidence constituted by the improbability of the alleged fact, viz that, of a hand expert in writing, this, and no one other production, should be to be found.

Supposing the instrument genuine, it will seldom happen that no circumstantial evidence, evidentiary of the occasion of executing it, and the probability of its having been executed, should be to be found. In proportion as the existence of this sort of confirmative circumstantial evidence appears probable, the unforthcomingness of it will constitute an objection to the trustworthiness of the supposed transcript; and an objection too obvious to be in danger of being overlooked.

By all these considerations, not only the danger of deception in case of fraud, but the probability of an attempt at deception by fraud, will surely appear to be reduced very considerably below — I will not say certainty — but below an even chance. To facilitate conception, — out of a hundred cases in which evidence of this sort is proffered, in ten, and no more than ten, it is accompanied with fraud, and in one out of these ten the fraud succeeds. Thus stands the matter, on the supposition of the admission of the evidence In ninety cases out of every hundred, right decision — justice, is the consequence, in one only, misdecision — injustice. Next, suppose a peremptory exclusion put upon this species of evidence. Here the proportions are reversed in one instance, misdecision — injustice, is prevented; in ninety instances, right decision is prevented, injustice is produced.

If the above ratios appear too great, take lesser ones: but they will hardly be taken, by anybody, so small, but that, in his view of the matter, the probability will be still on the same side — the practical result will be still the same.

Case VII. The original in the power of the adverse party.

Observations In this case, so long as the party in whose hands the original is, does not produce it, the existence of the alleged transcript being notified to him, the fidelity of the transcript is thereby proved, as against such detainer, by a most satisfactory species of evidence — the virtual admission of the party interested in the proof of unfaithfulness on the part of the transcript, if in truth it were chargeable with any such defect.

That a script, or anything else, should *have been* in the power of the party in question, or any other individual, is one of those events against the happening of which, be they ever so undesirable, no industry on the part of the law can afford security But that a script, or anything else, the forthcomingness of which is requisite for the purposes of justice, should *continue* unforthcoming notwithstanding, and at the same time continue in existence, is a state of things which cannot have place from any other cause than an inexcusable imperfection — a voluntary imbecility, in the system of procedure. Supposing it (for argument's sake) put out of doubt, that a man, having any such article in his custody or power, wilfully persists in the non-production of it, — no torture that he chose to submit to, rather than comply in this respect with the obligations of justice, could be too severe: at no price should it be permitted to a man to purchase the privilege of flying in the face of law, and committing a known injustice *

A possible, and not very extraordinary case, is this The original, having been in the hands of the adverse party, has passed out of his hands, and altogether out of his power, without any design of eluding the probative force of the transcript, and, in a word, without any default of his in any shape. In this case, he will naturally be able to show, if it has perished, that it has perished, if not, into what other hands it has passed If, instead of this, he declares (being, of course, judicially examined) that he knows not what is become of the original, — in such case, although the declaration should be true, no injustice can reasonably be to be apprehended from considering the verity of the transcript, as between them two at least, as sufficiently established If, after this declaration, he declares, moreover (under the same securities for veracity as are applied to the testimony of an ordinary witness,) that he does not believe the alleged transcript to be faithful, but to be unfaithful in such or such specified points, — here comes a contrariety of evidence, a difficulty under which the judge must form, on this as on other cases, the best judgment in his power

In this case, — as between these two parties, the withholder of the original, and the holder of the transcript, — it manifestly makes no difference, whether the original be produced, that, by comparison with it, the transcript may be verified; or whether, on the non-production of the original, the verity of

* English procedure, with the most perfect complacency, licenses injustice in this shape, to a most deplorable extent. But of this kind of imperfection the display belongs, not to the present subject, but to that of *Procedure*, and the head of *Forthcomingness*.

the transcript be declared to be sufficiently ascertained.

As between them two, yes. supposing the holder of the transcript satisfied of its verity — satisfied, consequently, that the original itself, if produced, would not be more favourable to his cause As between them two, yes. but not as between other persons It it were understood that, on the terms of establishing the verity of an alleged transcript, the possessor of the alleged original had it absolutely in his power to protect it from the scrutiny of the judge, and to make the alleged transcript good evidence against other persons, in the same or other suits, — the effect of forgery might thus be rendered attainable, without any of the risks. In pursuance of a preconcerted scheme of collusion, in an action brought on purpose, a pretended transcript of a deed of any description and to any value is proferred in evidence by the plaintiff, notice for the production of the original is given to the defendant, the defendant forbears to produce it, and thereupon the character of an original — an original confirmed by judicial inquiry, is given to the fraudulently pretended transcript

§ 4 *Arrangements for securing the fidelity of transcripts*

Rule 1. Upon every transcript, made by a public scribe in the course of office, let a pledge of correctness be entered upon the face of it, as follows —

1. The name of the transcriber, written by his own hand

2. The designation of the actual time of taking the transcript, expressed by the day, month, and year

3. The designation of the place at which the transcript was taken

Rule 2 If, of the same transcript, one part be written by one hand, another by another, the designation should be repeated every time it thus changes hands, but, the name once given at length, the initials will afterwards be sufficient

Rule 3. This obligation ought equally to be extended to professional scribes, for example, to notaries, conveyancers, attorneys, and their clerks.

Rule 4. Where, either at the time of making the transcript, or afterwards, it comes to be examined by any person other than the transcriber, the same pledge of correctness should be given by such *examiner* likewise.

Rule 5. And this whether, on the part of the transcriber, the transcript bears on the face of it any such pledge of correctness, or not.

Rule 6. Of every such official, as well as of every such professional transcript, as well the writer as the examiner should at all times be subject to judicial examination, touching the fidelity of the transcript, and the truth of their respective marks of verification, as above

Rule 7. If, notwithstanding all such external evidence, the fidelity of the transcript be in dispute, and the original be still forthcoming, — the examination of the transcript by the original, as touching the points in dispute, may be made at any time, by or under the eyes of the judge

Taken on the whole, the uses of these entries are not unobvious

1 To afford a security against incorrectness through negligence If error appears, it appears at the same time who the person is, to whom it is to be imputed

2 To afford a security against fraud. If fraud have any share in the production of the error, — being the work of design, it cannot but be a material one, so as to operate to the prejudice of some right But, the more material it is, the more strongly it points the eye of suspicion upon the person of the transcriber, and there he is, to answer for it If the entry be not the writing of the person whose writing it purports to be, it is then a forgery and, in this case, the punishment and peril of forgery attach upon the fraud

3 A collateral and inferior use, in the case of the transcriber, is, to serve as an index and measure of his capacity and diligence, by showing the quantity of business dispatched by him in each given portion of time.

The use of the designation of the time, coupled with that of the place, is to throw difficulties in the way of forgery. The forgery will be detected, if it should appear that, on the day in question, there was no such person writing in that office, in that place. And, as to the clerk himself whose hand is thus forged, it will be easier to him to say with assurance that he wrote no such paper on this or that particular day, than that he never wrote any such paper in the whole course of his life. At the particular time in question, it may happen to him to recollect that his whole time was occupied about other business

In the case of the examiner's mark of attestation, an effectual indication of forgery will be afforded, should it ever appear that, before the time therein specified, the original had perished.

In the case of an official transcript, the designation of the place may, at first sight, appear superfluous. The situation of the official house is a matter of universal notoriety; and the official books and documents are kept at the official house. But,

1. In some cases, the office itself is ambulatory; as in the case of military offices, by sea and land.

2. The transcript may be of the nature of

those which are destined to be sent out of the office; such as circular letters, and the like

3. The document in question, though designed to be kept in the office, may, on some unforeseen occasion, be sent out of it, or, by accident, separated from it The designation of the place will in this case serve for the replacement of it.

4. The designation of the person is scarcely complete without the designation of the place. Of the names called proper names, there are few but what are in fact common to many persons.

Of the above-proposed arrangements, the description is simple, the efficiency obvious, and the trouble not considerable The application of them may at least be considered as forming the matter of a general rule If, in this or that particular instance, the labour should appear to outweigh the utility,—in every such particular instance it will be easy to discard them by a special rule of exception adapted to the case

In the case of an official transcript (as above) a transcript having for its writer, or examiner, or both, a public functionary,—if the above arrangements for the security of individual responsibility be established, the security afforded (as above) by the relative date of the judicial deposition, will be the less material; inasmuch as the certificate or attestation of transcription or examination will never have been attached to the transcription, but under the persuasion of eventual liability to judicial scrutiny.

On that supposition, the case to which it applies with particular efficiency is that where the examiner has not been any such public functionary, but some unofficial individual—such, for instance, as a professional agent of this or that one of the parties in the cause, or, in case of an instrument of conveyance, or other contract, the man of law, or the clerk of the man of law (notary, attorney, or conveyancer,) by whom the original was drawn, or who, in the way of his professional functions, had had occasion to advert to the contents of the original for any other purpose.

With the help of this check, so strong is the collective body of security thus afforded, that the trustworthiness of an examiner of the least trustworthy description may be raised by it to a level superior in the eye of reason to a person of the most trustworthy description, to whom, for want of the requisite arrangements, the security for individual responsibility is found not to apply. For example, the testimony of the party by whom, not consequently in favour of whom, the supposed transcript is proffered in evidence, will, under these circumstances, present a better claim to credence than can be presented by any supposed official transcript;—nay, even by any transcript, of which, though it be known that it was made or examined in this or that particular office, and consequently by one or other of the clerks that at one time or other have been employed in that office, it is not known by what one in particular of those clerks it was written or examined

§ 5. *How to distinguish between original and transcript*

In the case of preappointed evidence, all difficulty from this source is, or at least naturally will be, endeavoured to be provided against and prevented.

But, in the case of casually-written evidence, the case may remain exposed to every difficulty

If it be a letter, that letter will naturally be signed by him whose discourse it is But, among persons in habits of intimacy with each other, and perfectly acquainted with each other's hands, the formality will often have been omitted

But a script appears in form of a letter, and that letter signed by a name. To a person sufficiently acquainted with the handwriting, it may be proportionally clear that it is the handwriting of the individual whose name it bears: but, to the persons interested in the business, that person and his handwriting are (suppose) alike unknown. In that case, fraud of every kind apart, it cannot assuredly be known to a certainty whether the script be an original or a copy All that can be said is, that its being an original is the more frequent, and thence in each individual case (setting aside idiosyncratic indications) the more natural and probable, result For,

1 Considered in an aggregate point of view, the number of letters of which no transcripts are taken, exceeds (it may well be thought) in a prodigious degree the number of those of which transcripts are taken. But the strength of this consideration will depend upon a variety of circumstances —1 Upon the importance of the subject of the letter; commercial, or non-commercial—relative to business purely private, or to business more or less public, &c. 2 Upon the prevalence of the faculty and habit of taking copies of letters, in the country in question, at the time in question

2. When a transcript of a letter is taken (fraud apart,) it is common and natural that upon the face of it it should be so intituled; or, at any rate, that in some way or other an indication should be given of its not being meant for anything more. On the other hand, this indication is a circumstance to which it may easily happen to be omitted. A letter lies before me: I take a copy of it (no matter for what purpose) for my own use: I know

it to be but a copy: what need have I to give the information to myself?

Suppose other persons are meant to share with me in this use—all of whom are acquainted either with me or with the writer of the original, and with our respective hands. Even in this case, the indication will be apt to appear alike superfluous, and, as such, to be omitted.

3. If the original be no more than a memorandum, written by the writer for his own use, and not addressed to anybody, or meant to be sent to anybody,—in that case, if a transcript be taken of it by another person, it may be impossible for any third person (otherwise than by examination of one of the persons—the writer of the original, or the transcriber) to give so much as a guess which was the original, which the transcript. Either, presenting itself without the other, would of course be taken for an original. From the sight of the original alone, no person would be led to conclude that any transcript had been made of it, from the sight of the transcript alone, no person would be led to conclude that it was not an original, but a transcript. Such would generally be the case, supposing both of them equally free from alterations and slips of the pen. On the other hand, where alterations and blemishes are visible, from the nature of these blemishes some sort of indication or ground of conjecture respecting the script in question taken singly, as to the question whether it be an original or a copy, may every now and then be discoverable.

In an original, whatever alterations occur will naturally have arisen from a correspondent change in the thought and plan of the discourse. If one word be struck out, and another written over it, the word thus substituted will commonly have no resemblance in physical appearance to the word to which it is substituted: especially if, a clause composed of three or four words in connexion being struck through, another clause, embracing also a number of words, be put to serve instead of it.

In a transcript, where any such alterations are perceptible, if the error consisted in the omission of a word or series of words, the correction will consist in the insertion of such omitted word or words; which insertion, the error not having been discovered till the line is finished, will commonly be made in the way of interlineation. If the error consisted in the substitution of one word for another, the improper word will, in general, be a word more or less nearly similar in physical appearance to the proper one.

In short,—in an original, if any alterations are perceptible, they will be such as, being the result of a change of thought, will be indicative of such a change: in a transcript, if any alterations are perceptible, they will not be indicative of any change of thought.

On the occasion of these and all other such diagnostics, a caution as useful as any or all of them put together, is, not to place too implicit a confidence in them; and this for two reasons.—1. Because, even fraud apart, their conclusiveness is susceptible of an infinity of gradations. 2. Because, if any one were understood to be conclusive, fraud would naturally bend its endeavours to take advantage of the rule.—Example. In the natural state of things, fraud apart, an original brouillon may swarm with substitutions and interlineations, to any degree of complication: a transcript will not naturally be infected in any considerable degree with any such blemishes. But, if this were to be understood in the character of a peremptory rule, to which the judge were obliged to conform—a man who, making a transcript, wished for any sinister purpose to make it pass for an original, would fill it with such blemishes on purpose.

Rule. Where, as between divers scripts emanating from the same original source, a doubt arises which is to be considered as the authentic draught, as, for instance, between two such scripts, whether the first be a rough sketch preparatory to the original, and the second the original, or the first an original, and the second a transcript (viz. either in tenor or in substance,)—let not the claim of any such script to be considered as the more authentic, be regarded as fixed by any general rule applicable to all sorts, or to any sorts, of scripts, except so far as, in the instance of this or that particular species of script, the distinction may have been fixed by an appropriate provision of statute law. But, in each instance, let all such of the contending scripts as can be produced, be produced accordingly; and, from a joint comparison of them all, let the true import of the discourse be collected.

Examples.—

1. Shop-books. Several shop-books kept by the same shopkeeper. In some, the order of the entries will have been purely chronological in the waste-book and journal. In others, the primary principle of arrangement will be logical, the transactions being classed in groups, sometimes according to the persons, sometimes according to the things, to which they relate: the chronological principle of arrangement being secondary with relation to these logical ones.

In general, an entry belonging to that book in which the transaction is entered before it is entered in any other, will be more trustworthy than the correspondent entry in any other of the books: because the former one will be of the nature of an original, the others no more than transcripts, entered on so many different principles of arrangement. But it may happen that a mistake was made in the

prior entry, and that it received correction in a posterior one.

2. Official books of any public office The documents usually entered in the office being known, — the document, as made out in proper form, will naturally have been preceded in many instances by a short minute or memorandum, indicative of the species of the document which is to be made out, and serving for instruction to the clerk by whom it is to be made out.

3. The documents (if more than one) serving to exhibit a man's last will — viz if no sufficient care has been taken by the legislator to stamp the character of anthenticity upon a document of a particular description, to the exclusion of all others that are liable to come into competition with it · or if a document, upon the face of it authentic, should come to be impugned on the ground of spuriousness, falsification, or unfairness in respect of the mode of bringing it into existence

CHAPTER IX

OF REPORTED REAL EVIDENCE. *i e* SUPPOSED REAL EVIDENCE, TRANSMITTED THROUGH ORAL JUDICIAL TESTIMONY, OR THROUGH CASUALLY-WRITTEN EVIDENCE

THE inferiority of transmitted evidence, as compared with immediate evidence from the same source, is as manifest in the instance of this, as of any other, species of transmitted evidence. This species of evidence cannot therefore but be ranged under the head of makeshift evidence. At the same time, the cases are numerous, and the description of them extensive, in which the correspondent immediate evidence is not to be had, yet in which evidence from that source is so material, that, in a general view, the admissibility of it, even in the secondary and reported form, is altogether out of dispute.

Of the instructiveness and importance of *real* evidence, a general view has already been given under the head *circumstantial* evidence, of which it constitutes a species On the present occasion, what remains to be brought to view is the specific description of the characteristic fraud, and the modifications which this species of transmitted evidence is susceptible of, according to the nature and trustworthiness of the medium through which it may happen to be transmitted to the conception of the judge

The species of fraud to which this species of makeshift evidence stands exposed, may be thus described:— A person (suppose the defendant, or any other person on his behalf, in an expected criminal cause) — applying himself to the thing which, with relation to the principal fact in question, is already become. or which he proposes to convert into, a source of real evidence — either obliterates or alters the evidentiary appearances presented by it in the state in which he found it, or superinduces upon it fresh appearances of his own production, such as appear to him conducive to his purpose (viz. in the present case, that of exculpating him from the charge.)

This, it is evident, is neither more nor less than the sort of fraud which there has already been occasion to bring to view (to wit, in the Book on Circumstantial Evidence,) under the denomination of *forgery* of real evidence: *alterative* or *fabricative*, as the case may be.

One circumstance is remarkable, as being peculiar in relation to this modification of transmitted evidence Exposed, as it has been seen to be, to a characteristic fraud, it is so no otherwise than as the corresponding immediate evidence is the real evidence afforded by the same physical object, — issuing from the same source

The cause of the difference is, that, in the case of the other modification of transmitted evidence, there are at least two persons concerned, or supposed to be concerned, in the character of witnesses or sources of evidence, two persons, the one of which (viz. the extrajudicial witness) may, under favour of his exemption from the sanction of an oath, and from cross-examination, put a deceit upon the other (viz upon the intended judicial witness,) such a deceit, from which the judge, armed as he is with those instruments for the extraction of truth, is proportionably defended

But, to the fraud liable to be practised upon, or in relation to, real evidence, the situation of one cause stands no less exposed than that of another — that of the judge, no less than that of any reporting percipient witness, on whose report, through choice or necessity, he rests his conception of the fact, — instead of the testimony of his own senses, with his own judgment for their assistance.

For this same reason, every thing that relates to the examinability of the supposed extrajudicial witness has no place here. Here there is no extrajudicial witness in the case; in the room of the interrogable or uninterrogable *person*, we have the uninterrogable *thing*.

The personal evidence, by which the supposed real evidence in question is transmitted to the conception of the judge, may wear any of the forms which have already been brought to view·—1 Oral evidence, judicial testimony, delivered or extracted in the judicial, that is (by the supposition) the most trustworthy, mode, 2. Casually-written evidence; minutes taken, descriptive of the appearances exhibited by the thing — by the source of the real evidence: taken by a private individual, in the situation of an extrajudicial, and not an official, witness, — taken consequently at the time when the evidentiary appearances

are freshest and most instructive, or at any late period (if any,) when, by the agency of time, they have been rendered less correctly instructive: taken, again, either at the very moment of inspection, or at any succeeding period, and at the end of any longer interval of time. 3. Written evidence taken by a pre-appointed, and, *quoad hoc* at least, an official, witness: not by the judge himself, but by some person of chosen trustworthiness, appointed for the purpose either by general and permanent designation of the law, or by special appointment from the judge. 4. Judicial testimony, delivered and extracted in the judicial mode, but grounded and supported by written minutes, containing the result of the inspection the view itself taken, and the result committed to writing, at a period earlier than that at which the business could have been performed by a judicial presentation, or examination in the first instance.

Comparing with each other the two species of evidence, the original and reported (bearing in mind the several causes of inferiority observable in makeshift evidence, with relation to the correspondent species of regular evidence,) we shall find the difference much less in this, than in any other, instance.

1. The person by whom the reported real evidence is reported, may always be a *pre-appointed* witness — and that witness pre-appointed even by the judge. Here then vanishes all danger of fraud. Of all the several species of makeshift evidence, this is the only one which is not exposed to any variety of what we have called the *characteristic fraud*.

2. The person appointed thus to act in the character of reporting witness, may be, and naturally will be, a person possessed of that appropriate stock of information, which, with relation to the subject-matter of the deposition, will place him in the predicament of a *scientific* witness. The danger of deception on the part of the judge, without fraud on the part of the deposing witness — without any symptom of weakness in his rational faculties — without any other than such of which his intellectual faculties may be the seat, — is thus reduced to its minimum.

To the *moral* trustworthiness of official evidence (viz. of judicial, the most trustworthy species of official, evidence,) he may, and naturally will, add the *intellectual* trustworthiness of scientific evidence. If no appropriate modification of physical science be requisite, the person selected for this purpose will naturally be appointed by the judge; a person known to him through the medium of official relation and intercourse. In the opposite case, some person recommended by the general reputation of appropriate science.

It follows, then, that if, between the immediate and the thus reported real evidence, there be in any case any practically material difference in point of trustworthiness, it can only be in so far as there is something in the particular nature of the real evidence in question, that disqualifies it from being transmitted with accuracy through the medium of personal report: the perceptions which it affords to a percipient witness being such as cannot, without material alteration, be transmitted through the medium of language.

But, even in this case, the difference in point of trustworthiness will not be so great, as, upon the face of the above statement, it might at first sight appear to be. The judge — the official permanent judge — is not, upon the footing of this arrangement, so correctly and fully informed, as in the case where the information is presented to him in the shape of immediate real evidence. True: but (though *he* is not) his nominee, his deputy, — the person selected by him on the ground of his appropriate trustworthiness, as qualified, for the purpose in question, to officiate in his place, — receives and contemplates the information in its character of immediate real evidence. The decision of the case does not in effect lose the benefit of immediate real evidence: the result of the arrangement is no more than this, viz. that the decision in effect is transferred from the judge in ordinary, to another judge, who, though but an occasional one, may, on the particular occasion in question, for anything that appears, be regarded as equally fit and competent.

Upon this footing stands the disadvantage which reported real evidence lies under, when compared with immediate real evidence. Considered in another point of view, it may (at least in certain circumstances) appear possessed of an advantage. For the judicial trustworthiness of the official judge — for the probity, attention, and intelligence, brought into action by him on the occasion, — the public possesses in this case a sort of security, which it possesses not in the other. Suppose in the place of the judge an all-perfect human being, and at the same time, on the part of the proposed occasional judge-depute *ad hoc*, a character considerably inferior in these respects to his principal, the difference and the disadvantage on the side of the reported real evidence, in its comparison with the immediate, may be very considerable. On the other hand, suppose any considerable degree, though it be no more than the ordinary degree, of deficiency in point of trustworthiness on the part of the ordinary judge; or (what is at once an equally natural and less invidious supposition) suppose but, on the part of the public, a degree (though it be no more than the ordinary degree) of *suspicion* of a deficiency of trustworthiness in any of these points on the part of the judge, the advantage capable of being possessed by the information when in the shape of *reported* evidence,

may be not inconsiderable. The judge (supposing him to repair to the spot alone) sees as much of the evidence as he pleases, and no more than he pleases: pays what attention to it he pleases, and no more than he pleases: contemplates it, if he pleases, on one side only, and with no other intention than that of discovering what pretences can be found, what excuses can be made to the public and his own conscience, for deducing from it inferences favourable to that side of the cause which his affections induce him to espouse. With these eyes it is that he views it: and it is after thus viewing it, in his character of a witness, that he reports it — to whom? To himself, in the character of a judge. It is the judge himself who is the witness; and that witness examined *in secreto judicis*, in the recesses of the judge's own conscience: examined, and without cross-examination, by the judge.

Turn now to the opposite case, and see upon what footing stands the case of information from the same source, when reported to the judge through the medium of some other official (or at any rate a preappointed) witness. His report is delivered,—it may at least be, and therefore (at the instance of either party) ought to be, delivered, — upon the same footing, in every respect, as that of any ordinary witness — in public, and subject to cross-examination, with the several attendant securities. It is from this completely scrutinized evidence, delivered under the eye of the public, that the judge, himself speaking and acting under the eye of the public, draws his inferences.

In the one case, the judge decides upon data not before the public, and the public in consequence has no controul over him in the other case, the judge decides, as in ordinary cases, from data which are as completely before the public as before himself.

With respect to the option, the question therefore seems to be brought to this point — In the case where the information presents itself to the judge in the shape of immediate real evidence (the judge conveying himself to the spot for the purpose of contemplating it in that shape,) can he, or can he not, take the public, a sufficient portion of the public, with him? If he can, and does,— in such case the immediate evidence preserves its superiority over transmitted evidence. If he does not,—in that case, the transmitted evidence, instead of being inferior, is in fact, in a practical view, superior, to the immediate evidence; the transmitted evidence (though in itself it possesses the characteristic property of makeshift and irregular evidence) to the regular.*

* The justice, that is, of immediate and intrinsic importance—the justice upon which the sense of security on the part of the public depends, is not abstract real justice, but apparent justice. Real justice is no otherwise of importance, than in as far as apparent justice (as is the case in the ordinary state of things) depends upon it The supposition is a strained and odious one; nor is it without great exertion and reluctance, that the mind of man, especially the mind of an ardent lover of justice, can bring itself to frame it: but, for the moment, and in the character of a supposition, it may be an instructive one. Better by far that injustice should be really done in all cases, so justice be universally thought to be done in the same cases, than that justice should be done in all cases, at the same time that in half, or though it were but a quarter, or say a tenth, or even a twentieth part of those cases (we know not where to draw the line,) injustice, and not justice, were with equal universality thought to be done. In the former case, in respect of the mischief of the *second order* (see Dumont, and *Introduction*,) no alarm, no sense of insecurity, by the supposition: in the other case, a violent alarm — a strong sense of insecurity, and that a universal one.

But, in the case where the information is presented to the judge in the shape of immediate real evidence, the public not present,— the sort of justice in favour of which the chance is augmented, is no more than real abstract justice, as above described: the justice in favour of which the chance is lessened, is apparent justice. In the case where the public is present — whether it be in the shape of immediate real evidence, or reported real evidence, that the information is presented — the probability in favour of apparent justice is at any rate preserved undiminished, howsoever, in the case of reported evidence, the matter may stand in respect of real abstract justice.

CHAPTER X.

OF EVIDENCE TRANSMITTED THROUGH AN INDEFINITE NUMBER OF MEDIA.

We come now to the case where the information in question presents itself as if transmitted through media, simple or complex, as above described, and in each case with repetitions, in any number, of any one or more of the elements

The modifications of which this case is susceptible, are evidently infinite. Happily, the conduct that seems proper to be observed in relation to them will be found capable of being determined by a few simple principles.

The first point to be ascertained under this head, is the influence exercised by the number of the media upon the probative force of the information thus conveyed

For this purpose, instead of the word *medium*, there may on some occasions be a convenience in employing the word *degree*.

The mode in which this is to be done, is by reckoning, for every medium through which the evidence passes, a degree. Thus, hearsay evidence through one medium is of the first degree, through two media of the second degree, and so on.

1 In every succession from one medium

to another, by which a supposed extrajudicial statement passes, in its way from the supposed percipient or other primary extrajudicial narrator, to the ear or eye of the judge, —it loses a portion of its probative force.

2 This it does of course from the mere consideration of the general chance of incorrectness, and without taking into the account any peculiar chance of incorrectness capable of being produced by the idiosyncratic character of any of the supposed intervening relators.

3 The circumstance of mendacity or bias affords likewise at every step an additional chance or probability of incorrectness, as well as of falsehood *in toto* but this chance, depending upon idiosyncratic character and circumstances, is incapable of being estimated, any further than as the situation and character of individuals is taken into the account, and made the subject of special investigation

4 Conceive divers supposed extrajudicial witnesses of the same remove or degree, each represented as confirming, in tenor or in purport, the supposed statement supposed to have been given by the rest —for each such witness (credit given to the fact of their having existed in that character,) the evidence acquires a portion of probative force

5 But the greatest additional portion of probative force capable of being thus acquired, can never be great enough to raise the probative force of a lot of hearsay evidence standing at that degree, to a level with one standing at a higher degree, *i. e.* in which the number of media it is supposed to have passed through is less

6 Deponens (for example) states, that, on a certain occasion, a number of persons, whom he names (John Middleman, Thomas Middleman, and others,) concurred in assuring him that they were present when Percipiens was giving an account of a duel fought in his presence between the defendant and Occisus, in the course of which Occisus received his death wound It is evident that, so far as Deponens is believed, the fact of defendant's having been the cause of the death of Occisus will acquire an additional, and (setting aside idiosyncrasy) a determinate, portion of probability, for every additional person of which this number is stated as consisting. But, if there were a thousand such supposed intermediate and mutually confirmative extrajudicial relators, this could never impart to the hearsay evidence of Deponens any such degree of probative force, as if Deponens, instead of representing himself as having taken his information through these thousand media all at the same degree, were to represent himself as having himself taken it immediately from the lips of Percipiens

Recapitulation.—1. In the case of transmitted evidence, the probative force of the information presented immediately to the judge, is inversely as the number of degrees. 2. Supposing, at each degree, one witness, and no more; at each degree, it is therefore inversely as the number of media or witnesses. 3 But, at any given degree, it is directly as the number of witnesses standing at that same degree, and supposed to have agreed with one another in their respective extrajudicial statements in relation to the same fact *

Hence it appears how inconsiderate and inadequate the provision is, of those laws, which, without entering into any such explanations as above, take upon them to obviate misdecision, by requiring, as a necessary ground to the validity of the decision, a specified number of witnesses The number may be completed, and the probative force of the evidence may in fact, instead of greater, be but so much less, than if there were but one.

On the part of the judge, common honesty, enlightened by common sense, would (it may be thought) be sufficient to supply any such deficiencies on the part of the legislator, and thence to prevent misdecision on this ground. But the instances in which the light of common sense has been extinguished by the vapours of jurisprudential science, are, as it will be seen throughout, but too abundant: and to obviate in that quarter some apprehended deficiency in the article of common honesty, is the undisguised object of the legislator in the framing of such restrictive and exclusive regulations †

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* The above remarks apply not only to the case of hearsay evidence through many media, but also to that of transcriptitious evidence through many media, or transcripts of transcripts. One remark still remains, which is peculiar to the latter species.

By confrontation with, and examination by, a transcript of any superior degree, a transcript of any inferior degree may be raised in the scale of trustworthiness to a degree next below that with which it is so compared.

Thus, suppose a transcript of the tenth degree. By examination with the original, it may be endowed with every security for trustworthiness that can be given to a transcript of the first degree, and is thereby raised altogether upon a level with a transcript of that first degree: by confrontation with a transcript of the first degree, it may in the same way be endowed with every security for trustworthiness that can be given to a transcript of the second degree.

† Will it be said, that, when two witnesses are thus made necessary, they must both of them, of course, be deposing witnesses? If any such position were advanced, it would be rejected at any rate by English law. In the case of treason, to ground conviction, there must, indeed, by statute, be two witnesses; but, by jurisprudence, one at least of these two witnesses may be a piece of paper. [The statutes 1 Ed. VI. c. 12, and 5 & 6 Ed. VI. c. 11, render two witnesses necessary in a charge of treason. The 7 & 8 Wil. III. c. 3, requires two witnesses to prove the overt act or acts; either both deponing to the same

Transmitted evidence purporting to have passed through more media than one, may still be received, whatsoever be the number of such media: to wit, in every case in which makeshift evidence transmitted through no more than one medium would be received — always under the same conditions and restrictions. So likewise in the case where the individual description, or even the number of the media, cannot be ascertained

To a mind impregnated with the principle of the excluding system, a proposition to this effect cannot but appear in the highest degree alarming. What? let in upon the mind of the judge a deluge of evidence, to the untrustworthiness of which there is no bounds?

Reasons in support of the rule — arguments *à priori*, supported and well supported, by arguments *à posteriori* — are, however, by no means wanting: reasons, and such (it is believed) as will be found satisfactory upon the whole.

1. The main and most striking reason is, that, by the alleged increase in the number of the media, no new facility is given to fraud. On the contrary, it can never answer the purposes of fraud — it would be unfavourable to the purposes of fraud, falsely, or even truly, to represent any such increase. That assurance of correctness cannot but be diminished in proportion to the number of media the evidence has passed through, is a truth, the force of which cannot but be felt by every mind to which it is presented. But a man actuated by fraud, intending deception, to be brought about by mendacity, will of course give to the information the most plausible, the most trustworthy, form, of which it is susceptible: he will never spontaneously and unnecessarily multiply causes of untrustworthiness and distrust in regard to it

A man says what is not only sooner said, but more likely to be believed, and yet not more likely to be detected if false, if he says, I had the fact from Titius, who said he saw it, but is now dead, — than if he says, I had the fact from Titius, who is dead, and who says he had it from Sempronius, who, if Titius is to be believed, gave Titius to understand that he saw it, but being dead also, cannot be called upon for his testimony.

Take, for example, a case from English jurisprudence * The validity of a will being in question — a will purporting to have been executed in the presence of three witnesses, whose names were entered upon the face of it in the character of attesting witnesses — two of these supposed witnesses were proved to be dead, the third, on her cross-examination, deposed, that, on her attending one of the other two in his last illness, about three weeks before his death, he pulled the will from his bosom, and acknowledged to her that it was forged by himself.† This evidence (it appears) was received, was credited, and the decision — a decision pronouncing the will a spurious one — grounded upon it This supposed oral evidence transmitted through oral — this evidence, hearsay evidence as it was, was received and credited. It was regarded as not only veracious, but true, by the proper judges, judging from the whole complexion of the evidence on both sides

Now to the point in question Suppose that, instead of being deemed true, it had been deemed false and mendacious, and had been so accordingly The will was, on this supposition, a genuine one the story of its having been declared by one of the attesting witnesses to be spurious (spurious as having been forged by himself,) was a mendacious story trumped up by this witness, who, it being false, could not but have been conscious of its being so Now then, suppose that, instead of saying that what she heard as above,

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overt act, or one of them to one, and the other to another overt act of the same treason. The prisoner's confession may be proved by a single witness, when offered in confirmation of the testimony of the witnesses, or any other collateral matter. Willis's case, 8 Hargrave's St Tr. 254; Crossfield's case, 26 Howell's St Tr. 56, 57. If the overt act is the assassination of the king, or any attempt against his life, or his person, it may be proved under the 39 & 40 Geo. III. c 93, by a single witness. A confession of the prisoner may also be proved by a single witness. In the case of perjury, two witnesses are necessary to contradict the alleged false statement of the defendant. Q. *v.* Muscot, 10 Mod. 193 The English law of treason having been, by statute, made part of the law of Scotland, the rules above stated apply to that part of the country. It is worthy of observation, however, that by the principles of the criminal law of Scotland, no man can be convicted of any offence on the testimony of a single witness. The rule has very little effect in practice, as a case scarcely ever occurs in which more than one individual is not cognizant of some portion of the *res gestæ*; and it is a sufficient compliance with the principle, that the narrative of a perripient witness is confirmed by another, whose statement may have the slightest possible connexion with the criminative circumstances. — *Ed.*]

* Clymer *v.* Kettler, Hawk. iv. 428, from 3 Burrows, 1245.

† This is not correctly reported by Hawkins, who has been followed in the text by the Author. In referring to Burrow's Reports, it appears that it was an action of ejectment, in the course of which, the validity of two wills was called in question, dated respectively 1743 and 1745. — Mary Victor deposed, that William Medlicott pulled out of his bosom the will of 1743, and said it was the true will of John Clymer. This was in her examination *in chief:* in her cross-examination she added, that Medlicott at the same time acknowledged and declared to her, that the will of 1745 was forged by himself. — *Ed.*

she heard from the supposed forger himself, she had spoken of it as having been heard from John Middleman, now also dead, who said he heard it from the supposed forger, under the same circumstances as above would the fraud in this shape have presented any more plausible title to credence than in the other? The answer, it should seem, will hardly be in the affirmative

2. The danger of fraud (*i. e.* of deception by fraud) not being increased by the number of supposed media, — there remains the danger of incorrectness, *i. e.* of deception by incorrectness But in this case, in whatsoever proportion the danger of incorrectness may be thus increased, the danger of deception does not increase with it for, whatsoever be the danger of incorrectness, it is apparent to every eye, upon the very face of the evidence — apparent to all eyes alike, and in no danger at all of being set down at any value below its real value

In regard to fraud, a possible observation on the other side is this — Information being, according to your observation, more likely to be incorrect when transmitted through several media, than if transmitted through no more than one, and so in that light likely to appear to everybody, — a man who, meaning fraud, were to represent the information as having passed through *more* media than one, might by that device exempt his testimony from the imputation of fraud, and by that means gain for his false testimony, in this complex shape, a degree of credence beyond what could be gained for it by its being presented in the more simple shape The propriety of this observation might perhaps be admitted but at any rate it does not seem worth controverting on one side, or worth relying upon on the other side For a lot of evidence to gain credence, it is not sufficient that it appear exempt from fraud, it must appear correct and true it is not sufficient that it be regarded as being pure from material error from this or that *particular* source, it must be regarded as pure from material error from *whatever* source But the fresh degree of untrustworthiness it is necessarily tinged with by every medium through which it passes, is essential to its very nature, and it is only in part, and not in the whole, that it can be done away by any marks of comparative purity in no more than one out of whatever may be the number of the media through which it is supposed to flow

Add to which (if it be worth adding,) that this supposed receipt for putting a varnish of veracity upon mendacious evidence, is on no other supposition a promising one, than that of its remaining a secret — a secret in mendacious hands. But, the secret being now published (not to say that it is of itself sufficiently obvious,) the virtue of it, if it ever possessed any, or would have been capable of possessing any, is already at an end. the eventual offspring of fraud has been torn from her womb and been rendered abortive.

The truth of the above conclusions will be found to receive ample confirmation from general, and (it may be added) even necessary, practice

Turn to any established system of judicature, an extensive class of cases may be found (and that the same, or nearly the same, in all,) in which transmitted evidence is received without scruple whatsoever may be the number of media through which it purports to have been transmitted, or even although the very number, as well as the individuality, of such media be undiscoverable. — The class of cases in question is that in which the principal fact in question, the principal fact to be proved or disproved, belongs to the class of what may be called *ancient facts*: a fact which, supposing it to have happened, happened so long ago, that it would be in vain to look to any witnesses, forthcoming, and consequently still living, from whose examination it might be proved in the regular and most trustworthy mode But there is nothing in the mere *date* of a fact, and that *relative*, measured from a particular point of time (the time in which the proof of it comes to be called for) that is capable of rendering it credible upon weaker evidence than would be requisite to gain equal credence for it at another time That a man of such or such a name, living at such a place, should at that place have been married to a woman of such a name, and had by her children of such and such names, is not a whit more credible if placed at the end of the seventeenth century, than if placed at the end of the eighteenth

But (except in so far as the application of preappointed evidence may have happened to extend itself to the instances in question,) in former ages, there are no sort of facts that are capable of being established by any other than this weak and long-spun sort of evidence: and yet, for the purposes of legal decision, facts of various descriptions — facts, though placed at ever such remote periods, are, under every system of established law, continually adduced and credited.

Nor can it be said that, if such evidence be at all admissible, no causes except what are of light moment can with propriety be rested upon such slight evidence. In the case where the fact in question belongs to the class of ancient facts, none of those questions of which the great mass of questions of light moment is composed — small debts, slight assaults, and verbal injuries — can ever come upon the carpet. Questions of the greatest moment — questions relative to the title to estates, to immoveables to any amount, to

hereditary powers and honours, — of this sort are the questions that come to be tried upon the ground of this slight evidence.*

Truths of the mathematical class — truths in any number, might be heaped together in this field: but in every instance, if attempted to be employed in practice, they would be found either altogether inapplicable, or, if applied, more likely to lead to misdecision than to justice.

Suppose, for example, that a mathematician, taking up the observations brought to view above, were to set to work in his own way, and, because demonstration is the fruit of his own science, fancy he had given *certainty* to the conclusions capable of being formed in relation to the trustworthiness of evidence *In a series of remotely-transmitted hearsay evidence, every article standing at a degree indicated by a higher number, is lower in the scale of trustworthiness than an article standing at a degree indicated by a lower number* Expressed, as of course it would be, in mathematical short-hand, by single letters instead of words or combinations of letters, a proposition to the above effect might put in a specious claim to the character of irrefragable truth Yes but in what way? On the supposition of a matter of fact, not announced, but gratuitously assumed, and, in a mathematical sense, altogether incapable of being proved viz that, in each instance, — an article of hearsay evidence at a lower degree being compared with an article of ditto at a higher degree, — in each medium or rank of mediums, the idiosyncratic trustworthiness of the intermediate witness or witnesses were on the same level. Suppose a suit, having for its subject-matter a pecuniary object of inconsiderable value suppose on both sides a lot of hearsay evidence, on the side of the plaintiff, evidence of the second degree, the deposing witness and the supposed intermediate witness both of them universally known, and known as of the highest rank, as well in the scale of moral reputation as in that of opulence; on the side of the defendant, hearsay evidence only of the first degree, but

* The application of evidence to facts of the religious class not coming within the design of the present work, what follows in this note is mentioned in no other character than that of an *argumentum ad hominem:* but, in that character, applied to all Christian (not to speak of Mahometan and Hindoo) judges, and in particular to English ones, the weight with which it presses seems to be irresistible. Disbelieve transmitted evidence, on the ground of the multitude or the uncertainty of the number of the media through which it purports to have passed, you reject history in general, and all ecclesiastical history in particular. If the facts in support of which evidence of this complexion will naturally be adduced, be, merely on the ground of their having this and no other sort of evidence for their support, to be pronounced incredible, much more must all facts brought to view in the character of a basis of religious opinion be incredible. The supposed facts brought to view for a judical purpose, are all of them of the most ordinary and natural cast: and whatever chance they may have of gaining credence depends upon the vulgarity of their complexion, their conformity in every respect to what is generally understood to be the ordinary course of nature; — *e g.* that John and Joan, being married at the usual time of life, had sons and daughters, and having attained a usual age, and being possessed of landed property, left such or such a son, or such and such daughters, to succeed to it. The facts which are the subjects of the earliest period of every ecclesiastical history, are facts more or less deviating from what at present is generally understood to be the ordinary course of nature, or they could not be, what by the supposition they are, facts constituting the subjects of religious faith: that Jared, for example, at the age of 162 years, cohabiting with a woman unknown, begat for his first-born a son named Enoch, and died 800 years afterwards, continuing for an unspecified part of that time to beget sons and daughters.[a]

The facts which, in the case of the Christian religion, constitute the subject-matter and basis of religious faith, do not purport to have been established by any judicial examination, or consigned, in any instance, to an official register, in the character of *preappointed* evidence. The shape in which they present themselves is uniformly that of transcriptural evidence, which, after having passed through an uncertain number of oral media, fixes itself, at a point of time more or less remote from the fact, in the shape of a written original, of the nature of casually written evidence. If, on this ground, the trustworthiness of an article of transmitted evidence depended, in any such considerable degree, on its proximity to the source, the extraordinary facts which in the Mahometan religion constitute the subject-matter of religious faith, would present, in this respect, a better title to credence than the extraordinary facts which in the Christian religion constitute the subject-matter of religious faith. For the Koran purports to have had for its author (whether in the character of dictator, or of actual scribe, makes little difference) Mahomet himself; by whom, or in whose presence, the extraordinary phenomena in question are stated to have been produced: whereas the New Testament, having, for divers portions of it, divers authors, purports not to have had for the author of any portion of it the founder of the religion preached in it — the person by whose power any of those extraordinary facts were produced; nor yet (in the instance of any portion of it) any person in whose presence they are stated to have been produced.

The purpose in view in these observations, will, I hope, not be misconceived: it is, not the destroying the credit of history in general, or Christian history in particular, but the destroying any objection that, on the ground of English judicial practice, might be opposed to the general rule recommending the leaving the door open to transmitted evidence in general, howsoever multitudinous and uncertain the number of the media through which it may have been transmitted.

[a] Genesis, v. 18, 19, 20

the reporting witness — the judicial witness — a pauper notorious for mendacity. By the mathematician, the superior weight of evidence would be demonstrated to be on the side of the defendant; while, by everybody but the mathematician, it would be regarded, and, though without demonstration, yet with more reason, as being on the side of the plaintiff.

Add to this, that, in many instances, in which, not without good cause, hearsay evidence of many removes from the supposed source has been employed, (for example, in English practice,*) not only the persons of the supposed intermediate witnesses, but even the number of the degrees, has not been ascertained, nor been capable of being ascertained. The general sense, conception, understanding, of the neighbourhood in the case of a testimony to this effect, supposing the conception just, there must in every instance have been a matter of fact at bottom — some determinate matter of fact, the conception of which must, through the respective relations of a certain number of intermediate witnesses, singly or in ranks, have been transmitted to the ears of the deposing witnesses.

In a case of that description, the number of degrees not being ascertained, the requisite data not being given, matter for the hand of the mathematician would not be to be found. Truth, however, would be but the better served by the deficiency: for, the mathematician, with his scientific mode of deceit, not being capable of being set to work, no deception could flow from that source.

CHAPTER XI.

WHAT OUGHT, AND WHAT OUGHT NOT, TO BE DONE, TO OBVIATE THE DANGER OF MISDECISION ON THE GROUND OF MAKESHIFT EVIDENCE.

§ 1. *Impropriety of excluding any kind of makeshift evidence.*

It has been seen how various in specie, and how abundant probably in number, are the instances in which makeshift evidence of one description or another, is habitually received, and must ever be received, in judicature.

It has been seen, that a danger of deception, and consequent misdecision, is in every instance naturally attached to the reception of makeshift evidence.

It has been seen, on the other hand, how — by the influence of a principle common to human nature, and in particular to men in the situation occupied by men of law — the danger of deception has been generally exaggerated: or, what comes to the same thing, such arrangements have been produced as could not be justified on any other supposition than that of a degree of danger beyond the danger really existing in each case:

That this exaggerated estimate has had for its cause an assumption, which, upon a closer examination, turns out to be decidedly erroneous, viz. that the danger of deception on one part is as the danger of falsity on the other.

That the erroneousness of this assumption is proved by every instance in which the prevalence of it is exemplified in practice: for the exemplification of it in practice consists in the determination formed and executed in each instance — the determination *not* to pay any regard *whatever* to the lot of suspected evidence, to consider the falsehood of it as certain, instead of being more or less probable, in a word, to regard it as certain that in each instance the disposition of the judge is to overvalue it: whereas the truth is, that, by every instance in which an exclusion is thus put upon a lot of evidence, a fresh proof is given that the disposition of men in judicial situations is to undervalue it — to treat as if it were incapable of having any weight at all, that which is never altogether without weight, in any instance.

That, under the most natural and extensively prevalent constitution of the judicial establishment, in which the tribunal is composed of one or more permanent and official judges, nothing can be more extravagant or inconsistent than the distrust of which the practice of exclusion is the practical result — whether the object of the distrust be the judge himself by whom the exclusion is pronounced, or his colleagues and successors.

So prone am I to give too much credence to evidence of this description, that I give it no credence at all — that I determine to disregard it altogether. So prone am I to decide on insufficient evidence on the one side, that I decide without evidence, and against evidence, in favour of the opposite side.

So prone are all my colleagues — so prone will all my successors be, to give too much credence to such untrustworthy evidence, that I, who alone am proof against such delusions — I, in order to preserve them against the influence of it, am determined for their sake to pronounce a decision, which, in the character of a precedent, shall tie up their hands, and prevent them from throwing open the door to any such delusive evidence. I, who cannot trust myself with the faculty of pronouncing from the evidence — I, confident in that exclusive portion of sagacity in which I have none to share with me, have determined by this means (such is my prudence) to impose on my colleagues and successors,

* See 1 Phil. Ev. p. 218, and the Note to p. 134, *supra*.—*Ed.*

to the end of time, the obligation of deciding, in every such case, without and in despite of evidence.

The only instance in which this system of exclusion has any colour of rationality, is that in which (as in one of the many forms of English judicature) the tribunal is composed of a set of ephemeral, unofficial, unprofessional, unexperienced judges, placed under the tutelage, and in some respects under the controul, of one or more permanent, official, experienced judges The jury, were they to be trusted with such evidence, would to a certainty be deceived with it, therefore they never shall be trusted with it.

Supposing the conception of unfitness on the part of the professional judge to be trusted with such evidence — supposing this conception just, in its application to himself and his experienced brethren, — the extension of the same imputation to this unexperienced class of judges, seems, at any rate, clear of the charge of inconsistency, — the absurdity is gross and palpable, but it is all of a piece

On the other hand, suppose the professional sort of judge to be proof against the influence of this species of delusion, — suppose the danger of being deceived by it not universally extensive, but confined to the non-professional class of judges, — the system of exclusion, even in this limited application of it, is still precipitate and indefensible You conclude they will be deceived by it why so hasty in your conclusions? To know whether they have or have not been deceived by it, depends altogether upon yourself. What! can you not so much as stay to hear their verdict? Condemn men unheard? — condemn thus your fellow judges? Apply, where as yet there is no disease, a remedy, and a remedy worse than the disease? — a remedy worse than the disease, when, had you but patience to wait for the disease, a remedy is in your hands as safe and gentle as it is infallible?

Day after day, you annul the verdict of a jury without disguise, and send the cause to be tried by another jury, on the alleged ground of its being a verdict against evidence Would it cost you anything to extend the allegation to cases of this description? or to add to the cases calling for a new trial, that of a verdict grounded on untrustworthy and deceptitious evidence?

Thus much for supposition and argument In fact, however, no such distinction has had place: the manacles once constructed, unexperienced and experienced hands are alike confined by them. Peers have been not less ready, not to say eager, to impose it upon themselves, than yeomen and shopkeepers to submit to it. It is by such easy means, and at so cheap a price, that favour, when agreeable and convenient, is seated upon the throne of justice.

Nor is the application of the system of exclusion by any means confined to English judicature Under the auspices of Roman jurisprudence, it is perhaps, upon the whole, still more extensive. What difference there is, seems to be to the advantage of the English system. On the ground of personal untrustworthiness at least, the causes of exclusion are, on the one hand, still more abundantly extensive than in the English system; on the other hand, the adherence to them seems to be much less steady. The range of cases that afford to the judge the faculty of putting an exclusion upon the witness, is still more extensive but in each instance it is rather a power than an obligation. Is it his pleasure to put an exclusion upon a witness? He may find a warrant for it. Is it his pleasure not to exclude the witness? He may likewise, and equally, find a warrant for it In the English system, the cases in which, by the advantage of the conflict between preceding decisions, judges have been at liberty to decide either way, are but too abundant; but, on the other hand, in the cases to which the conflict has not extended, the option and the licence fails where the decision that stands nearest to the individual case in question is not opposed by any other, usage will not permit its being disregarded.

Adopt the principle of exclusion, in the character of a security against deception, — adopt it in any case whatsoever, there is not any point at which its application can with any consistency be made to cease Exclude for this reason any one lot of evidence whatsoever, by the same reason you are alike bound to exclude all evidence, and along with it all justice

Discard the principle of exclusion altogether (that is, in all cases where the exclusion of the lot of evidence in question would have the effect of excluding all evidence from that source — from the source from which the information issues,) — adopt in its stead the principle of universal admissibility, — you do no more than give extension to a principle, the innoxiousness of which, in every point to which the application of it has been extended, has been made manifest by undeviating experience. Among the cases to which it remains to be extended, there cannot be any in which the evidence can be so weak, but that cases in which, being equally weak, it is admitted notwithstanding, abound, and have ever abounded, and without objection or complaint, to an extent, the magnitude of which affords a conclusive proof of the safety with which this sort of liberty may be allowed.

The cases in which weak evidence is admitted — weak to every imaginable degree of weakness — are cases in which whatever danger may be attached to the admission is altogether out of the reach of remedy:—1. Weak

circumstantial evidence: evidence, in the case of which, the connexion between the principal fact and the supposed evidentiary fact is loose and remote to any degree of remoteness 2. Weak direct evidence, in the case where the veracity or correctness of the testimony is endangered by some cause of illusion, or by some sinister interest, which either *in specie* is not taken into the account, or, in the individual instance, is out of the reach of observation

The inconveniences attached to the observance of the principle of exclusion are altogether out of the reach of all remedy, palliative as well as curative The dangers attached to the principle of universal admissibility are not only in themselves inferior, in a prodigious degree, to the mischiefs attached to the principle of exclusion, but, whatsoever they may amount to, at the worst, arrangements are not wanting by which (in one way or other) defalcations may be made, reductions may be applied, and at any rate certain limits may be set, to the mischief, that is, to the number of the instances of misdecision capable of flowing from this source

These arrangements, such as the nature of the subject has suggested, remain to be brought to view in this place.

§ 2. *Arrangements for indicating the amount of the danger.*

Arrangements having for their object to lessen the danger of misdecision from the admission of makeshift and other weak evidence, may be distinguished, in the first place, into such as have for their more immediate object the *making known* the actual amount of the danger, and such as have for their more immediate object the *lessening* the amount of it.

Arrangements having for their immediate object the lessening the amount of it, may combat it in either of two ways by lessening the frequency of it, or by lessening the amount of it when it happens

Provisions having for their result the bringing to view, in the shape of experience, the utmost possible amount of the mischief from this source, that is, the *limits* of that amount, would, in a variety of ways, be of unquestionable use: —

1. They will constitute a sure, and the only sure, basis of legislation, in this as in so many other cases facts, showing, by the light of experience, the effects of existing institutions

2. They will form a natural, proper, and most satisfactory accompaniment of any such arrangements as might be thought fit to be made, on this part of the ground of evidence, tending to do away, or narrow, the application of the excluding system.

3. They will form, in the first instance, a visible security against any durable and considerable inconvenience, considered as derivable from any such defalcation from the authority of the excluding system. Should deception, and consequent misdecision, be suspected, justly or unjustly, of running in any increased stream, from any branch of the newly-opened and apprehended source, — measures may thereupon be taken for remedying the mischief, at any time, and at its earliest stage They will also serve as an anodyne to any panic terrors that might otherwise be produced by the contemplation of an innovation, which to some eyes may be apt, in spite of the clearest deductions of reason and even experience, to appear a formidable one.

4. On the supposition of the adoption of the other proposed remedial arrangements, — they will serve to give a correct view — the only tolerably correct view that can be given, of the degree in which those arrangements prove conducive to their intended purpose.

If the different modifications of makeshift evidence, and the other sorts of evidence particularly liable to prove weak, and, by their weakness, deceptitious, have been here delineated and explained with sufficient clearness, — a judge, and the scribes his subordinates, will find no difficulty in committing to paper, as often as a lot of evidence appertaining to any of these heads presents itself, the head to which it appertains In such or such a cause (naming it,) on the side of the plaintiff, the evidence was of this or that description (naming it,) and no other, on the side of the defendant, there was no evidence, or evidence of this or that description (naming it) the decision was in favour of the plaintiff, or *vice versâ*

Referring a lot of evidence to the species to which it appeared to belong, in a system of nomenclature thus constructed, would be a sort of exercise analogous to that scholastic exercise, which, in the language of grammatical instruction, is called *parsing*, referring each word to that one of the *genera generalissima* of grammar, the eight or nine *parts of speech* to which it appears to belong.

If the principle thus brought to view — the principle of methodical registration — were applied to every suit without exception, whether turning or not turning upon any suspicious species of evidence, — the sort of register thus produced would, in more ways than one, be conducive in no inconsiderable degree, to the ends of justice; as has been shown in treating of preappointed evidence.

From a register of this kind, the utmost possible amount of the mischief produced by the admission of evidence of a suspicious complexion, as thus distinguished — produced by the aggregate of suspicious evidence, of all sorts taken together, and of each sort in par-

icular — may be indicated, with the utmost degree of exactness that can be desired · and, by comparing year with year, it will be seen whether it be in a stationary state, in a state of increase, or of decrease.

Suppose, for example, that, in a given year, the number of instances in which, on one side, no other evidence was exhibited than what belonged to one or another of the species of makeshift or other suspicious evidence, amounted to 100; and, of this number, in 50 instances the decision went in disfavour of the side on which the suspicious evidence was exhibited; in the 50 other instances, in favour of that side. This last number would represent the utmost possible amount, on one hand, of the mischief (as likewise, on the other hand, of the good) produced by the leaving or throwing open the door to evidence of this sort. Thus much as to the aggregate of the cases of all sorts put together and the same instruction would be afforded in relation to each sort taken by itself.

Though the number of the instances in which benefit or mischief has been produced by the admission of evidence of this description, would thus be given, yet, to exhibit the aggregate quantum of the benefit on the one hand, and of the mischief on the other, would require another head or two, having for their object the indication of the quantum of benefit or mischief thus produced in each cause. To furnish this information would require a statement of the species of causes to which the individual cause belonged, in each instance (for example, penal or non-penal; and, if penal, relative to what species of offence·) and, in the cases where money or money's worth was at stake, the amount of the value adjudged, or claimed and refused to be adjudged, to either side.

§ 3. *Arrangements for diminishing the amount of the danger*

We come now to the second class of remedial arrangements applicable to the diminution of the quantum of mischief from this source. arrangements aiming, in a direct way, at the diminution of the frequency of it

I. *Oath of credence* or *sincerity* on the part of the exhibitant (the party by whom the article of makeshift evidence in question is exhibited:) his declaration to this effect, viz. that, according to his persuasion, the information presented by the article of evidence is, so far as concerns the purpose for which he presents it, correct and true. such declaration being given under the sanction of an oath (where that ceremony is in use) or solemn declaration, and subject to *vivâ voce* examination as to the grounds and causes of such persuasion.

The test of sincerity thus proposed is no other than what, on a former occasion, was brought to view in the number of those *securities*, the refusal of which, on any occasion whatsoever, was represented as an omission altogether repugnant to the ends of justice * It nevertheless seemed to call for a separate mention here partly, lest, on an occasion on which the use of it is so manifest, it should fail of presenting itself to view; partly, because, on the occasion of its application to the present purpose, it finds the case attended with material circumstances, such as do not apply to it in other cases—with circumstances which call for particular observation

The cases in which the demand for this security is most imperative, are those in which the evidence presented immediately to the judge, presents itself, not in the oral, but in the written form, viz casually-written evidence, and minuted evidence, with any number of media interposed In the cases where the evidence presented immediately to the judge is in the oral form, whatever security for sincerity is afforded by judicial examination in the usual manner, is applied, of course, to the judicial witness. Where there is no extraneous witness, this security is wanting, and hence the demand for a supply to the deficiency, by the examination of the party by whom the evidence (in this case the written evidence) is exhibited.

No good reason could be given why this same security (whatever be the worth of it) should not be applied, in like manner, to those modifications of transmitted evidence, in the case of which the evidence immediately presented to the judge is presented in the oral form, viz hearsay evidence, and *memoriter* evidence Indeed, unless excluded by special appointment of law, the general liberty of examination, applying itself to self-regarding as well as extraneous evidence, would involve the points in question in the present case. In the way of distinction, all that can be said here is, that, where there is another person (viz the extraneous witness) to whom the security applies, the demand for the application of the like security to the testimony of the party, in the character of a self-regarding witness, is not quite so great

In a certain point of view, the security thus afforded may be apt to present itself as little worth A party, who, having been dishonest enough to procure or fabricate an article of evidence of this sort, is dishonest enough to make use of it, will come prepared for all the consequences, nor will he shrink from perjury — from the scarce punishable perjury necessary to give this support to it. True: but, in regard to the written evidence of this kind, many a man who, either knowing or suspecting the falsity or incorrectness of it, would present it notwithstanding, and thus

* *Vide supra*, Vol. VI. p. 325.

let it take its chance, would at the same time be far enough from supporting it at the peril of the punishment of *detected*, or though it were only the shame of *suspected*, perjury: and, in regard to the oral evidence of this kind, not only would many a man, notwithstanding any secret suspicion entertained by him of its falsity or incorrectness, suffer it, if proffered to take its chance as before, but there are also others, who, though not bold enough to support a tale of perjury with their own lips, would yet be dishonest enough to send other lips upon the adventure.

Thus, in two cases, both of them but too common, the arrangements proposed would afford considerable security. At present, under every system of technical procedure, this security is altogether wanting. When judges, on so many occasions as we have seen, not only apply no discouragement to insincerity, but apply encouragement and even compulsion to the production of mendacity—when judges, by the whole tenor of their practice, proclaim a predilection for insincerity,—can it with any reason be expected that suitors in general, or more particularly that their professional guides and agents, the worshippers of the judicial hierarchy, should in general be averse to it, or, when employable with safety, backward to employ it?

II. To this head also belongs another arrangement, all along proposed, for allowing to the judge (to be exercised at his discretion) the power of exacting from the party in whose favour the decision operates in the first instance, security for *eventual reinstatement*, for affording to the other party completely adequate satisfaction, in case, by the subsequent exhibition of more trustworthy evidence from the same original source, the decision having the makeshift evidence for its ground should turn out to be erroneous.

On those occasions, the description of the contingency was confined to the particular event bearing a special relation to the case then in contemplation—the event of the disproof of the makeshift evidence, by other evidence emanating from the same original source. But, from what source soever any such subsequently corrective evidence may have issued,—if it be true, and the decision called for by it be different from that which it finds in force, the practical inference (it is evident) is precisely the same.

III. In what cases, for the remedying of the injustice liable to be produced by the decision of one tribunal, liberty should be granted or obligation imposed of submitting the cause to the cognizance of another, is a question that belongs not to the present subject, nor to the present work.

In the extraordinary sort of case here in question, that of a decision grounded on such weak and comparatively untrustworthy evidence,—such reference might perhaps with propriety be prescribed or allowed of, in causes and circumstance in which, supposing the decision grounded on evidence of the ordinary stamp, such reference might not be eligible. Without attempting at present to decide upon the eligibility of any of these arrangements, the present indication will be confined to such remedies of this stamp as the nature of the case admits of. The question of their ultimate eligibility properly appertains to another subject, that of Procedure.

1. Liberty of appeal; *i. e.* of appealing to another tribunal, whose decision shall have for its ground this same body of evidence, without either addition or defalcation. The person by whom such appeal (if preferred at all) will be preferred, is of course a party, and that party to whose prejudice the decision, having the supposed insufficient evidence for its ground, is regarded by him as having operated.

2. Liberty of reference: power given to the judge to refer the decision, in a case of this sort, to another tribunal (naturally a superior tribunal,) if he thinks fit, with or without a provisional decision of his own annexed to it.

An arrangement of this description is superseded (it may be thought) by the one immediately preceding it. If appeal be allowed, the party in whose disfavour the decision (the decision grounded on the comparatively untrustworthy evidence) operates, will, if he considers it as being injurious to him, appeal of course: if he does not regard it as injurious to him, the case calling for a reference does not exist: so that, in each and every case, such reference is of no use.

To this it may be answered—1. The party, howsoever willing to appeal, may be disabled by the expense. 2. He may be deterred by the contemplation of the expense and vexation added together. 3. He may be deterred by the consideration of the weight and authority of the opinion declared by the court below. The court above—whether, if it had to frame a decision on the subject in the first instance, it would or would not have pronounced the same as that which has been pronounced below—may not regard the case as clear enough to warrant the reversing a decision already pronounced by a competent judicature.

Upon all these considerations taken together, it will probably appear that the demand for the power thus proposed to be given to the judge, would by no means be superseded by the power of appeal, if given to the party.

Moreover (in case of appeal,) argument, and consequently expense or vexation on the part of the appellant, and consequently on the part of the adversary, would be naturally (though, it should be added, not necessarily) allowed: whereas, in case of a reference made (as above) by one tribunal to another, such

argument, with the vexation and expense attached to it, would not be so much in course.

3. *Obligation* of reference — *obligation* superadded to the power above proposed to be given to the judge: the reference in this case being or not being accompanied by a provisional decision previously pronounced by himself.

4. In the case of trial by jury, — power to the judge (the professional directing judge) to order a new trial, if dissatisfied with a verdict given on the ground of the suspicious evidence.

This arrangement takes for granted a previous *charge*, or direction from the judge, warning the jury against the error into which the order for a new trial assumes them to have fallen, by deciding in favour of the evidence, the insufficiency of which is thus assumed.

In English law (it has already been observed,) new trial granted, at the instance of a party, on the ground of the verdict's being *against* evidence, is in familiar use the extension would be a very slight one, were the power extended to the case of a verdict supposed to be grounded (as above) on *insufficient* evidence

In the case of exclusion in general, the assumption is, that, if the jury were suffered to hear the evidence, they would be sure to be deceived by it Experience, had judges but patience to consult her, would have superseded the demand for this rash suspicion. Will they be deceived by it? Stay and see. Should their decision prove erroneous, then, and not till then, it may be proper to take measures for obtaining a new one.

§ 4. *Importance of admitting makeshift in the character of* indicative *evidence.*

The principle employed for fixing the conditions to be annexed to the admission of makeshift evidence, was this — viz not to admit any such comparatively untrustworthy evidence, where evidence to the same effect is to be had in a more trustworthy shape, from the same source.

But, supposing the sources of information to exist, will the information be always to be obtained from them in any such more trustworthy shape? He whose interest it is to bring forward the information in question, will it be in his power to draw it forth from those superior sources? This will depend upon the sagacity and industry displayed on this ground by the legislator—upon the care taken by him to afford the requisite *powers* to him (whosoever he be) whose inclination and will is in a state of preparation for this service.

The powers in question are those which are requisite to the investigation of a chain or thread of evidence — to the *discovery* of such evidence as the individual nature of the case may have happened to afford; and (when discovered) to the securing of its *forthcomingness* for the purposes of justice.

To take the arrangements adapted to this purpose, constitutes one of the principal functions of the system of *procedure:* to that subject accordingly they belong, and not to the subject of the present work. A brief intimation of the mode in which evidence, fit or unfit to constitute a ground for definitive decision, may be applied to this incidental purpose, may, not without reason, be expected to be found here

By the term *indicative* evidence, I understand, not any particular and separate sort of evidence, such as circumstantial, direct, self-regarding, and so forth, — but evidence of any sort, considered as being productive of a particular effect; viz the indicating or bringing to view the existence, certain or probable, of some other article of evidence. Indicative evidence is *evidence of evidence.*

To apply the distinction to the subject of makeshift evidence If the rule above laid down in this behalf be a proper one, no article of makeshift evidence ought to be received (viz into the list of the articles constituting on that side the ground for decision,) where evidence in a more trustworthy form is to be had from the same source in other words, no such article of evidence ought to be received into the budget of documents designed by the judge for *ultimate use* Be it so. but neither of this description, nor of any other conceivable description, can any sort or article of evidence be named, which it may not be proper to employ in the character of *indicative* evidence, viz as a help to the discovery or procurement of other evidence, such as may be fit for ultimate use

Thus, for example, in the instance of hearsay evidence — hearsay evidence of the second degree — supposed oral evidence transmitted through two media Says deposing witness, in his examination before the judge, — Middleman, as he said to me, heard Percipiens say, that he was by, and saw what passed, when the defendant gave Occisus his death's wound; and there ends his evidence. Now then, Middleman and Percipiens, are they both alive? The evidence is plainly unfit to be received into the budget for ultimate use: accordingly, neither would it in any case be so received into any such collection under English law.

But ought such information to be altogether unemployed and lost? By no means. Unfit, in the character of evidence, for ultimate use, it is not the less fit for serving in the character of indicative evidence. Let Percipiens be convened before the judge; and if, on being examined, he gives evasive answers, or says he knows nothing about the matter, let Middleman be convened to confront him; —

that, by means of Middleman's testimony, the misrecollections (if any) in the evidence of Percipiens, may, if possible, be corrected—the deficiencies in his recollection may, if possible, be supplied.

The same explanations are alike applicable to every other modification of makeshift evidence. Casually written evidence is indicative, with relation to the judicially extractable oral evidence of the writer of the script: transcriptural evidence is indicative, with relation to the original script: minuted evidence is so, with relation to the writer of the minute, as well as to any extrajudicial witness whose oral statement or narration is the subject of it: *memoriter* evidence is so, with relation to the script, the supposed tenor, purport, or effect of which, is thus reported: reported real evidence is so, with relation to the real evidence which is the subject of the report: and, in case of the interposition of divers media, transmitted evidence of any degree is indicative, of course, of all superior degrees of evidence from the same original source.

From the bare description of this species of evidence (that is, of the use thus to be made of any species of evidence,) it will be manifest beyond dispute that any system, which, for the purpose of any sort of cause, penal or non-penal, should (unless for the avoidance of preponderant delay, vexation, and expense) omit to make use of makeshift or other evidence in this way,—to make use of it to the utmost, for the purpose of discovering and obtaining such information as is to be had in a state fit for ultimate use,—is, to the amount of such omissions, defective, and unconducive to the ends of justice.

The proposition is not a purely hypothetical one. In the instance of the English system of procedure, exemplifications of it but too extensive may be observed. In the penal branch, in cases of felony unclergyable and clergyable,* or (to speak without nonsense) in first and second rate crimes, evidence, applicable or not to ultimate use, becomes by accident applicable to this use: it serves for the discovery, and thence perhaps for the obtainment, of evidence ultimately employable. This incidental use is extendible always by accident,—(for design (design, at least, directed to the legitimate ends of justice) is an incident still wanting to the jurisprudential system of English procedure,)—this use is extendible, to a certain degree, to inferior offences. But, to causes non-penal, carried on in any branch of the regular mode (whether it be the branch called the common-law branch, or the branch called the equity branch,) it is scarce in any case extendible. If the evidence which the witness whom you have summoned has it in his power to give, happens to be of that sort which is applicable to ultimate use, well and good,—it may be put to use accordingly: if not, the arrangements of procedure will not suffer it to be put to the other use: if you have no evidence from any other source, be the evidence obtainable from this source ever so conclusive, you lose your cause.

* By 7 & 8 G. IV. c. 28. § 6, the benefit of clergy with respect to persons convicted of felony is abolished.—*Ed.*

CHAPTER XII

ABERRATIONS OF ENGLISH LAW IN REGARD TO MAKESHIFT EVIDENCE.

Such are the arrangements, such the rules of judging, that have been suggested by a regard for the ends of justice—the avoidance of misdecision, on one hand, and, on the other, the reducing, on every occasion, to their least dimensions, the collateral and never completely avoidable inconveniences of delay, vexation and expense.

If the above arrangements are well adjusted to such their ends—and if the arrangements actually pursued by English jurisprudence were also well adjusted to these same ends,—those actually existing arrangements could not, in any point, be very widely distant from the above proposed ones. So much for the argumentative picture of things. The picture next to be given must be taken from life. If, on this occasion, the reader has prepared his mind to view a system of arrangements suggested by, and *bona fide* directed to, the ends of justice, great indeed will be his surprise and disappointment. If, on the other hand, the contrary hypothesis be assumed—if, on considering the natural opposition of interest on this ground between the governors and the governed, his assumption should be, that, in the views and wishes of the authors of these arrangements, the difference between right decision and misdecision has been in general a matter of indifference—and that, in so far as was conducive to the profit of the governing profession, not the minimum, but the maximum, of delay, vexation, and expense, has been the object of endeavour,—he will find every object consistent with that assumption—every arrangement flowing naturally from that source.

An explanatory hint must in this place be given to the non-professional, and more particularly to the non-English, reader. Observing one copy of the same document rejected, at the same time that another copy of the same instrument is admitted,—if, for anything that appears, both are in existence and producible, it may naturally enough appear to him that the rejection of either, however ill-founded in principle, would be matter of indifference in practice. Reasonable as it is, the supposition would be erroneous and delusive. Under a different system of proce-

dure — under the system drawn from Roman law, and generally prevalent on the continent of Europe, — it would either be agreeable to, or at least less widely distant from, the truth. But in English procedure, no option thus made, if it be exclusive, is ever a matter of indifference. The document thus excluded is always the document, whatever it be, that happens to have been tendered The consequence of the exclusion is, not a simple reference to the approved document, without further delay, vexation, or expense, but an actual loss of the cause to the party whose document is thus rejected. The direct injustice thence resulting as to the main point in dispute, is not indeed, in this case, in *every* instance, irreparable; but in many and many an instance it is. either because, under the existing arrangements, the door is not left open to a fresh demand on the same ground, or because, in the interval, and before it can receive a decision, either some necessary evidence has perished, or the fund necessary for the alimentation of the suit has been exhausted. Be this as it may, and according to the least calamitous result, a fresh trial, *hearing*, or whatever be the name of it, is necessary — in a word, a fresh suit: in consequence of which, the delay, vexation, and expense, bestowed upon the preceding one, are in a great part (or, as the case may be, in the whole) wasted and thrown away

Here then, once for all, let this deplorable and but too indisputable truth be borne in mind. that — howsoever it might be under a natural system, and even in the technical system of any other country — in the technical system of English jurisprudence there are no innoxious, no completely reparable, nor anything like completely reparable, mistakes; and that, whatsoever absurdity is discernible — fraud, and the spirit of extortion, may or may not have been the cause — plunder, oppression, and affliction, are infallibly the result.

On this ground, as on every other part of the vast demesne of jurisprudence, whatever is at variance with the ends of justice will be to be referred, in proportions not always to be distinguished, to the two grand sources of misdecision, — improbity and folly. The improbity, has for its cause the as yet unremedied but not irremediable, opposition of interests between this class of governors and the governed The folly has for its cause, at least for a very principal one of its causes, one of the essential characters of jurisprudential law — the taking the conceptions and practice of a less experienced and less informed, as a standard for the notions and practice of a more experienced and better informed, age

I proceed to bring to view the most important of the aberrations from the above rules, exemplified in English law; together with the inconveniences with which they respectively appear pregnant.

1. The first consists in admitting, at the instance of the plaintiff, to the prejudice of the defendant, in the lifetime of the defendant, a letter or memorandum in his hand: the defendant, though alive, being neither compelled nor permitted to stand forth himself in the character of a deposing witness, to be examined upon oath (as a non-litigant witness would be) touching the facts brought to view in such written discourse.* And so in the case of a written statement of the plaintiff's, at the instance of the defendant.

By the influence of a superstition, which has been already touched upon, and which will be more thoroughly discussed in another place, the evidence of a defendant is not permitted to be extracted in the mode recognised to be the best But the objection confines itself to the best mode no sooner does a bad mode present itself, than the prohibition is taken off

Refusing to hear the testimony of a defendant, extracted in the way of *vivâ voce* examination, the law refuses (as may well be imagined) to receive the testimony of the same person exhibited in the form of written non-judicial evidence — in the form of a letter or memorandum, not designed at the time of writing it (or at least not purporting to be designed) to be exhibited as evidence. So far, at any rate, it is consistent, and, admitting the propriety of not suffering the defendant to be examined in the character of a witness, unexceptionable

But when the plaintiff, having by any accident possessed himself of a letter or memorandum in the handwriting of the defendant, thinks fit on his part to exhibit it as evidence; then the rule goes for nothing, and the evidence is admitted In this admission, the law considers itself as safe against deceit: and so it undoubtedly is, viz on one side, the side of the plaintiff, — the only side to which, on this occasion, its views appear to have extended To the prejudice of the plaintiff, the admission of it will not be productive of injustice Why? Because it is he who produces it So far is right the reason is a conclusive one But the defendant? are his interests taken equal care of? The answer is, No: they are entirely neglected. In a multitude of cases — each of them capable of being realized, each of them, doubtless, every now and then realized, — conclusions as contrary to truth, as they are prejudicial to the defendant, will every now and then be drawn: necessarily drawn, when a deaf ear is turned to those *vivâ voce* explanations, by which the truth of the case might, in its whole extent, be brought to light.

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* *Vide supra*, p. 124, Note *.—*Ed.*

2. The second aberration consists in the exclusion put upon the like written testimony of a witness, litigant or non-litigant, after his decease: a point of time, after which, on the one hand, the examination of such witness is become impossible, on the other hand, the capacity of profiting, in his own person at least, by such his testimony, supposing it false and fraudulent, is at an end.

Such (it will be seen) is the course taken in general by the English law: a course crossed indeed by a multitude of exceptions, the propriety of which can by no other arguments be maintained, than by such, the validity of which is the condemnation of the general rule.

In the whole field of evidence, which is as much as to say, in the whole field of justice, few points can be of greater importance. Under this head come the books of a shopkeeper, including the register kept by him of the monies due to him. That these books should not of themselves, and during the master's lifetime, be conclusive evidence in his favour, the evidence unsanctioned, and the author uncross-examined, is a proposition too plain to stand in need of argument. Each shopkeeper might, at that rate, impose a tax to any amount, on any number of persons, at his choice. That the written evidence even of his servant in his behalf should not be received as conclusive—should not be received at all during the lifetime of such servant, such servant being capable of being examined in the regular mode, and yet not examined—is another proposition which I have endeavoured to establish. But if, after the death of such servant, the entries made by him were not permitted so much as to be received in the character of evidence, what would be the consequence?* That every tradesman's title to the monies owing to him for his goods, would be dependent, completely dependent, on the life of the servant, the book-keeper, the journeyman, the porter, by whom they had been respectively delivered to his customers. The death of the servant, and the ruin of the master, would be the effect of the same inevitable cause.

A word, a phrase, a broken hint, an uncompleted and perhaps uncompleteable sentence,—such is the garb in which Reason clothes herself on those great and rare occasions, on which she vouchsafes to visit the shelves of English law. Sometimes the word "*necessity*," sometimes the phrase "*course of trade*," is the fragment of a reason, under favour of which a pretence is sought for the breach made, upon this ground, in the irrational and intolerable rule. But to what use introduce *necessity*?—what justification can *necessity* afford for the breach of any rule laid down by reason—of a rule prescribed by any comprehensive view of the dictates of utility? The species of evidence being admitted, one or other of two opposite results—deception, or non-deception, is the most probable. If admitted, would it be oftener productive of deception, and thence of erroneous decision, than of a just persuasion, and thence of a decision according to truth and justice? In this case, where is the *necessity* (let what will be understood as signified by that vague appellation)—where or what is the *necessity* that can warrant the admission of the fallacious light?

Apply the same observation to the compound term, the *course of trade*. Trade is a good thing, it is universally agreed to be so: great sacrifices, though not always very advantageous ones, are made continually in its service. But is it in the nature of trade, any more than of any other desirable object, to be benefited or promoted by the letting in a species of light, of which injustice oftener than justice will by the supposition be the consequence? Is it in the nature of trade, any more than of justice, to receive advancement by a system of decision, of which the effect will be, to put the fruits and profits of trade more frequently into the pocket of a cheat than of the lawful owner?

Of two things, one. The evidence admitted either promises to be most frequently productive of justice, or of injustice. If of justice, no such word as necessity or trade can be *necessary*—if of injustice, no such word can be *sufficient*, to warrant the admission of it.†

It has been observed already, that there is a whole class of facts, for the proof of which, in spite of all excluding rules, a door is thrown wide open to all sorts of evidence without scruple not only to this but too suspicious evidence, but to the much more suspicious and fallacious evidence, which, by English lawyers, has so often been confounded with it. I mean *hearsay* evidence. And what are these facts? I can think of but one attribute by which, indeterminate as it is, they can be designated, and that is, *ancient: ancient* facts—facts tending to the establishment of family relation, locally obligatory custom, ancient possession of rights of partial ownership, and the like. If, on one part of the ground more than another, the argument from necessity can be said to apply with peculiar force, it will be on this. On this sort of ground, exclude this sort of evidence, you exclude all evidence. The witch of Endor, the sibyl once so complaisant to the curiosity of Ulysses, are not now in office. Ghosts cannot now be brought into court, *obtorto collo*, to be sworn and cross-examined. An interval

* *Vide supra*, p. 123, Note †.—*Ed.*

† For a fuller exposure of the arguments founded upon the words necessity and trade, see Book IX. *Exclusion*; Part III. *Deception*; Chap. III. sect. 3.

of a certain length, has it elapsed between the present time and the time of the fact or supposed fact? —such evidence as the nature of things furnishes, you must admit, or none Written extrajudicial evidence, if it be to be had; howsoever it happens to present itself, it is your best chance: failing this, even hearsay evidence —hearsay evidence, remote from the fountain head by any number of degrees, and with or without being able to trace it to the fountain head, or so much as to number the degrees. Such is the choice, in respect of sorts of evidence one of these two, or none. But, even in this case, of what avail, or even import, is the plea of necessity, any more than in any other? As to the import, here indeed it is plain enough that such is the case — this evidence or none But, in this case, as in every other, is not the absence of all evidence a preferable result to the presence of a species of evidence, which, be the case what it will, is more likely to give birth to a wrong judgment than to a right one?

In vain would it be to say, that in this case the danger of deception is in any respect less than in any other: on the contrary, it is even greater. Recent testimony — testimony concerning recent facts, if mendacious or otherwise incorrect, possesses its chance of receiving confutation or correction in the regular and most satisfactory mode, from the sanctioned and scrutinized testimony of persons still alive: circumstantial evidence will, in the character of indicative evidence, afford a clue to this or that lot of *vivâ voce* evidence — a clue which fraud, with all its cunning, may not have suspected. But, in the case of *ancient* facts, who shall follow out the clue that has been broken by the same hand that cut the thread of life?

It may be thought superfluous, after this, to add any such reflections as the following — 1. That, in point of distance of time, no determinate line has been so much as attempted to be drawn, nor could easily be drawn, between these ancient facts and facts of more ordinary occurrence, 2 That, among the facts thus treated as ancient facts, are facts that may have been but as of yesterday, 3. That in particular, in a case that has given birth to a decision pronouncing the admission of even hearsay evidence, the length of interval extended not beyond twenty years, 4. That the length by which, in the proposed rule, the place of the line which separates admission from exclusion is proposed to be determined, is the length of human life — a length which, though in one case it may be but that of an atom, may in another case be some number of times the above recorded and admitted length of twenty years, and 5. That the true criterion between cases for admission and cases for rejection, is constituted, not by the length of time, considered in itself, but by the existence or non-existence of the faculty of submitting the testimony to the action of the scrutinizing and purifying tests. The witness, in mind as well as body, is he still ready at the call of justice? Admit not his written statement, though it have an antiquity of sixty, of eighty years, to plead for it. Has he taken his departure from the world we live in? Admit the paper, though the ink have scarce yet ceased to wet it. But may it not then be false? false, and fabricated for the purpose? Indubitably it may: though, in our own times at least, such fraud, or any mark of such fraud, committed by a hand so circumstanced, is neither natural nor common. But is the presence of such fraud, in each case, more probable than the absence? And, where present, is the success of it more probable than the failure, after all the warning recommended to be given of it, and which so naturally will be given of it? And are these the only times in which the propensity to fraud has been to be found in the nature of man? Forged deeds, and other fruits of lettered fraud, are they in greater proportion to true and authentic writings in these our times, such as they are, than in the times of monkery and monkish charters?

Such are the questions of minor account, that present themselves as applicable to this particular case. But have they not been already superseded and rendered superfluous by that broadest and all-comprehensive line of argument, which covers the whole of the ground to which the species of evidence now before us is applicable?

3 A third aberration consists in receiving the testimony of a witness in the unsatisfactory form of casually written evidence, upon the ground of a mere unforthcomingness on his part at the time, without any inquiry into the cause, whether temporary or perpetual;* and without provision for reparation of the wrong, in the event of its being proved false by subsequent *vivâ voce* examination in the regular and proper mode. The admissibility of this evidence, under these circumstances, being established, what would be the consequence? That, where the value at stake was sufficient to pay the expense of the fraud, a man would procure his witness, in the first place, to fabricate a piece of written evidence adapted to the circumstances of the case; in the next place, to keep out of the way till after it had been put to its judicial use, and a decision had been grounded upon it. Or, by procuring the like testimony from a man, whose known intention it was never to re-

* This is scarcely consistent with practice. It has been held, that proof of the hand-writing of a clerk, and that he has gone abroad, and is not likely to return, is not sufficient to make a memorandum by him admissible in evidence. 1 Esp. N. P. C. 2.—*Ed.*

visit the country in which it was to be fabricated, the expense of purchasing absence might thus be saved.

Not that it follows, by any means, that if, under favour of the rule protested against, the characteristic fraud were even to be frequently attempted, the attempt would be as frequently, or anything like as frequently, successful. With the warning which it is here proposed should be given of it, and which, without any such proposal, would naturally be given of it, to the judge of fact by the judge of law, I should not expect to see such evidence frequently productive of a decision on that side, even where the truth of the case was on that same side, much less to see any frequent reason for suspecting that fraud had by this means been rendered triumphant. But where, without incurring any such risk, the purposes of substantial justice might in an equal degree be accomplished, the danger, whatever it may amount to, seems to have nothing to compensate it.

Symptoms of a tendency at least to admit in this unguarded way evidence in its own nature so suspicious—so apt to be fallacious, has been here and there betrayed by English law.

4 In regard to the admission of transcripts, the aberrations of English law are still more remarkable.

In the case where the original is not absolutely unproducible, the question respecting the admission of transcripts will be apt at first to present itself as of little or no practical importance: if the transcript will serve, let it be admitted—if not, let the original be produced. Thus, in effect, the matter will stand, taking the world at large. But in English procedure, the spirit of chicane has, on this part of the ground, as on so many others, contrived to raise a cloud of frivolous distinctions, under the influence of which the interests of justice have in numerous instances gone to wreck. In that system of procedure, so far as the use of trial by jury extends, whatever evidence is capable of contributing to form the ground of decision, must be presented, every part of it, within the compass of a given part of a given day. At that period a transcriptural document being presented, if it be a case where a transcript is allowed to be received in place of the original, well and good, if not, and the document is a necessary one to the side of the party by whom it was produced, the cause is lost for that time at least, *i. e.* in respect of the action then depending: and whether the loss be repairable or no, depends upon a variety of circumstances. If the transcript be presented on the defendant's side, and essential to it—and if the case be of the number of those in which a transcript, or that sort of transcript, happens to be found inadmissible,—woe to the man whose lot it happens to be to occupy the station of defendant! If it be the pleasure of the judge to grant him a new trial, on condition of taking his chance for that expensive remedy, the omission may be repaired—the original may be produced. But at the best, and even at that expense, the reparation of the omission—the saving his cause from perdition and injustice, and himself perhaps from ruin—depends not upon himself, whereas, were his station in the cause that of the plaintiff, it would depend upon himself to suffer what is called a *nonsuit*, and, at the price of a fresh action, to substitute the admissible document for the inadmissible one.

On the ground of transcriptural evidence, among the inconveniences by which suitors are apt to be tormented, those which consist in undue decision or failure of justice having the spuriousness or incorrectness of this species of evidence for their cause, constitute but a small proportion of the aggregate mass. It is in the triple shape of delay, vexation, and expense, that the principal part of the mischief displays itself.

Transcripts are made of a mass of writing to any extent, where a glance of the original would be sufficient.

Of a mass of writing, of which but a small part is relevant, or at least necessary to the purpose, the whole is transcribed without distinction.

Transcripts are made by an official hand, at an extra expense—an expense sometimes altogether arbitrary, and most commonly excessive, as being at a monopoly,—where transcripts made at an ordinary expense might afford a lot of evidence equally satisfactory to an impartial or candid mind.

Originals are fetched from unlimited distances, in official, or other appropriate, and consequently high-paid custody,—when transcripts in the way of extract, or even entire, might be obtained and sufficiently authenticated at an inferior price.

The mass of delay, vexation, and expense, which has for its cause any real *bonâ fide* disbelief or suspicion as to the genuineness or correctness of a lot of transcriptural evidence, is perhaps not a tenth, not a twentieth, not a hundredth part, of that which has *mala fides*, on the one part or the other, for its cause. In the view of guarding against spuriousness and incorrectness, certain regulations are established. If, in any the most minute particular, party A is found departing from these regulations, party B takes advantage of the flaw. Each party, sure of being opposed by morally unjust, though legally just, objections on the part of the other, heaps paper upon paper, expense upon expense. A party, though secure in his own mind against objection on the part of his adversary, will, for the sake of inflicting vexation on him, pretend

to apprehend vexation from him; or rather, without so much as the necessity of any such pretence, act as if he apprehended it. Agents of the parties, on both sides, and of all descriptions, official scribes of all descriptions, all have an interest in increasing the load by additions in themselves unnecessary; all have pretences for giving birth to such increase, all have it more or less in their power to give birth to it. Judges, by whom such abuses should be watched with a sleepless eye and averted by an inexorable hand, contribute not so much to reduce the load as to increase it, by useless and groundless punctilios, the result of some caprice of the imagination — of partial views, in which the contemplation of some ill-chosen means has eclipsed the prospect of the ultimate and proper end, the prevention of the inconveniences so often mentioned.

Parties, their agents, and the subaltern officers of justice, each on his own part aims at profitable injustice: judges second the endeavours of all.*

5. Few questions have been more agitated in English law than those which relate to the admissibility of, and the effect to be given to, different articles of *adscititious* evidence † The subject occupies sixty closely printed nominal octavo, real quarto pages, in Phillipps's exposition of the law of evidence Of a subject thus extensive, more than a very general view cannot be expected to be given in the present work: nor is it necessary for our purpose to go beyond the more prominent features.

One remarkable circumstance is, that the whole body of the rules of law relating to this subject are, with a very small number of exceptions, exclusionary. Either the decision given in a former cause is said not to be evidence; and then it is that decision which is excluded: or it is said to be conclusive evidence; and then an exclusion is put upon the whole mass of evidence, howsoever constituted, which might have been capable of being presented on the other side

In saying this, enough has already been said to satisfy any one, who has assented to what was said in a former chapter concerning adscititious evidence, that nearly the whole of the established rules on this subject, except to the extent of the single and very limited case in which it was there seen that exclusion is proper, are bad. Accordingly, the rule that a judgment directly upon the point is conclusive in any future cause between the same parties, is a good rule — it is almost the only one that is

Even this rule is cut into by one exception. that verdicts in criminal proceedings are not only not conclusive, but are not even *admissible* evidence, in civil cases ‡ For this exception, two reasons are given. the one founded on a mere technicality — the other on a view, though a narrow and partial one, of the justice of the case The first is, that it is *res inter alios acta* the parties in the civil cause cannot, it is said, have been also the parties in the previous criminal one, the plaintiff in a criminal proceeding being the king It is obvious, however, that the king's being plaintiff is in this case a mere *fiction* Although the party in whose favour the previous verdict is offered in evidence, was not called the *plaintiff* in the former proceeding, there is nothing whatever to hinder him from having been the *prosecutor*, who is substantially the plaintiff Now if he was the prosecutor, and his adversary the defendant, it is evident that the cause *is* between the same parties; that it is *not*, in reality, *res inter alios acta*; and that if it be treated as such, justice is sacrificed, as it so often is, to a fiction of law.

The other reason is, "that the party in the civil suit, in whose behalf the evidence is supposed to be offered, might have been a witness on the prosecution" ‖ This is true. He *might* have been a witness, and the previous verdict might have been obtained by his evidence But it *might* be, that the contrary was the case. Whether he was a witness, or not, is capable of being ascertained. If he was not a witness, why adhere to a rule which cannot have the shadow of a ground but upon the supposition that he was? But suppose even that he was a witness, and that the verdict which he now seeks to make use of, was obtained from the jury by means of his own testimony This will often be a very good reason for distrust; but it never can be a sufficient reason for exclusion. Under a system of law, indeed, which does not suffer a party to give evidence directly in his own behalf, it is consistent enough to prevent him from doing the same thing in a roundabout way A proposition, however, which will be maintained in the sequel of this work, is, that in no case ought the plaintiff to be excluded from testifying in what lawyers indeed would call his own behalf, but which, by the aid of counter-interrogation, is really, if his cause is bad, much more his adversary's be-

* The papers from which the above remarks on the aberrations of English law have been compiled, were written by Mr. Bentham at different times, and left by him in a very incomplete and fragmentitious state. It appears that he had intended to give some account of what is done by English law in regard to all the different kinds of makeshift evidence, but never completed his design. The remainder of this chapter (with the exception of a fragment, which for distinction's sake has been printed within brackets,) is the result of a partial attempt to fill up the void which had thus been left in the body of the work.—*Editor*

† See Chapter II. of this Book, § 3, *supra*, p. 127.

‡ Phillipps (edit. 1824,) i. 317, *et seq.*

‖ Ibid. i. 319.

half than his own. Should this opinion be found to rest on sufficient grounds, the reason just referred to for not admitting the former verdict as evidence, will appear to be, on the contrary, a strong reason for admitting it.

Thus much may suffice, as to the first rule relating to this subject in English law — a rule which has been seen to be as reasonable, as the above-mentioned exception to it is unreasonable. We shall find few instances, in the succeeding rules, of an approach even thus near to the confines of common sense.

For, first, a judgment is not evidence, even between the same parties, "of any matter which came collaterally in question, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment."* By the words *not evidence*, lawyers sometimes mean one thing, sometimes another: here, however, *not admissible* in evidence, is what is meant. That it ought not to be *conclusive* as to any fact but such as the judgment, if conformable to law, necessarily supposes to have been proved, is no more than we have seen in a former chapter: that, however, because it ought not to be made conclusive, it ought not to be admissible, is an inference which none but a lawyer would ever think of drawing. A common man's actions are received every day as circumstantial evidence of the motive by which he was actuated: why not those of a judge? — The next rule is, that a verdict or judgment on a former occasion, is not evidence against any one who was a stranger to the former proceeding: that is, who was not a party, nor stood in any such relation to a party, as will induce lawyers to say that he was *privy* to the verdict. The reason why a judgment under these circumstances is not evidence, is, that it is *res inter alios acta*. But we have seen already† that its being *res inter alios acta*, though a sufficient reason for receiving it with suspicion, is no reason for excluding it.

The more special reason, by which, in the case now under consideration, this general one is corroborated, is, that the party "had no opportunity to examine witnesses, or to defend himself, or to appeal against the judgment."‡ This being undeniable, it would be very improper, no doubt, to take the judgment for *conclusive*. On this ground, what is the dictate of unsophisticated common sense? A very obvious one. As the party has not had an opportunity to examine witnesses, to defend himself, or to appeal against the judgment, at a former period, let him have an opportunity of doing all these things now: let him have leave to impeach the validity of the grounds on which the former judgment was given, and to show, by comments on the evidence, or by adducing fresh evidence, that it was an improper one: but do not shut out perhaps the only evidence which is now to be had against him, merely because it would be unjust, on the ground of that evidence, to condemn him without a hearing. In the nature of a judgment is there anything which renders a jury less capable of appreciating that kind of evidence, than any other kind, at its just value? But it is useless to argue against one particular case of the barbarous policy which excludes all evidence that seems in any degree exposed to be untrustworthy. The proofs which will be hereafter‖ adduced of the absurdity of the principle, are proofs of its absurdity in this case, as in every other.

Another curious rule is, that, as a judgment is not evidence *against* a stranger, the contrary judgment shall not be evidence *for* him. If the rule itself is a curious one, the reason given for it is still more so. — "Nobody can take benefit by a verdict, who had not been prejudiced by it, had it gone contrary:" a maxim which one would suppose to have found its way from the gaming-table to the bench. If a party be benefited by one throw of the dice, he will, if the rules of fair play are observed, be prejudiced by another: but that the consequence should hold when applied to justice, is not equally clear. This rule of *mutuality* is destitute of even that semblance of reason, which there is for the rule concerning *res inter alios acta*. There is reason for saying that a man shall not lose his cause in consequence of the verdict given in a former proceeding to which he was not a party, but there is no reason whatever for saying that he shall not lose his cause in consequence of the verdict in a proceeding to which he *was* a party, merely because his adversary was not. It is right enough that a verdict obtained by A against B should not bar the claim of a third party C, but that it should not be evidence in favour of C against B, seems the very height of absurdity. The only fragment of a reason which we can find in the books, having the least pretension to rationality, is this, — that C, the party who gives the verdict in evidence, may have been one of the witnesses by means of whose testimony it was obtained. The inconclusiveness of this reason we have already seen.

The rule, that a judgment *inter alios* is not evidence, which, like all other rules of law, is the perfection of reason, is in a variety of instances set aside by as many nominal exceptions, but real violations, all of which are also the perfection of reason. To the praise of common sense, at least, they might justly lay

* C. J. De Grey, in the Duchess of Kingston's case, *apud* Phillipps, i. 304.

† *Vide* Chap. II. ‡ Phillipps, i. 309.

‖ See Book IX. *Exclusion;* Part III. *Deception.*

claim, if they did no more, in each instance, than abrogate the exclusionary rule But if the rule be bad in one way, the exceptions, as usual, are bad in the contrary way.

One of the exceptions relates to an order of removal, executed, and either not appealed against, or, if appealed against, confirmed by the quarter-sessions. This, as between third parishes, who were not parties to the order, is admissible evidence, and therefore (such is jurisprudential logic) conclusive the officers, therefore, of a third parish, in which the pauper may have obtained a settlement, have it in their power, by merely keeping the only witnesses who could prove the settlement out of the way till after the next quarter-sessions, or at farthest for three months, to rid their parish for ever of the incumbrance The reason of this is, "that there may be some end to litigation,"* —a reason which is a great favourite with lawyers, and very justly. Litigation—understand, in those who cannot pay for it—is a bad thing. let no such person presume to apply for justice One is tempted, however, to ask, whether justice be a thing worth having, or no? and if it be, at what time it is desirable that litigation should be at an end? after justice is done, or before? It would be ridiculous to ask for what reason it is of so much greater importance that litigation between parishes should have an end, than litigation between individuals, since a question of this sort would imply (what can by no means be assumed) that *reason* had something to do with the matter.

What is called a judgment *in rem* in the exchequer, is, as to all the world, admissible, and conclusive. The sentence of a court of admiralty, is, in like manner, as against all persons, admissible, and conclusive So is even that of a foreign court of admiralty The sentence of ecclesiastical courts, in some particular instances,—this, like the others, is admissible, and, like the others, conclusive. It is useless to swell the list. Equally useless would it be to enter into a detailed exposition of the badness of these several rules The reader by whom the spirit of the foregoing remarks has been imbibed, will make the application to all these cases for himself

The law recognises no difference in effect, between the decision of a court abroad, and that of a court at home. The sentence of any foreign court, of competent jurisdiction, directly deciding a question, is conclusive, if the same question arise incidentally between the same parties in this country: in all other cases it is inadmissible. The case of debt, in which it is admissible, but not conclusive, is partially, and but partially, an exception, for even in this case the foreign judgment is, as to some points, conclusive.†

To make no allowance for the different chance which different courts afford for rectitude of decision, would be consistent enough as between one court and another in the same country: in England, at least, the rules of the several courts, howsoever different among themselves, being each of them within its own sphere the perfection of reason, any such allowance as is here spoken of would be obviously absurd. that must be equally good everywhere, which is everywhere the best possible. Of foreign judicatories, however, taken in the lump, similar excellence has not, we may venture to affirm, been ever predicated by any English lawyer, nor is likely to be by any Englishman, for Englishmen, how blind soever to the defects of their own institutions, have usually a keen enough perception of the demerits, whether of institutions or of anything else, if presented to them without the bounds of their own country. Were a consistent regard paid to the dictates of justice, what could appear more absurd than to give the effect of conclusive evidence to the decisions of courts in which nearly all the vices of English procedure prevail, unaccompanied by those cardinal securities—publicity and cross-examination—which go so far to make amends for all those vices, and which alone render English judicature endurable? Yet the rule which, in so many cases, excludes those decisions altogether, errs nearly as much on the contrary side; for, the difficulty of bringing witnesses and other evidence from another country being generally greater than that of bringing them from another and perhaps not a distant part of the same country, there is the greater probability that the decision in question may be the only evidence obtainable

After what has been observed concerning the admissibility of prior decisions in English law, little need be said on that of prior depositions Wherever the decision itself is said to be *res inter alios acta*, the depositions on which it was grounded are so too, and are consequently excluded In other cases they are generally admissible though to this there are some exceptions Happily nobody ever thought of making them conclusive.

[‡ Among the causes which have contributed to heap vexation upon suitors on the ground of evidence, one has been the scramble for jurisdiction (*i. e.* for fees) between the common-law courts, and the courts called courts of equity. Such was the hostility, the common-law courts refused to give credit to whatever was done under authority of their rivals. Depositions in equity were not admissible evidence at common law. When the work of iniquity is wrought by judicia-

* Phillipps, i. 312. † Ibid. i. 330-334.

‡ Here commences the fragment alluded to in p. 170.

hands, there must always be a pretence; but no pretence has been too thin to serve the purpose. It consists always in some word or phrase: and any one word that comes uppermost is sufficient.

The pretence on this occasion was, — a court of equity is not a court of record. A better one would have been, to have said, it is not a tennis court. The consequence would have been equally legitimate, and the defects of the common-law courts, and the effrontery of the conductors of the business, would not have been placed in so striking a point of view.

With much better reason (if reason had anything to do in the business) might the equity courts have refused the application of courts of record to the common-law courts. In every cause, the evidence, and that alone, is the essence of the cause; in it is contained whatever constitutes the individual character of the cause, and distinguishes it from all other causes of the same species: to a cause, the evidence is what the kernel is to the nut. In a court of equity, this principal part of the cause, though not made up in the best manner, is at any rate put upon record, or, in plain English, committed to writing, and preserved. In a court of law this is never done. The evidence, like the leaves of the Sibyl, is committed to the winds. What goes by the name of the record is a compound of sense and nonsense, with excess of nonsense: the sense composed of a minute quantity of useful truth, drowned and rendered scarce distinguishable by a flood of lies, which would be more mischievous if they were less notorious.

In the court of Exchequer, the same judges constitute one day a court of equity, another day a court of law. What if the occasion for the rejection of the evidence had presented itself in this court? In the hands of an English judge, the *jus nitiendi* is the sword of Alexander. On the declared ground of iniquity, stopping every day their own proceedings, why scruple to refuse credit to their own acts?]

It is now, however, fully settled, that the answer of the defendant, as well as the depositions of witnesses, in Chancery, are evidence in a court of law; and that "a decree of the court of Chancery may be given in evidence, on the same footing, and under the same limitations, as the verdict of judgment of a court of common law."*

The exemplifications which we undertook to give of the defects of English law in relation to makeshift evidence, may here end. To what purpose weary the reader with the dull detail of the cases in which casually-written or *ex parte* preappointed evidence are excluded, with the equally long, and equally dull, list of the cases in which, though exclusion would be just as reasonable (if it were reasonable at all,) admission, and not exclusion, is the rule? To know that the established systems are everywhere radically wrong — wrong in the fundamental principles upon which they rest, and wrong just so far as those principles are consistently applied, — this, to the person who regards the happiness of mankind as worth pursuing, and good laws as essential to happiness, is in a pre-eminent degree important and interesting. But, for one who, by a comprehensive survey of the grand features, has satisfied himself that the system is rotten to the core; for such a person to know that it is somewhat more tolerable in one part than in another part — that principles which are mischievous in all their applications, are a little more or a little less mischievous in one application than in another — that, in this or that portion of the field of law, vicious theories are consistently carried out, and yield their appropriate fruit in equally vicious practice, while in this or that odd corner they are departed from, — would in general be a sort of knowledge as destitute of instruction, as it always is and necessarily must be of amusement.

* Phillipps, i. 340.

BOOK VII.

OF THE AUTHENTICATION OF EVIDENCE.

CHAPTER I

AUTHENTICATION, WHAT. CONNEXION OF THIS SUBJECT WITH THAT OF PREAPPOINTED EVIDENCE.

In the book having for its subject *preappointed evidence*,*—in bringing to view the *uses* or *advantages* derivable from that kind of evidence, considered as applied to instruments expressive of contracts, taken in the largest sense,—prevention of spurious or falsified instruments, *i. e.* spurious in the whole or in part, was stated as being of the number of those uses.

The function then considered as belonging to the legislator was, so to order matters, that, in so far as contracts have been entered into, genuine instruments expressive of them shall be in existence, and that spurious instruments, instruments expressive of discourses that were never uttered by the persons by whom they purport, or by some one are pretended to have been uttered, may not be in existence

So to order matters, as that, when an instrument so framed as above is genuine, it shall be believed to be, and recognised as, genuine; and that, when an instrument purporting or appearing or pretended to be so framed as above, is not genuine, but either spurious *in toto* or falsified, it shall be understood that it is spurious or falsified, and, in case of falsification, what are the parts in it that are falsified; is another of the legislator's functions, which remains to form the subject of this book.

On that former occasion, room and demand were seen to exist for something in the way of *regulation* — something, how little soever in comparison with that which has so commonly been done.

On this occasion, there is no demand for anything whatsoever to be done in the way of *regulation:* whatever is to be done consists wholly of *instruction*—instruction from the legislator, delivered for the information and guidance of the judge.

CHAPTER II.

SUBJECT-MATTERS OF AUTHENTICATION, WHAT. MODES OF AUTHENTICATION IN THE CASE OF REAL AND OF ORAL EVIDENCE.

THREE main species or parcels have again and again been mentioned, as comprising together the whole possible matter of evidence—*real, oral,* and *written* The same term, *authentication,* may be employed with reference to each of them: but the import of it, in the three cases, differs to a certain degree, according to the different natures of the subject-matter to which it is respectively applied

1. In the case of *real* evidence, to authenticate the evidence is to establish the identity of the body (whatever it be) which is the source of the evidence, — the body, the appearances of which constitute the evidence, — together with the authenticity of those appearances to make it appear, to the satisfaction of the judge, that the body exhibiting certain appearances at the time of its being produced in court or subjected to the examination of a scientific witness (acting on that occasion in the character of a subordinate and deputed judge,) is the same body as that by which the evidentiary appearances were exhibited in the first instance 2 That the appearances exhibited by it at the two points of time, and during the intervening interval, are the natural consequences of the principal fact, and have not been either fabricated, or materially altered, either by design or negligence

In the case of *real* evidence, safe custody will commonly besides have another object, viz. insuring the existence and forthcomingness of the object—preventing it from being destroyed or lost But this purpose belongs not to the present head, but to the head of securing the forthcomingness of evidence.

2 In the case of *personal oral* evidence, to authenticate the evidence is to establish the identity of the person who, in the character of a deposing witness, is subjected to oral examination, —who, in the character of a deposing witness, is admitted to give his testimony in the presence of the judge to make it appear to the satisfaction of the judge, 1. That he who speaks of himself as being such or such a person, is really that person; 2. That the person who, at the time in question, in presence of the judge, speaks of himself as having been present on a certain past occasion, on which a person known by a certain name was actually present, is that same person; whether, on the occasion in hand, he calls himself, or is called, by the same, or by a different, name.

3. In the case of *written* evidence, to establish the genuineness of the document is to make it appear, to the satisfaction of the judge,

* Book IV. (Vol. VI. p. 508.)

that the document exhibited as containing the discourse expressed by a certain person on a certain occasion, does really contain the discourse of that same person, and (where the occasion is material) that this discourse did really issue from him on that same occasion.

Correspondent to the respective nature of the respective species of evidence, will be the several courses requisite and proper to be taken for establishing their authenticity.

1. The case of *real* evidence admits of safe custody, an expedient that applies not at all, or not with equally and uniformly unexceptionable propriety, in either of the other cases. For this purpose, a particular sort of person is not unfrequently appointed by law, in contemplation of his presumed trustworthiness with reference to the purpose. He takes charge of the article, keeps it in his possession till the time comes for its being produced, in the character of evidence, before the judge, and it is partly by the fact of his having thus kept it in his custody, partly by the testimony he gives, or is considered as giving, of its having been so kept without any fallacious alteration, that its authenticity is established.

2. The case of *personal oral* evidence, that is, of a person appearing before the judge to give his testimony, admits not of any appropriate mode of authentication. His being the same person as he who (commonly under the same name) is stated by him as having been present on the occasion in question—been present in the character of a perceipient witness—is included of course in the testimony he gives. The fact of his identity, if there be any doubt about it, will, like any other matter of fact, be to be proved or disproved, as the case is, by such evidence of any kind or kinds as the occasion furnishes.*

It is not often that in this case the demand for authentication will present itself. A case the most likely to give rise to doubts, is when, for a purpose innocent or criminal, the witness has, on the two different occasions, called himself, or suffered himself to be called, by different names.†

3. It is in the case of *written* evidence that the business of authentication admits of the greatest diversity, and demands a proportionable degree of attention.

The task will be found to be attended with very considerable differences, according to the differences of which the nature of the written document in question is susceptible—differences that have already been distinguished by appropriate names. I speak of the different modifications of written evidence that have been already marked out, and separately considered, under the general heads of *Preappointed* and *Makeshift* evidence. All these will, in their order, be now for this new purpose brought again to view.

A distinction must here be observed, between evidence of authenticity, and evidence of fairness. Authenticity may be proved by similitude of hands; it may be proved, provisionally at least, *ex tenore*, with or without the other presumption *ex custodiâ*. To the question of fairness, none of these media of proof, it is evident, can apply. The document may have been brought into existence by any modification of fraud or force, for any indication that can be afforded to the contrary from any of those sources. A bond is produced in evidence—the obligor may have been in a state of insanity or intoxication when he executed it: he may have executed it with the fear of a pistol or a dagger before his eyes, or in a state of illegal imprisonment, to which he had been subjected for the purpose. Of none of these modifications will the signature, or the custody of the instrument, or the tenor of it, afford any sort of warning.

CHAPTER III

MODES OF AUTHENTICATION IN THE CASE OF WRITTEN EVIDENCE.

§ 1. *Topics of inquiry.*

On the subject of authentication, as applied to written evidence, two more questions present themselves for discussion. 1. What, with reference to the main end of justice, is, in each distinguishable case, the best, the most trustworthy evidence? in other words, what is the best, with reference to security against deception? or simply thus, what is, in each instance, the most trustworthy mode of authentication? 2. What inferior modes of authentication may, in the several different

* Safe-custody is an expedient not uncommonly, and in certain cases not unnecessarily, employed, on the person of an individual, for the purpose of securing the exhibition of his evidence. But in this case, as in that of real evidence, safe-custody for this purpose belongs not to the head of authentication, but to that of securing the forthcomingness of evidence.

† The case of the identification of a party must not on this occasion be confounded with that of the identification of a witness. In the case of a defendant in a criminal cause, in whose presence another person in the character of a witness comes forward to depose—to depose, say in affirmation of the act of delinquency—a common preliminary address is, Look upon the prisoner; the person now before you, in the character of the defendant, is he the same person of whom you have been speaking, or were about to speak, as the person whom, on the occasion in question, you saw doing so and so? But in this case, the piece of evidence authenticated belongs not to the division of personal evidence, but to that of real evidence: the person whose identity is in question, is not the person of the deponent, but the person of him who is the subject-matter of the deposition—of the evidence.

cases, be admitted in place of the most trustworthy mode?

1. Which is the most trustworthy mode? The authenticity, as above explained, of this or that piece of evidence, is a particular species of fact. Whatever sort of evidence is most trustworthy with reference to facts in general — to facts taken without distinction, — will be so with reference to this. That sort of evidence is the most trustworthy, which will admit of being extracted in the most trustworthy mode of extraction What mode of extraction is most trustworthy, has been shown at large in the books entitled "*Securities*" and "*Extraction*" oral examination, accompanied with cross-examination, and the other securities naturally and usually attendant on it.

This being the most trustworthy, the most satisfactory, and (with reference to the main end of evidence, security against deception) the best and most eligible, two circumstances concur in preventing it from being employed on all occasions: 1. There are occasions on which it is not obtainable. such is the case where, at the time when the demand for the evidence arises, the witnesses from whose mouth it should have been extracted are not forthcoming. 2. There are causes in which, though obtainable, the employment of this most trustworthy species of evidence would not upon the whole be eligible. Why? Because, if obtained in this most trustworthy mode, the collateral inconvenience which, in the shape of vexation, expense, and delay, would inevitably result from the extraction of it in this mode, would be more considerable than the inconvenience consisting in what is lost in point of trustworthiness by the difference between the most trustworthy mode, and the next most trustworthy that may be to be obtained free from that collateral inconvenience.

As to unforthcomingness in evidence, the modifications of it, and their respective causes, have already been exhibited to view. Modifications, irremovable and removable. Causes of irremovable unforthcomingness, death, and incurable insanity: Causes of removable unforthcomingness, — 1. Insanity or other indisposition not incurable; 2 Expatriation, 3. Latency (see Vol. VI. p. 419)

§ 2. *Modes of authentication in the case of private contractual evidence.*

I proceed to bring to view such modes or sources of authentication as present themselves in regard to the different species of written evidence: beginning with private contractual evidence. It is that which affords the greatest variety of modes. The order in which I arrange them is that of superiority: meaning by superiority, preferability, on the score of trustworthiness; — the most trustworthy standing first upon the list.

I. Authentication by *direct* evidence.

1. Testimony given by the attesting witness or witnesses. The greater the number of such witnesses, and the larger the proportion of them that appear in the character of deposing witnesses, the more satisfactory, of course, will be the proof. As to the mode of taking the deposition — the mode of examination, — nothing particular requires, on this occasion, to be said of it. On this occasion as on all others, it will be less and less satisfactory, according as it varies from that which is considered as the most satisfactory, the mode so often described *

2 Testimony of non-attesting witnesses — representing themselves as having been percipient witnesses of the act of recognition. In that case, the perception taken by any such non-attesting percipient witness may have been as complete as it naturally will have been in the case of an attesting witness; or it may be less and less complete, in a variety of gradations A man may have seen and heard what was passing through a chink or keyhole, he may have heard without seeing, without seeing the act of recognition, he may have seen the instrument in the first instance without the signature, and presently after with the signature, and so forth. In this way, the direct evidence may insensibly degenerate into circumstantial evidence.

3. Testimony of the party or parties — all of them, or any inferior proportion of the number Proof from this source, (supposing all apprehension of mendacity out of the question,) will on all other grounds be preferable to that of extraneous witnesses, attesting or non-attesting The transaction was their own they are the less exposed to the danger of having forgotten it The dispute relative to the transaction is their own: they need the less grudge the trouble of coming forward to give their testimony in relation to it. But (especially in the case where the death or unforthcomingness of one of the parties would leave mendacity on the other side without controul) it is partly on account of the danger of mendacity from such interested evidence, that recourse is had to the less suspected evidence of extraneous witnesses and to parties, as well as to extraneous witnesses, it may happen at any time to die, or to be on any other account unforthcoming.

If the testimony of attesting witnesses is produced, the testimony of non-attesting witnesses will naturally be considered as superfluous. But if the authenticity be disputed, and be rendered more or less doubtful by the evidence or arguments adduced by the adverse party, and at the same time testimony of non-attesting witnesses happens to present itself; it cannot, it is plain, on the ground of superfluity, be excluded.

* See Book II. *Securities*, and Book III *Extraction*.

If, upon the face of it, the instrument appears to have been furnished with attesting witnesses, non-attesting witnesses cannot reasonably be tendered, unless some special cause (as hereinafter mentioned) be assigned for the non-production of any attesting witness. For, the attesting, the preappointed witnesses, —being, upon the face of the transaction, the chosen, and the only chosen witnesses,— cannot therefore but be regarded as more trustworthy than any witnesses taken without choice, unless some special reason be assigned, to show how it happened that this or that other witness, being also present, and being, by station in life, or character, more trustworthy than this or that attesting witness, was notwithstanding not called upon to put himself upon the list

II Authentication by circumstantial evidence.

4 The handwriting proved by *similitude of hands*, asserted by the testimony of a witness, who on other occasions has observed the characters traced by the party in question, while in the act of writing Presumption from similitude of hands established by view of the act of writing Presumption *ex visu scriptionis*

5 The handwriting proved by similitude of hands, asserted by a witness, who, without having ever seen the party write, is sufficiently acquainted with his hand by correspondence *i. e.* by having received from him letters, purporting (whether by their signature or by their contents) to be of his handwriting,* or by having seen other writings, which, by indications sufficiently persuasive, appeared to have been written with his hand Presumption from similitude of hands established by view of other writings of the same hand. presumption *ex scriptis olim visis*

6 The handwriting proved by similitude of hands, asserted by a witness, who, without any such previous acquaintance with the handwriting of the party as above, pronounces the handwriting in question to be the handwriting of the party, on a comparison made of it with other specimens of his handwriting, now, for the purpose of the comparison, produced to him for the first time Presumption from similitude of hands established by comparison *pro re nata*. or more briefly, presumption from *comparison of hands*—presumption *ex comparatione scriptorum*, or *ex scripto nunc viso*.

The two former modes may be characterized by the common description of authentication by *acquaintance*: the latter may be termed authentication by *scientific opinion*. The persons called in to give their opinions on a point of this sort, depose in the character of *scientific witnesses*. They will naturally be persons who, by office, profession, or pursuit, have been in the habit of regarding handwritings with a particular degree of attention, with a view to their authenticity or unauthenticity, their similitude or dissimilitude.

The handwriting of the party may (it is evident) form as proper a subject of authentication as that of any attesting witness. It is so even in a more direct way. It is only for the sake of establishing the concurrence of the party, that the attestation and deposition of the witness are called in. Suppose the authenticity of the party's signature sufficiently established, that of the witness's signature is not worth considering The causes of suspicion which apply (as above) to the testimony of a party, extend not to his signature the testimony to the presumed authenticity of the signature of the party is not his own interested testimony, but the uninterested testimony of an extraneous witness.

7. The authenticity of the instrument (the whole taken together,) inferred from the consideration of the person or persons in whose possession or custody it has been, from the apparent time of its origination,† to the time in hand, or such part of the intervening interval through which the possession of it can be traced Presumption *ex custodiâ* ‡

* In England, the proof of handwriting must be by witnesses, who have seen the proposed writer write, or who have received letters from him, and acted upon them. 1 Phil. Ev. 465, *et seq.* Proof from similarity of hands is not admitted. —*Ed.*

† Under English law, if a deed is thirty years old, it is said to prove itself, and is admitted in evidence, without any proof of its execution. 2 Term Rep. 171. Bull, N. P 255. And so of bonds and ancient letters and receipts. 1 Phil. Ev. 458, 459 - *Ed.*

‡ The evidentiary fact is here the *custody* in which (*i. e.* the *persons* in whose custody) the document in question appears to have been kept.

Proportioned to the antiquity of the instrument, will be the probable number of the persons by whom this situation, with reference to the document in question, has been successively occupied. The last of them (when he is not the only one) will have been the person by whom the instrument is tendered.

Here, then, comes a demand for spontaneous declaration on this subject on the part of such exhibitant, and for liberty of counter-interrogation on the opposite side of the suit or cause.

Such declaration is itself direct evidence; and, in addition to it, a demand may by accident present itself for ulterior articles of direct evidence, to an indefinite number. But, the purpose of the evidence *ex custodiâ* being to fortify or weaken the evidence *ex tenore*, and the evidence *ex custodiâ*, as well as that *ex tenore*, being both of them, with relation to the fact of the genuineness of the document, of the nature of circumstantial evidence,—hence it is that all direct evidence, which has for its subject the history (as it were) of the document, the enumeration of the different hands into which, from the time of its birth, it has successively passed, comes under

8. The authenticity of the instrument (the whole taken together,) inferred from the consideration of its tenor, or say *contents*. Presumption *ex tenore*.

9. The authenticity of the instrument (the whole taken together,) exhibited by a subsequent indorsement: an entry made upon the back or other vacant part of the paper or parchment, in a hand purporting to be that of some official person, and expressive of the fact of its having, in the character of an authentic instrument, been subjected to his inspection in virtue of his office.* Presumption *ex visu officiali*.

By this species of evidence, the question in regard to authenticity is rather shifted off, than solved. Superinduced upon the original instrument is another piece of writing, which, as being a writing, requires authentication, as well as the original instrument. An indorsement of this kind may be considered as a supplemental written attestation added to the instrument, at a subsequent point of time to that of the execution of the instrument.

The memorandum in question, was it really written by or by the order of the person, by or by whose order it purports, upon the face of it, to have been written? It is only by circumstantial evidence, that to this question an answer can with propriety (at least in case of dispute) be given. By direct evidence, yes, if he be alive and forthcoming. but if he be, then, at an earlier or later stage of the inquiry, not any such circumstantial evidence, but this direct evidence, will, for the purpose in question, be the most satisfactory, and therefore the most proper, and ultimately the only proper, evidence.

In ancient times, when, by various circumstances connected with the immaturity of the human mind, forgeries were rendered much more easy and much more frequent than at present, — an incident not unfrequently exemplified is that of an official person visiting the written instruments deposited in this or that official receptacle, and (to serve as proof of their genuineness) writing or causing to be written upon each, a memorandum to the effect here spoken of.

Of the sort of apparent certificate or judgment here in question, the effect is, to declare the opinion of somebody, that the instrument on which it is marked was genuine — was not a forged one. If the principal, the substantive, document, be not incapable of having been taken for the subject or made the product of an act of forgery, neither is this subsidiary, this adjective, instrument. But forasmuch as, to each of any number of forgeries (especially if so many different hands, purporting to have been written at so many different times, be taken for the objects of imitation,) a separate set of difficulties stand opposed; the consequence is, that to any such apparent certificate it can scarcely happen to be altogether destitute of probative force. Some probative and authenticative force a document of this sort will always have, whereby, to the amount of it, it will make an addition to the intrinsic self-probative force possessed by the principal instrument itself — the evidence or presumption *ex tenore*.

As in the case of the original subject-matter, so in the case of this adjunct, evidence *ex tenore*, with evidence *ex custodiâ* for the corroboration of it, will in general be the only evidence on the ground of which a judgment concerning the genuineness of it can be formed.

To these it may now and then happen that the evidence *ex collatione* may be addable; viz where, in the same repository, or in other accessible repositories, manuscripts which by their physical tenor appear to be of the same handwriting are to be found — manuscripts capable of being employed in the character of *standard scripts*.

In the three cases where the conclusion is founded on a supposed similitude of hands, the superiority in quality ascribed to the prior in order cannot with propriety be ascribed to it but under certain conditions and limitations.

1 As between presumption *ex visu scriptionis*, and presumption *ex scriptis olim cognitis*. If, of two witnesses, each has, within the same compass of time, seen an equal number (*ten* suppose) of scripts derived from the same hand,— of which two witnesses, one only had, in the instance of one or more of these scripts, been an eye-witness of the act of writing,— the evidence of him by whom that advantage had been possessed, could not but, in a theoretical point of view, be regarded as the better evidence. Why? Because the mode of cognizance that fell exclusively to his lot, is, with reference to each such object of comparison, of the nature of direct evidence. the other is but presumptive, circumstantial evidence. In a practical view, however, the difference can seldom be worth regarding; especially if the way in which the cognizance was obtained

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the head of circumstantial evidence: for it is but rarely that, without the intervention of direct evidence, circumstantial evidence finds its way into the presence of the judge.

* In the case of Alexander Humphreys or Alexander, tried before the Court of Justiciary in Scotland, in April 1839, for forging documents, with a view to prove his right of succession to the honours and estates of the earldom of Stirling,—one of the documents, which the jury found to be forged (finding it not proven that it was forged by the accused,) was a map of Canada, and corresponding documents, which bore certificates from Lewis XV., Fenelon Archbishop of Cambray, and Flechier Bishop of Nismes. (*See* Trial of Alexander Humphreys or Alexander, &c. Edited by William Turnbull, Advocate. Edin. 1839.)—*Ed.*

was that of epistolary correspondence. When, from an individual more or less known to me in person or by reputation, I receive a letter, bearing his signature — that is, when I receive a letter with a signature purporting to be that of a person known to me as above, — on what supposition can such a letter have emanated from any other hand than his? On no other than that of forgery a crime not to be presumed, or so much as suspected, without special ground, in any single instance much less, in a number of unconnected instances.

Suppose, on the other hand, the writings of the same hand seen by one witness in ten instances, without his seeing the act of writing in any of those instances, while, by the other witness, the act of writing was seen in one instance only, he not having seen any other writings of the same hand: in this case, the evidence of him who had never seen the act of writing, would surely be regarded as the most satisfactory of the two.

So likewise in the third case, as compared with the two former ones: the case of *scientific* evidence, as compared with authentication under favour of opportunities derived from *acquaintance*. If, in respect to qualification for forming a right judgment, any advantage be afforded by opportunities derived from acquaintance, it can only be by reason of the comparatively greater number of opportunities. The number of opportunities of this sort derivable from personal acquaintance may have been considerable in any degree, and, upon a general view of the subject, will naturally appear indefinite. The number of data of this kind put into the hands of a scientific witness on the occasion in question, or on any one occasion, for any one particular purpose, will seldom be considerable, and will always be definite. But — suppose the opportunities of observation equal in every respect, as between the witness speaking from particular acquaintance, and the witness speaking from general and appropriate science — the superiority naturally belonging to the latter, by reason of the superior intensity of attention, and the superiority of appropriate intelligence naturally resulting from it, will be sufficient in general to bestow upon the value of his opinion a decided superiority. The witness speaking from acquaintance has (for example) received from the individual whose hand is in question, ten letters, and no more: and that, suppose, in the compass of two years. Let these same letters be put all at once into the hands of a scientific witness, together with the writing to be judged of, the advantage afforded him by his science must be inconsiderable indeed, if it does not render his opinion on the subject of more value than that of the unscientific witness, judging from particular acquaintance.

The case in which the presumption from custody is most apt to be called in, is that where the deed to be authenticated comes under the notion of an *ancient* deed. *Antiquity*, in this respect, not being designative of any particular length of time, to the exclusion of all others, — to give precision to our conception on the subject, it will be necessary to particularize some determinate length of time, beyond which (reckoning from the day of the exhibition of the deed in evidence) it shall be deemed an ancient one, — say, therefore, thirty years. Of the lapse of such a length of time, a natural and frequent consequence is, that all means of authentication by particular acquaintance shall, to a person in the situation of the party having occasion to authenticate the deed, be unattainable. Here, then, comes in the presumption from custody. Here is a deed signed, having, for the name of one of the parties, the name of one of my grandfathers. I myself never saw him, consequently, never saw him write. I can think of no person now living, who, to my knowledge, ever saw my grandfather, or had any correspondence with him. But upon the death of my father, on taking a survey of his effects, I found in a box this amongst other deeds.

The presumption *ex tenore* is the *medium authenticationis* that remains to be resorted to when all others are unattainable: it is a proof, and the only proof, that can never be wanting. The presumption *ex custodiâ* includes it, and, implicitly at least, is grounded on it. When I conclude the granter of that deed to have been my grandfather, it is not merely because it was once in the custody of my grandfather, but because, from the tenor of it, it is a deed in which my grandfather, in his time, could not but have had an interest. But, though the presumption *ex custodiâ* cannot present itself unaccompanied by the presumption *ex tenore*, yet the latter may without the former, and it is for this reason that the two sources of authentication are stated as separate. By accident, it might have happened to the deed to have been found in a receptacle not within my custody: by accident, it might have been found in a public road or street, into which it might have fallen by the accidental disruption of a package in a vehicle to which it had been consigned: by accident, it might have been found in a chandler's shop, into which it had found its way by negligence, amidst a bundle of waste papers.

By this single presumption, unassisted even by the presumption *ex custodiâ*, deeds and other scripts are, in various cases, considered as sufficiently authenticated, under the actually established system of jurisprudence. They are so, for example, in English jurisprudence. A deed which is considered as sufficiently authenticated by the presumption *ex tenore*, is, in the language of that law, said *to prove itself*. Such is the phrase, in the lan-

guage of one of those classes of men whose self-complacency is never so exulting as when they triumph, or seem to triumph, over reason. To have said, the authenticity of a deed may be presumed in certain cases from the tenor of it, would have been to have stated, not only the decision itself, but the consideration on which its claim to be regarded as a proper one depends. In the expression, in certain cases a deed *proves itself*, a decision to the same effect is expressed, but, in the place of the reason, it gives a paradox — an absurdity, if not in reality, in appearance — a sort of appropriate and professional figure of speech, of the same stamp with those by which, in so many other instances, these professional men seek to hide their meaning from the view of other men, and on which they love to found their claim to the praise of superiority in science.

§ 3. *Modes of authentication in the case of written official and casually written evidence.*

The principal points of consideration being thus stated under the head of *private contractual evidence*, — being that which affords them in the greatest variety, the two remaining classes of written evidence — official evidence and casually written evidence, will give us but little trouble

I. *Written official* evidence If, in the case of private contractual evidence, — evidence issuing from an interested and thence suspected source, authentication *ex tenore* appears satisfactory, much more may it in the case of official evidence — evidence from a source, generally speaking, untainted by interest, and therefore unsuspected. In the case of private contractual evidence, the circumstance of custody, though material in itself, and, for the sake of one or other of the parties, necessary perhaps to be brought to view, contains in it matter of suspicion as well as confidence The deed, according to my statement, has, from the time of the date of it, been either in my own custody, or in that of some progenitor or predecessor of mine, and this custody I allege as an indication serving to show the person appearing upon the face of the deed as a party to it, to have been really so Good: supposing my statement in this behalf to be true; but supposing the deed fabricated or fraudulently altered by my hand, will not its having been in my custody be a still more necessary consequence? If, instead of having been in a custody thus open to suspicion, it had been in the joint custody of a set of official persons not capable of deriving any advantage from any such forgery, the presumption *ex custodiâ* could not but be much clearer of suspicion, much more satisfactory and conclusive. Hence, as already intimated, one of the main advantages and uses of official custody for the purposes of official evidence.*

2. *Casually written* evidence. The same modes of authentication which apply to the two just-mentioned modifications of written evidence, apply in general to this. Two exceptions alone, and those altogether obvious, present themselves Attesting witnesses are out of the case the characteristic property of preappointed evidence, and therefore of private contractual evidence, if exhibited according to preappointed forms, being to exhibit this source of authentication, that of casually written evidence, not to exhibit it.†

Persons casually present may happen to have been percipient witnesses of the act of writing, in the case of the unsolemn document, as in the case of the solemn one; but writing in general is not a social work. Epistolatory writing affects solitude, and so does the act of literary composition, as well as the act of making memorandums for self-regarding and domestic use. This is more particularly and obviously the case with regard to that large division of casually written evidence, which is most apt to be exhibited in causes of a penal nature, and consists of documents obtained through the indiscretion or negligence of the writer, and produced against him in the character of confessorial evidence.

Oral examination of the alleged writer of the script, is evidently, in a general point of view, the most eligible mode of authentication. It is plainly so in the relation of a means to the main end — the discovery of the truth. Supposing the writing to be mine, there can be no one of whom it can be so certain that he knows whose writing it is, as myself — that one percipient witness, who, in the nature of things, cannot fail to have been a percipient witness of the act. Other witnesses to it there may have been, or not been, as the case may be.

This first choice remains at the same time susceptible of exceptions, partly on the ground of practicability, partly on the ground of eligibility

1 The writer himself may be unamenable to the commands of justice. either for ever, as in case of death, or incurable insanity; or for a time, certain or uncertain, as in case of expatriation, latency, sickness

2 The writer may, in respect of the fact in question, be bent against the declaration of the truth. This fact may either have been already ascertained by experience, or may only

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* See Book IV. *Preappointed.*

† Unless, to a writing unofficial, and not bearing relation to any purpose which contractual or other legal writings, usually drawn up in legal form, have in view, the author or authors, having authentication in view, should call in the assistance of some other individual or individuals, in the character of attesting witnesses.

be presumed, or deemed presumable: presumable, either on *general* grounds, from his station in the cause; as when he is defendant in a cause of a highly penal nature, and the instrument (supposing it genuine) is a document capable of serving as conclusive evidence of his delinquency: or on *particular* grounds, as, for example, his moral character, — particularly in respect of veracity, the quality particularly in question in this instance.

3. In respect of delay, vexation, or expense, the choice of the writer himself for the authenticating witness may be attended with a degree of inconvenience, such as, either in the whole or in part, may be avoided by resorting to some other witness.

CHAPTER IV.

MODES OF DEAUTHENTICATION IN THE CASE OF WRITTEN EVIDENCE.

In the question relative to authenticity, the affirmative proposition is, as already observed, except in here and there an extraordinary instance, the true one. The affirmative is, therefore, under that exception, the proposition that comes to be proved: the negative, not, except in the extraordinary instances just spoken of. But, since instances of this description, how extraordinary soever, are unhappily found to exist, hence an operation opposite to authentication comes sometimes to be performed. Correspondent, in good measure, to the list of modes of authentication, will consequently be the list of modes of *deauthentication*. In the main, they will consist of the negation, or the reverse, of the modes of authentication: but with some variations and additions, as the tenor of them will show.

Modes of deauthentication — sources from which a persuasion that the document in question is spurious or falsified, may be obtained:

I. Direct evidence —

1. Testimony (disaffirmative) of attesting witnesses, *i. e.* of persons mentioned in the instrument as attesting witnesses.

2. Testimony (disaffirmative) of non-attesting witnesses, *i. e.* of persons not mentioned in the instrument as attesting witnesses.

3. Testimony (disaffirmative) of the party against whom the document is produced, and who denies his having authenticated it, denies the handwriting to be his, or, if signed as it by him, denies the signature to be his signature.

4. Testimony (disaffirmative and confessorial) of the party by whom it is produced (viz. the party in the cause,) and who, on being cross-examined or otherwise, confesses, either that he himself bore no part in the document in question, or that the other supposed party to the transaction (whether a party to the suit or no) bore really no part in it, in a word, that in one way or other it is *spurious*, or that, if there are certain portions of it in which they respectively bore a part, there are others in which they respectively did not bear any part: that is, that, in respect of a certain portion or portions of it, it has been *falsified*.

5. Hearsay evidence, testimony of any person whatever (attesting witness, non-attesting witness, or party,) declaring himself to have heard (on the part of an attesting witness, a non-attesting witness, or a party, by or in whose favour the document is produced) a discourse amounting to an assertion of its being spurious, or having been falsified.*

II. Circumstantial evidence —

1. Dissimilitude of hands, deposed to *ex visu scriptionis*.

2. Ditto, *ex scriptis olim cognitis*.

3. Ditto, *ex scripto nunc viso*, the document in question being now inspected by some scientific eye, and, on being confronted with other scripts indubitably from the same pen, pronounced dissimilar.

4. Ditto, from the appearance of its being a feigned hand.

5. Presumption *ex custodiâ*: the party producing it, or a person through whose hands it has passed, being the person who in case of success would be a gainer by having fabricated or falsified it, or procured it to be fabricated or falsified, to the effect suspected.

6. Presumption *ex tenore*: marks of spuriousness or falsification apparent on the face of it.

Indications of spuriousness or falsification, apparent on the face of a written discourse, may be presented either by the physical entities of which the signs are composed, or by the consideration of the discourse signified.

I. Indications afforded by the paper, parchment, or other substratum, on which the colouring matter is laid —

1. Paper, if of a date known to be posterior to the date apparent on the face of the instrument, a certain proof of spuriousness.

2. Paper, — if in any part the surface ex-

* Hearsay evidence of this description (the supposed extrajudicial evidence of the supposed perceipient witness, being supposed to have been delivered *mortis causâ*) has actually been admitted, and, as it should seem, credited, in English law. "In ejectment," says Hawkins, "when a will was produced on the part of the plaintiff, subscribed by three witnesses, two of whom were dead, and the third witness on her cross-examination swore, that while she was attending one of the deceased witnesses in his last illness, and about three weeks before his death, he pulled the will in question from his bosom, and acknowledged and declared to her that the said will was forged by himself; this was held good evidence."—*Hawkins*, 50. [*Vide supra*. p. 156. Note†.]

hibit a roughness and comparative thinness, such as would be produced by an erasure (*i. e.* the scratching of an edged or pointed instrument,) — a cause for suspecting falsification.

3. Paper, — if, in any part which appears to have been written upon (as, for example, in the middle of a line of writing,) a stain appears, such as might have been produced by a solvent, applied for the purpose of dissolving the ink or other colouring matter of which the characters are composed, — another cause for suspecting falsification.

N. B. — Indications Nos. 2 and 3, apply alike to parchment, vellum, or any other substratum consisting of skin.

4. Ink. If the colour of the ink, being uniform throughout, appear of a colour fresher than what (as supposed) it would have been if written at the time of the date, this freshness may be thought to afford some suspicion of spuriousness. Very little reliance, however, can safely be placed upon this circumstance. In respect of quality of colour, intensity of colour, and glossiness, the difference may be as great between two inks made at the same time, as between two inks made at different times.

5. Ink. If the appearance of the ink be different in different parts of the same writing, such difference may afford a ground for suspecting falsification. In this case, the reason may be considerably stronger than in the last preceding one. If, to an ink employed in the first instance, there succeeds another sort of ink, which continues to be employed to the end, scarce any cause of suspicion can be afforded by this change: the natural interpretation is, that the penman, not being satisfied with the ink, or perhaps with the pen that he found in one inkstand, betook himself to another ink, or to another pen that he found in another inkstand. The only case in which any considerable cause of suspicion can be deduced from this source, is that in which the different kind of ink appears in spots and patches, having ink of the first appearance on each side of it.* In this case, two other indications will be to be looked out for: 1. Marks of a discoloration or stain,

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* In a little work, called "The Theory of Presumptive Proof; or, an Inquiry into the Nature of Circumstantial Evidence, including an Examination of the Evidence on the Trial of Captain Donellan, London, 1815," the following curious case is stated. — *Ed.*

"John Hawkins and George Simpson were indicted for robbing the mail, on the 16th of April 1722. Hawkins, in his defence, set up an *alibi*; to prove which, he called one William Fuller, who deposed, that Hawkins came to his house on Sunday the 15th of April, and lay there that night, and did not go out until the next morning. Being asked by the Court, 'By what token do you remember that it was the 15th[a] of April? He replied, 'By a very good token; for he owed me a sum of money for horse-hire, and on Tuesday, the 10th of April, he called upon me and paid me in full, and I gave him a receipt; and I very well remember, that he lay at my house the Sunday night following.' The receipt was now produced. 'April the 10th, 1722. Received of Mr. John Hawkins, the sum of one pound ten shillings, in full of all accounts, per me William Fuller.' Upon inspecting the receipt, the Court asked Fuller who wrote it; he replied, 'Hawkins wrote the body of it, and I signed it.' *Court*—'Did you see him write it?' *Fuller*—'Yes.' *Court*—'And how long was it after he wrote it, before you signed?' *Fuller*—'I signed it immediately, without going from the table.' *Court*—'How many standishes do you keep in the house?' *Fuller*—'Standishes?' *Court*—'Aye, standishes; it is a plain question.' *Fuller*—'My Lord, but one; and that is enough for the little writing we have to do.' *Court*—'Then you signed the receipt with the same ink that Hawkins wrote the body of it with?' *Fuller*—'For certain.' *Court*—'Officer, hand the receipt to the jury. Gentlemen, you will see that the body of the note is written with one kind of ink, and the name at the bottom with another very different; and yet this witness has sworn, that they were both written with the same ink, and one immediately after the other. You will judge what credit is to be given to his evidence!'

"Thus the authenticity of the receipt, and the credit of the witness, were overthrown by the sagacity of the Court! But while the judge, Lord Chief Baron Montague, was summing up the evidence, he was interrupted by the following occurrence: the person who reports the trial was then taking notes of the proceedings; his ink, as it happened, was very bad, being thick at the bottom, and thin and waterish at the top, so that, accordingly as he dipped the pen, the writing appeared very pale or pretty black. This *circumstance* being remarked by some gentlemen present, they handed the book to the jury: the judge perceiving them very attentively inspecting it, called to them—'Gentlemen, what are you doing? What book is that?' They told him, that it was the writer's book, and that they were observing how the same ink appeared pale in one place, and black in another. The judge then told them—'You ought not, Gentlemen, to take notice of anything but what is produced in evidence;' and, turning to the writer, demanded—'What he meant by showing that book to the jury?' And being informed by the writer, that it was taken from him, he inquired 'who took it, and who handed it to the jury?' But this the writer could not say, as the gentlemen near him were all strangers to him, and he had not taken any particular notice of the person who took his book.

"That a jury ought not to take notice of anything but what is produced in evidence, has been said to be law; but, on the contrary, it has been held, and surely very properly, that a juryman may find from his own knowledge; indeed, what evidence can convince a person that that *is* which he knows *not* to be?

"Hawkins and Simpson were convicted and executed: indeed, the evidence against them was

[a] The robbery was committed about two o'clock on the morning of the 16th.

or of roughness and thinness, according to the nature of the chemical or mechanical means employed for the obliteration of the pre-existing characters; 2. The probable import and importance of the words obliterated, as deducible from the context.

II. Indications of spuriousness or falsification afforded by the nature of the *discourse* signified: —

1. In the script in question, mention (direct, or in the way of allusion more or less oblique) made of facts of later date, *i. e.* of facts that did not come into existence but at a time posterior to the date expressed on the face of the instrument. Facts, viz. things, persons, or events; or situations or other appearances of things or persons.*

2. In the script in question, words or combinations of words, or modes of spelling, known not to have been in use but at a time posterior to the date.

3. In the script in question, mention made of pretended facts, of the non-existence of which the individual in question is, from other sources, known to have been conscious: supposed facts, for example, inconsistent with other facts, of the existence of which he is known to have been conscious. In a deed (for example) recital of a fact, the falsity of which could not but have been known to him at the time. From this circumstance, it is evident, no indication of spuriousness or falsification can be deduced, any further than as the absence of mendacity on the part of the supposed author is assumed.

4. In the script in question, it being a contract (viz. either an instrument of conveyance or an instrument of engagement,) engagements or conveyances incompatible with prior conveyances made, or engagements entered into, by the individual in question, or known by him to have been respectively made or entered into by those in whose place, in that respect, he stands. From this circumstance, no indication of spuriousness or falsification can be deduced, any further than as the knowledge on his part of the disposition of law in this behalf, and the absence of improbity on his part in this respect, are assumed.

5. In the script in question, indications of a character manifestly superior or inferior to that of the individual in question, in respect of learning, intelligence, veracity, or any other branch of morality, as established by other writings, discourses, or actions of his, sufficiently ascertained. This indication is in a manner confined to scripts belonging to the head of casually written evidence, such as letters, memorandums, and literary compositions, in contradistinction to such as belong to the respective heads of *private contractual evidence* and *official evidence*.

6. In the script in question, opinions, affections, or tastes, manifestly opposite to those of the individual in question, according to information satisfactorily deduced from other sources. This again is in a manner confined to casually written evidence, as above.

7. In the script in question, the style, phraseology, or mode of spelling, manifestly dissimilar to those of the individual in question, ascertained from other sources. The idea attached to the word *style* being as yet extremely vague, the indication grounded on it will be proportionably vague. Another indication that applies principally to written evidence of the casual kind, as above.

8. In the script in question, the style or phraseology manifestly dissimilar to that in use in the *office* in question. This, upon the face of it, applies exclusively to official evidence.

CHAPTER V.

DISTINCTION BETWEEN PROVISIONAL AND DEFINITIVE AUTHENTICATION. RULES FOR THE LEGISLATOR AND THE JUDGE, CONCERNING THE AUTHENTICATION OF WRITTEN EVIDENCE.

Such being the possible modes of authentication, — next comes the inquiry, which mode on each occasion ought to be required?

For this purpose, a distinction must be taken, in the first instance, between provisional authentication, and definitive.

By provisional, I mean that evidence which may be received as sufficient for the authentication of the evidence in question, provided that no suspicion of its authenticity is expressed on the other side. By definitive, I mean that which, if satisfactory in itself, shall be deemed sufficient proof of the authenticity of the instrument, notwithstanding all protestations and contestations on the other side.

For the purpose of provisional authentication (that is, in all ordinary cases,) that mode of authentication will be the most eligible, which in each instance can be employed with least vexation, expense, and delay. But, should the authenticity of the document be disputed on the other side — in a word, should it be accused of forgery, — in such case the subordinate consideration referring to these collateral inconveniences must give way to the superior consideration referring to the direct justice of the case always supposed,

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very strong; but, had the fate of Hawkins depended upon the single testimony of Fuller, he would, but for this occurrence, have fallen a sacrifice to the acuteness of the *judge!* who appears to have been much displeased at the accidental confutation of his remarks on the receipt, although it was an accident in favour of life; and, had it not been a case where other evidence was so strong against the accused, it must have been looked upon as the special interposition of Providence."

* See Book I. Chap. III.

that the imputation of forgery may not be allowed to be made through mere wantonness, much less in the express view of giving birth to those collateral inconveniences; and that, accordingly, in the case of *mala fides* or temerity, the burden of the inconvenience may rest ultimately on the head of the party to whose misconduct it owed its birth.

If the mode of authentication which is not needful but in case of contestation, be regularly employed where there is no contestation — where no doubt of the authenticity of the document is really entertained, and if, between the modes of authentication necessary in the two cases, there be upon an average any considerable difference in respect of vexation, expense, or delay; the aggregate mischief unnecessarily produced in those three shapes must be prodigious indeed Among the writings of all sorts which come to be exhibited in a court of judicature in the character of evidence, if there be one out of a thousand in respect to which any such suspicion is really entertained, the proportion would prove much larger than I should expect to find it. Upon this supposition, in nine hundred and ninety-nine instances out of every thousand, this mass of inconvenience will be created without necessity or use, if, in pursuit of a phantastic idea of regularity, the employment of the definitive mode of authentication be insisted on, to the exclusion of the provisional mode the most convenient, *i. e.* least vexatious, expensive, and dilatory mode, which might so unexceptionably have supplied its place This oppressive plan of authentication we shall find established in English jurisprudence

In the adjustment of the modes of authentication to be established in regard to written evidence, the leading points or ends require to be kept in view on the one hand, satisfaction in respect of trustworthiness, on the other hand, avoidance of delay, vexation, and expense—the three inseparable modifications of collateral inconvenience

Of these two ends, this first-mentioned being the main and principal end, has in general been pursued with a degree of preference, which would have been very proper, but that the sacrifices that have been made to it, at the expense of the triple collateral end, have been inordinate, and much beyond anything which good economy in this respect would be found to authorize.

The supposition upon which judges and legislators have proceeded, in the fixation of the modes of authentication which they have prescribed, has been that of a universal and constant disposition on the part of all suitors to commit forgery: or, if that supposition has not in every instance been actually entertained, it is the only one on which the modes prescribed are capable of being justified—the only one by which the price paid, in the shape of delay, vexation, and expense, for the supposed advantage in the shape of satisfaction in respect of trustworthiness, would not be recognised to be excessive and oppressive. If among a thousand cases in which the legal *effect* of a piece of written evidence is in dispute, there be not so much as one in which the *authenticity* of it is a matter of real doubt on the part of the suitor against whom it is produced,—it is only in the one case where it is matter of real doubt, that the price paid for authentication in the shape of delay, vexation, and expense, or all together, need be so considerable as to be worth counting. Under the existing system, there is scarce a cause in which it is not considerable, and in many a cause it would be found to be seriously oppressive.

Thus it happens, that for one grain of mischief produced, or that would or could be produced, by fraud in the shape of *forgery*, a thousand, ten thousand, are produced by fraud in the shape of *chicane* of chicane, produced partly by the enmity of suitors, partly by the rapacity of their agents, abetted by that of the subordinate officers of justice: both passions protected and encouraged and engendered by prejudice and indifference on the part of judges and legislators. Familiarized with the spectacle of continual misery, generated according to rule and custom, and therefore on their parts without blame,—the reduction of the mischief to its minimum, the reduction of it so much as within any narrower bounds, never presents itself to them as worth regarding Like so many other processes which go on as it were of themselves, according to pre-established and never-considered rules, the authentication of evidence is considered as a sort of mechanical operation, the pathological effects of which have no claim upon them for so much as a thought Whence all this composure? For the observance of the established rules, the man in office is responsible for the propriety of these rules—for their subservience to the ends of justice, he is not responsible

To attempt in this place to combat the triple-headed monster by any proposed regulations of detail, would be to touch upon the topic of procedure a general observation or two may serve to indicate the course. Authentication in the ultimate, and what may be styled the adverse, mode, ought, instead of being the routine of practice, to be the *dernier resort*, the extraordinary recourse. The process of authentication should be carried on, not at the time of trial, but between party and party, at a preliminary meeting, either in the presence of the judge, or before some inferior minister of justice, whose time can best be spared.*

* In the following Book, the necessity of such a preliminary meeting, for innumerable other purposes as well as this, will be fully shown.

The party who has a document to produce, produces it in the first instance to the adverse party, who either admits the authenticity of it, or declares his intention to contest it. If he admits it, he marks it as admitted. If he chooses to contest it, he has a right to do so, but he uses it at his peril — at the peril of simple costs in case of simple temerity, at the peril of extra costs in case of *mala fides*. The end in view is, in every instance, to save the suitors from the delay, vexation, and expense, of adverse authentication, in so far as these several inconveniences are avoidable. The means to be employed in the prosecution of that end, is the taking such arrangements as shall make it the indisputable interest of every individual concerned, each in their several stations (parties, agents of parties, officers of justice of all classes,) to abstain from giving birth to these several inconveniences, any further than as they are necessary.

The virtual penalty inflicted on this occasion by imposition of costs with the above views, should not depend on the ultimate decision of the cause, but should be inflicted *pro unaquâque vice*, for each act of authentication unnecessarily performed. Otherwise, to the enmity of a suitor who was persuaded of his having the law on his side, the proposed remedy would apply no check. The principle would remain unapplied, unless, to each particular act of vexation, its own particular penalty stood opposed.

On the subject of the supposed proportion between the number of the cases in which suspicion of spuriousness has *not* existence, and that of those in which it *has* existence, one observation there is, which, to every person to whom the practice of technical procedure is familiar, will be almost sure to present itself.

"Number of cases," says the objector, "in which no suspicion of spuriousness is entertained, nine hundred and ninety-nine, be it so: number of cases in which suspicion of that sort is really entertained, one, and no more, be this likewise, for argument's sake at least, admitted. But, in addition to the one case in which any such suspicion is really entertained, what is there to prevent the bringing forward a *pretence* of suspicion, in an indefinite multitude of other instances? and in particular (for example) in every instance in which the party who is in the wrong (suppose the defendant) has more to gain than to lose by the delay, or, on either side of the cause, entertains a hope of forcing his injured adversary out of the field of litigation by the pressure of the expense."

The answer is: The state of things on which the above question grounds itself, is the existing state of things under the reign of technical procedure. But, in respect of the matter in question, the state of things here supposed is exactly opposite.

It being the policy of the existing state of things (for the sake of giving every practicable increase to the number of causes, and to the profit extractible from each) to give every possible increase to the number of *mala fide* defences and demands, as well as to the number of the *operations* performed, and to the number and length of the *instruments* exhibited, on the occasion of each such suit, *bona* and *mala fide* such taken together — and, to that end, to afford to wilful falsehood and insincerity, in every imaginable shape, every practicable facility and encouragement, — falsehood and insincerity in the parties litigant have accordingly been exempted, with little exception, from the check of counter-interrogation in every shape, and without any exception, from the check of counter-interrogation in the *viva voce* shape.

But, in the state of things here in question, whatsoever, on this or on any other subject, were said by a *party* on either side of the suit or cause, would be said under the influence of whatsoever securities for correctness and completeness are or would be applied to the case of an *extraneous witness* under the influence of *viva voce* counter-interrogation at any rate under the check of an oath, if, notwithstanding the objections brought forward in this work against that ceremony, it were thought fit to be retained, if not, under the check of a solemn and deliberate averment.

A party *contestant* would no more have it in his power to reap any advantage from a naked averment, declarative of a belief on his part in *disaffirmance* of its genuineness, or of a suspicion of its spuriousness, than the party *exhibitant* could do, from a naked averment, declarative of a belief on his part in *affirmance* of its genuineness. Each would alike be liable to be called upon (and under the same securities for sincerity as in the case of any extraneous witness) to state, in the most explicit manner, the grounds of the persuasion professed by him to be entertained.

To rash, as well as to *mala fide* contestation, various are the other checks that might be, and, if the ends of justice were the objects, naturally would be, applied. If, for example, by the production of a source of evidence, the needfulness of which (after the mutual explanations in question) appeared more or less doubtful to the judge, delay and expense to a certain amount would manifestly be necessitated, — not only would eventual compensation for the damage by such delay be secured, as well as the expense attendant on the production of the evidence in question cast of course upon the party by whom the production of it was thus insisted on; — but if, by the exhibition of this evidence, a demand for *counter-evidence* to be exhibited by the adverse party were produced, the expense of such counter-evidence might provisionally

be charged, in the first instance, upon the party thus insisting: rather than that by such means it should be in his power to oppress his adversary, by exhausting his means of maintaining his post in the field of litigation —his means of pursuing, in the character of plaintiff, his own claim, or repelling, in the character of defendant, that of the party on the other side.

In some cases, for the purpose of provisional authentication, instead of the executed, or rather say *recognised*, instrument, a *transcript*, or an *archetypal draught*,* may be employed.

Several cases may be mentioned, in which, supposing less delay, vexation, and expense, to be necessary to the adequate authentication of this succedaneous script, than to that of the proper instrument, the substitution may be employed with advantage.

Note that, for the purpose of *discussion*, on the ground of the *contents*, subject to eventual correction, the succedaneous script may serve exactly as well as the proper instrument.

If, in so far as, under the contract in question, the dispute turns upon the point of law, the question of law is decided against the exhibitant (plaintiff or defendant,) — the delay, vexation, and expense, of which the exhibition of the proper instrument would be productive, may, if worth saving, be thus saved.

Supposing that there is no question of law, or, if there be, that the question is decided in favour of the exhibitant: in either case, allowance of his claim follows of course, upon the supposition of the conformity of the succedaneous script thus exhibited to the proper instrument, of which the genuineness as well as the existence is thus, provisionally at least, supposed. Supposing the exhibitant to be the plaintiff: in this case, upon the authority of this succedaneous script, even *possession* might be delivered to him, if adequate security be given by him for eventual restitution *ad integrum*; *i. e.* for putting the adversary in a plight in every respect as good as if the possession had not been changed †

Of the actual execution, and thence of the genuineness, of the proper instrument (so likewise of the correctness and completeness of the succedaneous script;) even in case of contestation or doubt, —for saving of delay, vexation, and expense, evidence less conclusively probative than for the purpose of a *definitive* decision might be necessary, might, for the purpose of a *provisional* decision, be received on either side

Even if contested, a script which is authenticated *ab intrà* (*i. e.* which, on the face of it, presents the signature of the apparent author, affixed to it for the evident purpose of authentication) need not be authenticated *ab extrà* in the first instance. Why? Because, unless it be supposed to be tainted with forgery, its authenticity cannot appear dubious. But delinquency ought not in any case to be presumed without special ground, much less delinquency of so high a cast

Inability to effect the authentication of a script on or before a certain day, need not — ought not, to be rendered so much as a cause of delay, much less of ultimate miscarriage. The decision — a decision in all other respects ultimate — might be made provisional, dependent upon the subsequent authentication of the instrument on or before a day to be named. nor need even that nomination be so inexorably peremptory, as to allow accident, much less fraud, to triumph over justice.

Note that, in all these cases, the advantage

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* *Archetypal*, —*i. e.* the corrected and settled draught from which the instrument itself was transcribed, and which served as an *archetype*, or *original* to it. The appellation *rough draught* would not have served; since nothing hinders but that this original, to which no signatures have been attached, may have been no less fair than the instrument which (being transcribed from it) became the subject of the act of recognition, and in consequence received the signatures.

† In actual practice (Peake, p. 64,) where the supposed authentic instrument has, according to the evidence (but quære, *what* and *whose* evidence?) been *lost* (but quære, whether known to have *perished*—or, after search, simply *not found*?) a statement made of the supposed contents, from mere memory, has been received instead of it [a] To how prodigious an amount, in this real case, is the danger of abuse and mischievous misdecision greater than in the above supposed and proposed case! Supposing the fact of such deperition out of doubt. on this supposition, all check to intentional and mendacious misrepresentation of the supposed contents of the instrument, has perished along with it: and as to *unintentional* misrepresentation, who does not see how slight the security against it is in this *real* case—how strong, and all but complete, in the *supposed* case? Unless the witness or witnesses by whom (in speaking of the succedaneous script as genuine) the proper instrument is spoken of not only as being genuine but as being in existence, say thereby what is not true, — there the scripts remain, both of them, capable of being confronted at any time, until one of them is lost or destroyed.

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[a] In the fifth edition of Peake's Compendium, p. 96, the passage relating to the subject runs thus.—*Ed.*

"But of private deeds, or other instruments, the production of the original, if in existence, and in the power of the party using it, is always required: till which done, no evidence whatever of the contents can be received; but where the original has been destroyed or lost by accident, —as where an original award was lost in a mail which was robbed; or, being in the hands of the adverse party, notice has been given him to produce it, —then an examined copy, or even parol evidence of the contents, being the best evidence in the power of the party, is received."

and propriety of giving admission (provisional admission and effect) to such succedaneous evidence, depends upon the relative quantity of the inconvenience saved by it, in the shape of delay, vexation, and expense But let it not be forgotten that to this quantity there are no limits, other than those of the earth's circumference *

Note, moreover, that, so far as concerns *written* evidence (including the fact of its *genuineness*, and the nature of its *contents*,) the savings capable of being made in case of contestation, would, the whole mass of them put together, be inconsiderable, in comparison with that which, in the case of the supposed proper script, upon a call made by the party exhibitant, would have place, by reason of admission without contestation, as above

To these savings in the shape of delay, vexation, and expense, may be added a saving that, in the account of an honest man, will not be regarded as fit to be neglected — a saving in the article of improbity. improbity on the part of the parties and their professional advisers, improbity on the part of the judges, improbity on the part of the *custos morum*, improbity on the part of the keeper of the royal conscience.

In the ordinary intercourse of life, a man to whom it has happened to deny his own handwriting, is pointed at as a man of lost character; and to such a degree lost, that, to a person to whom the like loss is not a matter of indifference, it may be scarce safe to associate with him.

On what ground is it that, for such a mode of conduct, a man is thus consigned to infamy? On this, or on none, viz that in this way he was knowingly and wilfully guilty of falsehood — wilful and deliberate falsehood for the purpose of injustice.

The man by whom his adversary in litigation is loaded with the delay, vexation, and expense of proving (as well as exposed to the peril of not being able after all, in the teeth of so many opposing quirks, to prove at any expense) the genuineness of a document, of which there exists no real doubt; — literally speaking, and to outside appearance, this man does *not* commit the falsehood that would have been committed had the question, "*Is the genuineness of this document matter of*

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* About forty years ago, in a statute relative to East India affairs (26 Geo. III. c. 57, sect 38, Peake, 66,) provision was made, that, — in the case of written evidence of a certain description, written and attested in the East Indies, — for the authentication of any such article of evidence in Great Britain, proof of the handwriting of the persons whose signature appeared on the face of the instrument, should suffice: and this too for definitive authentication, and without a thought of any need of eventual confirmation by ulterior and better evidence: and so, *vice versâ*, in the case where an instrument executed in Great Britain requires to be authenticated in the East Indies.[a]

To this same purpose, a discovery that perhaps will one of these days be made, is, that, besides the East Indies, the surface of the earth includes other countries, more or less distant from Great Britain; and, in the course of a century or so, at the present rate of the progress of legislation, the benefit of this provision may be expected to be extended to several of those other countries But for each such country a separate act will be required; and, to warrant the motion for leave to bring in the bill, proof will be required (or at least an assurance given by a certain number of persons) that by the want of such accommodation divers persons have lost their property and been ruined, and, as often as any such bill is brought in, it will be opposed on the ground of innovation, and the proposer will be held up to view in the character of a Jacobinical anarchist, a Utopian speculatist, or both in one.

Voluminousness in tenor, scantiness in purport: thus it is that these vices, both of them to an insurmountable extent, are the properties of the same body of law. In this same state of things, on the part of men in power, the most anxious of all exertions are those which have for their object the preventing the application of reason to the field of law.

The trial in London; abode of the sole surviving attesting witness, a place in Cumberland or Cornwall; correspondents of his in plenty in London, with volumes of letters received from him; his handwriting would not be believed to be his, without his being dragged from Cumberland or Cornwall, for no other purpose than to say that it is his. A consideration which (on this as on every other occasion) is, by the licensed oppressors of the poor, and plunderers of rich and poor, trodden under foot, is, that, to a man who has not money enough to fetch a witness from Cumberland or Cornwall, the witness might as well be in the East Indies.

Of the sort of script thus allowed to be in this *makeshift* mode authenticated, the description is, of course, inadequate to the demand. Instruments of contract — instruments of the nature of those which are in use to be furnished with *attesting witnesses*, — yes. But a script at large, and (for example) a commercial letter or account-book, is this capable of being thus authenticated? *Answer*, — Yes or No: whichever happens to be most convenient and agreeable to the judge. — Much may be said on both sides: enough for this purpose on either side.

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[a] This is referred to by 100 Peake, 5th edit., and in p 60 allusion is made to the 13 Geo. III. c. 63, sect 40, which was passed to enable the Court of King's Bench, in all cases of indictment or information for misdemeanour or offences committed in India, to award writs of mandamus requiring certain judges in India to hold a court for the examination of witnesses, and to transmit the depositions to England. — These depositions are declared to be as good and competent evidence, as if the witnesses had been present, and sworn and examined *viva voce*. The 44th section makes a similar provision in civil actions or suits, in any court of law or equity, for which cause arises in India. — *Ed.*

doubt so your been put and answered in the affirmative. The falsehood is not committed: but what is committed is an injustice—an injustice which, in point of mischievousness, is exactly upon a level with such falsehood—the injustice, in which such falsehood would have found its sole object, and its sole advantage.

The falsehood has not been committed: but *why* has it not? Only because the judges (in whom the practice in this behalf has found its creators and preservers) have taken such good and effectual care to secure, to every dishonest man who in this way finds his account in making himself their instrument, the *benefit* of such falsehood; without that *risk*, which, had the eventual necessity of it been left subsisting, would have constituted the expense of it.

In so far as concerns justice and veracity, there are two codes of morality that in this country have currency and influence,—viz that of the public at large, and that of Westminster Hall. In no two countries can the complexion of their respective legal codes be easily more opposite, than that of those two moral codes, which have currency, not only in the same country, but in the same societies. and, if so it be, that, in the public at large, the system of morals that has place in practice, is, upon the whole, honest and pure,—it is so, not in proportion as the morality of Westminster hall (of which so many samples have already been, and so many more will be, exhibited) is revered and conformed to, but in proportion as it is abhorred. So far as concerns love of truth and justice, the greatest but at the same time the most hopeless improvement would be, the raising of the mind of a thorough-paced English lawyer, on a bench or under a bench, to a level with that of an average man taken at random, whose mind had not, for professional views and purposes, been poisoned with the study of the law: as, on the other hand, in point of sound understanding and true wisdom, the raising the same sort of mind to a level with that of a man of competent education, of the nature of that to which the term *liberal* is commonly applied.

Yes: it is from novels such as Maria Edgeworth's, that virtues such as the love of justice and veracity,—it is from the benches, the bars, the offices, the desks in and about Westminster Hall, that the hatred of these virtues, and the love of the opposite vices,—is imbibed. But that which to Maria Edgeworth was not known, or by Maria Edgeworth was not dared to be revealed, is the genealogy of her *Lawyer Case:* that that very ingenious and industrious gentleman had for his elder brother the Honourable Charles Case, barrister at law, M. P. in the lower house; and both of them for their father the Right Honourable the Lord Chief Justice Case, Christopher Baron Casington, in the upper: and that it was only by excecuting the powers given or preserved to him, and earning the rewards offered and so well secured to him, by his noble and learned father, that the younger son became what he was.

How long, for the self-same wickedness, shall the inferiors in power and opulence—the inferiors who are but instruments—be execrated, and the superiors, who are the authors of it, adored? Attorneys, solicitors,—were they the makers of judge-made law?—were they the makers of the system of technical procedure?—were they the makers of the law of evidence?

CHAPTER VI.

ABERRATIONS OF ENGLISH LAW IN REGARD TO THE AUTHENTICATION OF WRITTEN EVIDENCE

THE distinction between *provisional* and *definitive* authentication is unknown to English law In all cases alike, it insists upon having the authentication performed in the same mode, without allowing of any exceptions on the score of vexation, expense, or delay. It presumes all mankind to be forgers, and, where there is forgery, affords no facilities for the detection of it It guards against deception where there is none to guard against; and where deception is at work, interdicting the interrogation of the suspected person, it interdicts the most efficient means of scrutiny

Previous meeting between the parties, for the purpose of ascertaining whether any and what documents presented by one party are contested by the other, there is none disputed or not, the authenticity of every document must be *proved.*

True it is, that, for saving of delay, vexation, and expense, sometimes it does happen, that on one or both sides the genuineness of this or that instrument of contract or other script (or, as it may happen, of all the scripts meant to be exhibited,) is *admitted*

But it is only in so far as, on both sides, or (if it be an equity suit or cause) on *all* sides—and that to an indefinite number, all persons concerned, law advisers as well as suitors, are honest—and not only *negatively* honest, but completely and *actively* and zealously honest,—that any such admission, with the consequent savings, can have place If, by any such admission, a law adviser were to prevent his client from reaping any advantage which by the refusal of it might be obtainable (whether for want of the adversary's being able to procure the evidence, or by thrusting him out of the contest by the intolerable pressure of the expense,)—his conscience would hardly ac-

quit him of treachery, in betraying his client's interest.

"Not so," says somebody: "for, by the fear of eventual costs (*i. e.* of the eventual obligation of reimbursing the costs on the other side,) a dishonest, no less than an honest, man may be restrained from giving increase to such costs, though it be on the other side."

True, if every man were his own lawyer: but, under the reign of technical procedure, no man ever is, or with any the smallest chance of success can be, his own lawyer: and, so long as the system of procedure remains on that level in the scale of unintelligibility, to which it has been raised by the undiscontinued exertions of so many ages, the quantum of each man's burthen in this shape will always depend upon the sort of man, whose interest it is that it be as heavy as possible.

In this state of things, for the keeping down of superfluous expense on the part of the client, no degree of honesty on his part would suffice, without that sort and degree of honesty on the part of his law adviser, the existence of which (unless here and there, by great good fortune, under such encouragement as is given to him to be dishonest, it would be altogether absurd and idle to expect

Without the preliminary meeting above spoken of, it is physically impossible that, in relation to the matter in question, justice, or anything approaching to it, should be done. Injustice, in the shape of needless delay, vexation, and expense, if not in the shape of actual mis-decision, is unavoidable.

But although, without the aid of this arrangement, it is impossible that wrong should not be done, yet there are degrees of wrong: and, in instances to a great extent, wrong, over and above what was rendered necessary by the absence of this arrangement, will actually be seen to be done.

From the determination taken to put an exclusion upon that which is not only the best evidence, but the least burthensome evidence, viz. the evidence of the parties, follow— 1. (in violation of the dictates correspondent to the direct ends of justice) two opposite mischiefs; not only groundless exclusion, but rash and insufficiently guarded admission, and 2 (in violation of the dictates correspondent to the collateral ends of justice) enhancement of the necessary burthen — an enhancement, to the amount of which there are no assignable bounds: nor let it ever be out of mind, that — whenever the expense which presses upon him who has right on his side, swells beyond endurance — misdecision, to the destruction of his right, is the consequence; and the evil opposite to the direct ends, is either substituted or added to the evil opposite to the collateral ends, of justice.

I. Exclusion put upon the testimony of parties; viz. even at the trial.

II. Exclusion put upon the testimony of non-attesting witnesses.

III. Admission given to instruments without authentication, — *i. e.* admission given, without other proof, to an instrument purporting upon the face of it to be of a certain age, viz. thirty years old or upwards.

IV. Inadequate mode of bringing to view the supposed contents of a script in possession of the adversary.

For exemplification of the mischievousness, absurdity, and inconsistency (not to say improbity,) by which the practice in relation to this subject is characterized, a brief observation or two under the above several heads may suffice. But so full of complication, self-contradiction, and uncertainty, is this same practice, that the idea given of the chaos by the few samples of it thus brought to view, is little less inadequate than would be the idea of a house, by the like number of bricks picked out of it.

I. Exclusion put upon the testimony of parties, viz. at the trial of the cause.

In regard to the species of fact here in question, as in regard to every other, the most satisfactory, and on every account beyond comparison the most eligible, evidence (need it again be said?) is that of the parties, — viz. in relation to each fact, that one of the parties against whom it makes.

By the exclusion put upon the preliminary meeting, this evidence stands excluded, from the commencement of the cause. And when, at the end of half a year, or a whole year, or some number of years, from the day of the commencement, that inquiry which ought to have begun, and in most instances would have been concluded on that same day, is, under the name of *the trial*, suffered to take place, — upon this same best evidence is an exclusion again put, by means of another exclusionary rule.

In the eye of common sense, this is the best evidence possible. In the eye of the law, it is no evidence at all: therefore not the *best* evidence. For, on this part of the field, when exclusion is the object, out of the word *best* is formed the basis of the pretence.

Always excepted (I mean from the exclusionary rule) the case where an extra price, and that a most enormous one, is paid for opening the door to that which otherwise would be the excluded evidence; viz. at the equity shop and elsewhere. By the immeasurable and profitable addition thus made to vexation and expense together, coupled with the comparative badness of the *shape* in which the evidence is extracted, the objection which would otherwise have been so peremptory, is now removed.

Rather than give admission to that best and most satisfactory of all evidence, no evidence so loose and unsatisfactory but that admission will be given to it. in the case of an instrument of contract, for example, proof (*i. e.* what is called proof — viz. mere circumstantial evidence) of the genuineness of a couple of words purporting to be the name of an attesting witness. Look at these words, viz. *John Smith.* Did you ever know any person who ever bore that name? Yes. — Did you ever see him write, or receive letters which you understood to have been written with his hand? Yes — Judging from these opportunities, do you believe these words to have been written by him? Yes

True it is, that, when no better is to be had, the exigence of the case necessitates the reception of this loose — this circumstantial evidence But, when the case affords not only direct evidence, but the most trustworthy of all direct evidence, — to exclude that best evidence, and admit this loose evidence instead of it! How inexplicable the folly, were it not for the sinister interest that lurks at the bottom of it!

Wounded by the rule itself, justice is again wounded by the evasions of the rule.

1. Three obligors jointly bound in a bond Proof by extraneous witnesses (it must be supposed) being somehow or other unobtainable, one of the obligors is called to prove the execution of it. But, for this purpose, he must have been left out of the action, and the recourse against him lost * Just as it happens in penal cases, where one of two malefactors is let off, that his testimony may be employable against the other.

2. If a subscribing witness is become infamous, — on producing his conviction, his hand may be proved as if he were dead. Here inferior evidence is let in, to the exclusion of the best: circumstantial, to the exclusion of direct. So much for security against deception. Moreover, the conviction must be produced: a lumbering record lugged in, at a heavy and unnecessary expense, to prove a fact in itself notorious, and capable of being sufficiently proved by less expensive means; and which, after all, cannot be sufficiently proved by this means. John Brown was convicted; true: but how does the dead parchment prove that it was the same John Brown?†

3. So, when an attesting witness, being the only surviving witness, had become interested, without any prejudice to his character, his hand was allowed to be proved by somebody else, on the presumption that he himself would have denied it. ‡ Pre-established rules apart, the experiment might have been tried, at least, and if he had perjured himself, then might it have been time enough to encounter the perjury by other evidence.

II Exclusion put upon the testimony of non-attestors.

Witnesses to the number of half a dozen or half a score, all of them unexceptionable, are ready to be produced, each of them ready to say, "I saw the several parties attaching their respective signatures to this instrument, saying (each of them,) *I deliver this as my act and deed*"

Quibbleton, counsel for the defendant, addressing himself to the first of these witnesses What is your name?

Answer John Stiles

Quibbleton. My lord, here is the deed. — two (your lordship sees,) and but two, attesting witnesses; neither of them is named John Stiles

Judge. Set aside this witness.

Half a dozen or half a score, all of undisputed character, all ready to speak to this plain fact, and not one of them permitted. ‖ Why not permitted? Answer. Because, in

* From the very learned notes to the cause of Cabell *v.* Vaughan, 1 Saund. 291, it appears that all joint obligors ought to be made defendants, and that the plaintiff may be compelled to join them all, if advantage be taken of the omission in due time, and by a proper plea: and so, on the other hand, ought all obligees to join in an action. If, then, all the obligors are joined in the action, of course no one of them could be called as a witness. But if an action is brought against one only of three obligors, and advantage be not taken in due time of the omission of the others, then undoubtedly one of the omitting obligors may be called as a witness. Str. 35.—*Ed.*

† In such a case as this, proof of the identity of the individual with the John Brown mentioned in the record, would be required.—*Ed.*

‡ In Goss *v.* Tracy, the deposition of the plaintiff being offered in evidence, was objected to, and Tilley's case, Salk. 286, was cited in support of the objection. In that case an unexceptionable witness had been examined, and his deposition duly taken. This witness afterwards became interested in the cause, and at a subsequent trial at bar, his deposition was offered in evidence. The Court sent a judge to the Court of King's Bench for their opinion on the point, and they held, that the deposition could *not* be read, for that the witness was living, and could not himself have been a witness at that time, *vivâ voce*, because he was then interested.—*Ed.*

‖ Probably enough, in any individual case which gave birth or confirmation to this doctrine, the exclusion was not actually put upon any greater number than *one* witness. But in the nature of the case there is not anything to hinder the presence of any such percipient but non-attesting witnesses, in these or any still greater numbers: and (let the number in attendance have been ever so great) the same reason that sufficed for the exclusion of the one who was first tendered, would have sufficed for the exclusion of all the others: nor, therefore, were it ever so great or ever so small, would the number actually in readiness to be produced have appeared, unless by accident, upon the face of the report or treatise.

the first place, if permitted they would all perjure themselves: in the next place, having thus perjured themselves, they would all of them, in spite of counsel's cross-examination and judge's direction, obtain credence. Two persuasions these, neither of them (it is true) avowed, because, when absurdity or improbity enter upon the stage, they do not, either of them, present themselves stark naked. But, to give to the exclusion so much as the colour of being conducive to the ends of justice, these persuasions must both of them be entertained, or, at any rate, of the matters of fact respectively predicted by them, the *certainty*, or (to speak with a degree of correctness new as yet to lawyers' language) the *preponderant probability*, must be assumed.

But, supposing these persuasions entertained, on what ground is it that they must have been entertained? On this ground, and no other, viz. that the names of these persons are not to be found upon the face of the instrument, in the character of attesting witnesses.

Exists there, then, any article of law, by which it is required (on pain of nullity, or any other pain,) that, upon the face of every deed of the sort in question (wills being out of the question,) there shall be visible the names of two persons in the character of attesting witnesses? No: neither of any article of real (*i. e.* legislative) law, nor so much as any rule deduced in the shape of judge-made law.

On what ground, then, stands the rejection? Answer: On this ground, viz. that — when the name of a person, purporting to have been written by him in the character of an attesting witness, is visible on the face of the instrument — the testimony of any number of persons who (if they are to be believed) *actually* saw what it is there *declared* that this man saw, is not, with relation to the fact in question, *the best evidence*.

Non-Lawyer. What? — The evidence being *good* enough to produce a complete (or at least preponderant) persuasion, in this case, — by the mere circumstance of its not being the very best imaginable (admitting, for argument's sake, that it is not the very best) — by this one circumstance, is any sufficient ground afforded for shutting out this evidence, when there is no other? and when, in consequence, if this be shut out, the party who has right on his side must lose his cause?

Lawyer. Oh! but where, there being upon the face of the deed an attesting witness, he is not produced, but instead of him others are produced whose names are not upon the deed, here is an *omission:* from which we draw a conclusion; and the conclusion is, that, had the attesting witness been produced, his testimony would have been against the genuineness of the deed.

Non-Lawyer. And on this conclusion it is that you build the two other necessary conclusions, viz. that the non-attesting witnesses, being all of them so many intended perjurors, would all of them have affirmed the genuineness of the deed, the fact being otherwise, and, thus falsely affirming it, would have gained credence!

With submission, suppositions of a contrary tendency might be raised in any number, — any one of them less improbable than the above. Take half a dozen, or so, for examples: —

1. We know not where to look for the attesting witness: we know not who he was: we know not whether he be alive or dead.

2. We know indeed who he is, and where he is, but he is not within the jurisdiction of the court.

3. He is, indeed, within the jurisdiction of the court, and the place where he is, is known to us: but that place is far distant; and we, — who, at our peril, on pain of losing his evidence, and along with it (it now seems) our cause, were bound to advance to him whatsoever money, in case of dispute, should be deemed sufficient to defray the necessary and proper expense of his journey to and fro, attendance, and demurrage, whatsoever that might be — could not either find of our own so much money, or borrow it, — your laws against usury forbidding a man, in recompense for any risk, or for the relief of any exigency, to accept of any extra price.

4. Yes, we do know who he is: and it is because he was so well known to us, that we took care not to call him. He is a dishonest man, an enemy to us, and in league with the parties on the other side. After having promised or not promised to come, he would, after all, come or not come, according as, in their view of the matter, it would be best for them that he should or should not come. If he did come, he would deny his own handwriting: *I know nothing about the matter,* he would say: *it was not by me that this name was written.*

By counter-evidence, or even by counter-interrogation, it might have been possible for us, notwithstanding, to extract from him the truth of the case, and the more so, because, in the presence of two other persons (who are not, however, either of them, at present within our reach,) once upon a time he did declare and confess, that the name in question was really written by his hand. But both these means of coming at the truth we are debarred from, by another of your rules; viz. the rule, by virtue of which, merely because we are unfortunate enough to stand thus in need of his evidence, — of this enemy of ours, it is said by you that he is our *own* witness; and that, because he is our own witness, he must not by us be contradicted, or so much

as questioned. Whatsoever may tend to the bringing him to view in this his true character, whether it be counter-interrogation or counter-evidence, we are thus forced by you to suppress.

Independently of regulation — positive and effectually notified regulation — it is difficult to say what there is that should determine the choice of the party in favour of a supposed *attesting*, to the exclusion of (or even in preference to) a *non-attesting*, but by him equally known to have been a *percipient*, witness. True it is, that, by the signature of the attesting witness, proof is so far given, that in relation to the transaction in question he was a percipient witness. Yes but is it a proof that no *other* person was? a proof, too, which, by those who know that the contrary is true, is to be regarded as a convincing one?

The attesting witness would cost (suppose) so much money to produce: the non-attesting witness may be had for a few shillings less. This, in the eye of a *considerate*, and especially in the eye of a *poor* man, honestly advised, should suffice to give the preference to the non-attesting witness The attesting witness would, after all expenses paid him, suffer inconvenience (suppose) from the attendance: the non-attesting witness would not suffer any inconvenience This, in the eye of a *humane* and considerate man, should suffice for securing the like preference

Oh! but we have a rule about the *best evidence;* viz. that in no case shall any evidence be received but the very best which the nature of the case admits of

Preciously instructive rule! *We receive no evidence, but what we receive*. for anything more precise, or intelligible, or wise, or honest, than this, will not be found in it.

No evidence do we ever receive, other than the *best* evidence. And what is the best evidence? Answer: It is, on each occasion, that which we receive as such.

They know not, themselves, what their own rules are. Strange indeed it would be if they did: for, that which has no existence, how is it to be known to anybody? They know not themselves what their own rules are, they resolve that every other man shall know them: that is, without the possibility of knowing them, shall, as often as occasion offers, be punished for not knowing them

Nemo tenetur ad impossibilia, says another of their maxims. But in any one of their maxims, so sure as there is anything good, so sure is practice opposite.

Once more: Partly upon the *source*, partly upon the *shape*, depends the goodness of an article of evidence. As to the shape, in so far as depends upon themselves, in none but the very worst shape (come it from what source it will) do they receive any evidence: and, so it be in this worst, but to themselves most profitable, shape, no source so impure but that from that bad source they are ever ready to receive it. Yet, such is their delicacy, that (as if for evidence, as for meat, there were a market, at which, with money in his hand, a man may pick and choose) none, forsooth, will they put up with, but the very best of evidence.

III. Admission given to instruments without authentication

By the man of law, whenever you see a gnat strained at, on a second glance make sure of seeing a camel taken up and swallowed.

Behold an instrument, for the authentication of which, to-day, a whole score of witnesses, who (every one of them, if they are to be believed) were percipient witnesses of the execution of it (they not being attesting witnesses,) will not suffice it is accordingly dealt with as if it were forged. Wait till to-morrow, this spurious deed becomes genuine: and so plainly genuine, that, for the proof of its genuineness, no evidence is required.

This metamorphosis, who was the god that operated it? Answer The god Time. Yesterday the script wanted a day of being thirty years old to-day the thirty years are fulfilled.

This admission has neither quite so much absurdity in it, nor quite so much mischievousness, as the exclusions. The instrument, if it be not what it purports to be, is a forgery Forgery, a flagitious and pernicious crime, is not to be presumed Independently of particular argumentative grounds, the odds against the fact, as testified by experience, are prodigious for every forged instrument, you have genuine ones by thousands

Not but that to this crime (by the exclusion put upon the interrogated testimony of the party by whom or in whose behalf the instrument is produced) every encouragement has been given, which it has been in the power of Judge and Co to give to it. Suppose the party to have forged it he puts it silently into the hands of his lawyer, and it is the lawyer's business to fight it up. At the lawyer's elbow, if so it please him, sits the forgerer There he may sit till he is tired, for he is in no danger: the law has taken him under her care; not a single question can be put to him.

Convenient as this law is to every criminal, to an honest man it may happen but too frequently to be laid by it under an embarrassment, out of which it seems not altogether easy to say how he is to be delivered.

The instrument purporting, upon the face of it, to be thirty years old, or more, — this antiquity, coupled with *possession* (*i. e.* with the relation borne to the suit or cause, or to the fact in question, by the individual in whose possession it has been,) is accepted as evidence sufficient for the authentication of

it. But the individual (suppose) in whose possession it is, is the plaintiff; and, for the whole of the time that has elapsed since the execution of it, or for a part more or less considerable of that length of time, he has kept it locked up in his strong box not having in all that time shown it (because in all that time no occasion has called upon him to show it) to any person who is without interest in the suit or cause. By whose testimony, then, is the custody of it to be proved? By *his*, the plaintiff's? Oh no. that would be contrary to the inviolable rule But if not by *his* testimony, it cannot — by the very supposition it cannot, be proved by that of any one else.

Yes, if he had had information, timely information, of the existence of this rule of law, for in that case he might have got this or that uninterested person to look at it But if any such information had reached his mind, the care and pains taken by Judge and Co. for so many centuries to keep it out of his reach would have been frustrated. By keeping them from receiving existence, in and from any determinate form of words, care has been taken, very effectual care, that neither by non-lawyers, nor by lawyers themselves, shall any of these portions of imaginary law be laid hold of by *inspection* By their uniform repugnance to every conclusion that would be drawn by common sense, care not less effectual has been taken that they shall never have been laid hold of by *inference* or *conjecture*

If, in this case, the exemption granted from the obligation of authenticating the document by evidence *ab extrà* is proper, it can only be because, in the other cases, the obligation is itself improper, as being needless Forgery is not the crime of any particular point of time: whatever be the probability of it at this present day, it was not less on this day thirty years A deed purporting to have been fairly executed thirty years ago, may have been forged or falsified at the time of the date, or at any rate may have been forged or falsified at any subsequent point of time. Forged writings, of an apparent date two hundred years anterior to the real date,* — forged writings ascribed to Shakespeare,† have been known to deceive the very elect among English lawyers ‡

IV. Shifts, when the script is in the power of the adversary.

The hostility of the technical system to the ends of justice — the consciousness of that hostility, on the part of those who, while they are acting under it, are profiting by it — the violation at the same time so continually offered by themselves to the very principles to which by themselves the highest importance is attached, — all this may be seen exemplified in a case which shall now be brought to view.

When the article of written evidence, which the party in question stands in need of, happens to be in the hands of a party on the other side; when an instrument which a plaintiff (for example) stands in need of, happens to be in the possession of the defendant; the sort of shift that has been made is truly curious.

Under a rational system of procedure, the course is plain and easy. the evidence acted upon is of the best kind imaginable. Both parties being together in the presence of the judge, the plaintiff says to the defendant, "To make out my case, I have need of such or such an instrument," describing it· "you have it; have the goodness to produce it." "Yes," says the defendant (unless his plan be to perjure himself,) "and here it is·" or, "I have it not with me at present; but on such a day and hour as it shall please the judge to appoint, I will bring it hither, or send it to you at your house, or give you access to it in mine."

Under the technical system, no such meeting being to be had, no such question can at any such meeting be put But, at the trial (viz. under the *common-law*, alias *non-equity*, system, of which jury trial makes a part,) at the trial, that is, after half a year's, or a year's, or more than a year's, factitious delay, with its vexation and expense, — then it is, that, for the first time, a chance for procuring the production of a necessary instrument may be obtained.

Though, neither for any such purpose nor

* In the case of the claimant of the Stirling peerage, noticed above (p. 178,) one of the documents found to be forged, bore to be a charter by Charles I., of the year 1639 — *Ed.*

† See the controversy between Mr. Malone and Mr. Chalmers.

‡ Another remarkable feature of this fixation, is its being made without authority. Among the radical and incurable vices of jurisprudential (in contradistinction to statute) law, is, its incapacity to make fixations; to fix upon this or that quantity, in any shape, for any purpose; to fix upon this or that quantity, to the exclusion of all others. Analogy is the only instrument which jurisprudence can employ to weave its cobwebs; and, on the ground of law, it is seldom indeed that analogy can be seen to point to any particular quantity, more decidedly than to another. A rule of this sort is what, in English statute law, is called a statute of limitations. If in any one instance a statute of limitations can legally and constitutionally be passed, in the way of jurisprudential law, by this or that bench of judges, or even single judge, instead of Parliament, so may it in every other. In other cases, the usurpation has been more or less veiled; here it is stark naked. Accordingly, it has never been practised but in the dark. The personality of the author of the rule, and even of the decision, has been carefully concealed. No judge has ever avowed the making of it; when brought forward, it has been pretended to be found ready made.

for any other — neither to the party on either side nor to any agent of his — can anything in the shape of a question be put *vivâ voce* by a party or agent on the other side, — the question (for example,) *the instrument* (describing it,) *have you it, or no?* — yet, under the name of a *notice*, a sort of requisition in writing calling upon him to exhibit it, may be, and every now and then is, delivered. Of this notice to exhibit the instrument, what is the effect? That the defendant is under any obligation to exhibit it? No such thing. To produce any such effect would require nothing less than a suit in equity, whereupon the instrument would be exhibited or not: and if exhibited, not till the end of the greatest number of years to which the defendant (having an adequate interest) had found it in his power to put off the exhibition of it. To have enabled the party thus far to obtain justice without aid from equity, would have been robbing the Lord Chancellor and the Master of the Rolls, and the swarm of subordinates of whose fees the patronage part of their emolument is composed.

What, then, is the effect? Answer: that, after this notice, if that best evidence which is asked for be not obtainable — not obtainable, only because those on whom it depends do not choose it should be obtained, — what is deemed the next best evidence that happens to be in the plaintiff's possession is admitted: and on this occasion no evidence is too loose to be admitted

After such notice given, one succedaneum that has been admitted is a supposed transcript: "*an examined copy*," are the words Another is, "*parol evidence of the contents*."*

In the midst of all this laxity, observe and admire the strictness: "In case it be a copy that is offered, it must first be proved, that the original, of which it purports to be a copy, was a genuine instrument." So much the more business for the benefit of the man of law: so much the more chance of failure, for the benefit and encouragement of the wrong-doer.

But suppose no such copy producible; — the best and only evidence which it is in the plaintiff's power to produce, being, as above, "parol evidence of the contents;" *i. e.* some account given of the supposed contents of the supposed instrument, by a person into whose hands, by some accident or other, the opportunity of bestowing upon it a perusal more or less adequate — of throwing over it a glance more or less slight, and thus giving an account of it more or less correct and complete, — has happened to find its way.

This casual reporter, — for his report to be received, is it necessary that he (or, in his stead, the party by whom he is called in) should have established in due form the genuineness of the instrument, which, for ever so short a time, chance had thus thrown into his hands?

In this one point may be seen a mine, a rich mine, of future causes.

Behold now another mine The two sorts of makeshift evidence, thus brought to view in the case of a *deed*, — viz a *supposed transcript* (copy examined or not examined,) and *parol evidence of supposed contents*, — shall they apply, and under any and what modifications, to any and what other sorts of scripts?

Delight paints itself on the countenance of law, at the thoughts of such a mine of nonsuits, and, to the lawyer at any rate, if not to the client and suitor, of *agreeable surprises*.

Good all this, as far as it goes; when so it is that a man's good fortune has put into his hands any such makeshift evidence. But if not, what in that case becomes of the notice? In that case, the wrongdoer triumphs the party who is in the right loses his right, whatever it may be, and so the matter ends

Did but the judge deign to admit at the outset into his presence, the persons whose properties and liberties he has contrived with so little trouble to dispose of, — whatsoever were the instrument wanted, if it were not found in *one* of two hands in which it was expected to be found, it would be in *another*: every instrument that was necessary to justice would be ferreted out as it actually is, in the case where, justice being necessary to his own personal protection as well as that of the public, it has been the pleasure of the man of law that the necessary instruments should be made forthcoming, viz in the preparatory examinations taken, as in a case of murder, robbery, or other felony, by a justice of the peace

No loophole (or at least not so many loopholes) would then be left for the wrongdoer to creep out of; thus foiling, for a time, or for ever, the party whom he has wronged.

But, under the technical system, this business of *notices* affords to the wrongdoer an inexhaustible fund of chances:† in this lot-

* Admission having thus been given, not only to an examined copy, but even to parol evidence of the supposed contents, would it be given to an *archetypal draught*? to the unrecognised and unsigned original, from which the recognised and signed instrument itself, was itself but a transcript? Having to pronounce between these two species of makeshift evidence, while, by the power and for the benefit of the lawyers, the proper and more satisfactory species of evidence is kept out of the way, — *common sense* would, without hesitation, answer in the affirmative; *common law*, therefore, after the usual hesitation, not improbably in the negative.

† *Vide infrà*, Book VIII. Chap. XIII. *Chicaneries about Notice.*

tery, a *nonsuit* (the produce of which is an additional suit) constitutes the prize in which Judge and Co., with their protegé and partner, the wrongdoer, are sharers.*

I proceed to speak of the course taken by the English law on the subject of authentication, in regard to any sort of document coming under the notion of *official* evidence,— whether as purporting to be the work of an official hand, or to bear upon the face of it a testimony of its authenticity, imprinted upon it by an official signature. Here, under both principles, — the principles here advanced, and those acted upon (as above) by the jurisprudential law in question, — tenor and custody together should be sufficient proof. Upon the principles here advanced, the former alone is sufficient proof much more that and the presumption *ex custodiâ* together, when the custody is that of a hand so completely exempt from suspicion as in this case. But, upon the principles of English law, the presumption *ex tenore* alone cannot be sufficient; for to this case the ground of antiquity does not extend, and, as to the other part of the proof, it consists in the custody, which the law does not require.

According to Comyns,† "a deed indorsed as enrolled shall be read without proof." According to his continuator, the certificate of the auditor of the dutchy of Lancaster is sufficient evidence of the enrolment of a dutchy lease. According to the same, the indorsement by the proper officer is sufficient evidence of the enrolment of a bargain and sale. If (as I should suppose to be the case) the instrument in question was in these several instances admitted, as an ancient deed would have been, to prove itself, — no proof of the official custody in which it had been, was exhibited. But, on this supposition, to call the certificate that of the auditor, calling the indorsement an indorsement by the proper officer, was a *petitio principii*, an assumption of the very fact that required to be proved. In another case in the same book, where the custody is considered as part of the case, the fact of its being proved is mentioned (430).

Doubts upon doubts might be started upon this topic, and upon the several decisions that have been given on the occasion of it. In the way of statute law, I could undertake to clear up all these doubts, if what ought to be extirpated were fit to be amended. In the way of dissertation, I could undertake for nothing but to thicken them.

All this, like everything else — all this ever hath been, is now, and (so long as judge-made law reigneth) ever shall be, exactly as the judge pleases.

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* In one sample more, read at once the nature of judge-made law in general, and therein read the technical system of procedure, and therein, again, the law of evidence in particular.

When the script you want is in possession of your adversary, you have seen already what the succedaneum is, and what sort of chance there is of its being obtainable.

When the script is in possession of a person capable of being a witness (a non-litigant witness;) for the purpose of having it exhibited, you serve him with a writ called a *subpœna duces tecum*, by which he is ordered to attend and bring with him the script. If he obeys, it is well: if he obeys, that is, if so it be that he not only attends, but brings it. But what if he comes without it? To this hour, it is not settled what is to be done with him, nor how the script is to be got at and applied in the character of evidence. At any rate, to the party who, being in the right, has need of the evidence, the cause is lost for that time: saved to him, or not saved, the liberty of trying a new one.

Doubts from another mine. — The case of the proposed witness comes within some one or other of the thousand and one cases of exclusion. He is weak in mind, interested, a felon, an excommunicated person, an atheist, and so forth. In any such impure hand, may or may not the script be exhibited (viz. in the first place,) if, in obedience to the *subpœna*, it be actually brought? Exhibited? Yes, but by whom then is it to be *authenticated*, or any account given of it? In the next place, as to compulsion, and the means thereof; suppose (notwithstanding the other already-mentioned mine of doubts,) suppose it settled, that the hand, if pure and orthodox, would have been compellable. shall the atheistical hand, for example, be compellable? or shall an atheist, on condition of declaring himself such, or a theist, on condition of declaring himself an atheist, be allowed to keep back the necessary document, and thus to gain his point, giving the cause thus to the wrongdoer, whom he is in league with?

† Com. Dig. by Hammond. Title, Testmoigne, p. 129.

BOOK VIII.

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

CHAPTER I.

OBJECT OF THIS INQUIRY — ITS CONNEXION WITH THE SUBJECT OF THE PRESENT WORK

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

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

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

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

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

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

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

Notwithstanding so many professions as have been heard (professions which, even from the impurest lips, will, to one who duly considers the character of the nation and the temper of the times, sound rather as exaggerated than as altogether insincere,) many there appear to be who regard with scorn and ridicule the notion that the augmentation of the comfort and well-being of the Indian natives has had any share in so many exertions as have

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* In allusion to King John, who, according to Mathew Paris (p. 192,) demanded 10,000 marks of a Jew, and directed one of his teeth to be drawn daily, till he should comply.—*Ed.*

been made by governors-general in Hindostan for extending to those defenceless beings the protection of English laws.

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

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

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

CHAPTER II.

TECHNICAL OR ILL-CONTRIVING, AND NATURAL OR DOMESTIC, SYSTEMS OF PROCEDURE, WHAT?

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

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

The mode in which the will of a legislator (acting as such) is expressed, is by *rules*, mostly general, and at any rate laid down beforehand: the sort of law thus produced is called *statute* law. Very different was the mode in which the will of judges was expressed—of judges acting as such, and, by the exercise of that will, developing the course of procedure, and collecting fees. No rules were laid down beforehand: as occasion called, what was thought right, or pretended to be thought right, upon each occasion, was done: and as to rules, it was left to suitors to collect, or rather frame them for themselves as they could, from the observation of what had been done. Law produced in this mode of generation has been called *common* law; and sometimes *jurisprudence*, or juris-prudential law.

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

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

Before states existed, at least in any of the forms now in existence in civilized nations, families existed. Justice is not less necessary to the existence of families than of states. The mode in which, in those domestic tri-

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

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

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

bunals, created by nature at the instance of necessity, justice was administered, and, for that purpose, facts were inquired into, may for distinction's sake be termed the *natural* or domestic mode of judicature.

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

It is among the characteristics of technical procedure, all over the world, to abound in rules and formalities. In process of time — as occasion presented itself, and irresistible necessity urged inquiry — spite of all prejudices, a discovery was made, that, with little or no exception, these rules and formalities, instead of being necessary, were repugnant to the ends of justice: that an option was to be made between the sacrifice of these rules and formalities, and the sacrifice of certain portions of substantive law, necessary to the existence of the state. Accordingly, certain portions of the field of judicature were marked out, and a course prescribed for the appointment of judges, with authority to proceed and inquire, to hear and determine, as they would do in the bosom of their respective families, paying no sort of regard to any of these rules and formalities. For distinction's sake, the courts thus constituted may be termed *courts of natural procedure* or judicature: of natural procedure *restored*, or (if, in any odd nooks of the field of judicature, discovery should in any instance be made of any little spot which happened to have escaped the fangs of the technical system) natural procedure *preserved*.

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

In current nomenclature, the distinction nearest to a coincidence with that between technical procedure and natural, as here explained, is that between *regular* and *summary*; but the coincidence is far short of being complete. Thus far, it is true, they agree, — that, in comparison with all technical procedure, all natural is always summary. But technical procedure has its branches which are called *summary*, as well as its branches which are called *regular*: for designating that which is not technical, the word *summary* has therefore been unfitted. Moreover, summary means *short*: and wherever one course is shorter than another, it may, in comparison with that other, be termed *summary*. But, in a series of infinite length, the number of degrees is infinite: and in all that number there is no one that can have any exclusive pretension to the epithet of summary.

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

In every country (so I imagine it would be found,) men of law, unable to find the shadow of an argument, have trusted to the power of this prejudice, preserving a prudent or rather necessary silence. Blackstone, in the fertile soil of England, has been fortunate enough to find another and a still stronger prejudice, applicable to the same purpose. Summary procedure is a mode of procedure to be regarded with jealousy, and with such a degree of jealousy as shall prevent as much as possible the extension of it. With jealousy? Why? Because in summary procedure there

is no jury. No jury? — and what then? Is the use of trial by jury to be regarded as an end, or only as a means? Taken altogether, are the ends of justice more completely fulfilled by regular procedure with its jury, than by summary procedure without a jury? — another inquiry in which no lawyer ever ventured to engage, and on which Blackstone knew better than to start. No where prejudice reigns, everything is to be lost by inquiry, nothing to be gained by prejudice the same business is done (when it is done) upon much easier terms.

But, in the very word *summary*, may be seen an indication which, if it does not of itself afford, at least points out the path to, a complete demonstration of the incongruity of that mode to which it stands opposed. What is a summary mode? It is a mode, in and by which an efficient decision is obtained, with a less quantity of delay, expense, and vexation, than that which is attached to the other mode, termed the regular. To the use, then, of the regular mode, a quantity of collateral inconvenience attaches, which does not attach upon the summary mode. From this single statement, admitting it to be true, follows a necessary consequence, viz. that, — unless under the summary there be some deficiency in respect of the security against misdecision, and that deficiency such that the mischief of it is of a magnitude to outweigh the advantage obtained by the defalcation from the mass of collateral inconvenience in the shape of delay, expense, and vexation, — the existence of the regular mode, be it what it will, is an enormous nuisance. Is the summary mode, then, attended with any such disadvantage? Is the regular mode attended with any such disadvantage? If so, in what particular respect? What are the arrangements which, being necessary to the giving the completest security that can be given against misdecision, are to be found in the regular, and not to be found in the summary, mode? The question is a conclusive one: no answer has ever been, none ever will be, given to it. All the wits of all the lawyers by whom civilized society is infested, would sink under the task.

CHAPTER III

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

§ 1. *Ends of judicature, under the fee-gathering system, opposite to the ends of justice.*

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

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

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

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

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

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

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

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

But, in the nature of things, it was scarce possible that, in the situation in question, and with the powers inseparable from it, power should not be possessed of adding either to the quantum of the fee, or to the number of the occasions on which it comes to be exacted.

The mischief became much greater, the opposition of interest to duty much more stre-

* The judges are now paid by fixed salaries, but the subordinate functionaries are for the most part remunerated in the manner mentioned in the text, the amount of the fees being regulated by the judges.—*Ed.*

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

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

Accordingly, under this system, the judges, to the power, added the effectual inducement, to produce factitious vexation, expense, and delay (or, more briefly, to make business,) in a quantity almost without limit, and continually tending to increase. the vexation, expense, and delay, for the sake of the profit extractible, in the shape of fees, from the expense Hence the production of vexation, expense, delay, and official profit, became the real, and in a manner the sole, ends of judicature. profit the ultimate end, expense and delay, so many intermediate ends, the production of the vexation, not an end, but a collateral result

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

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

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

Gilbert's reasons for the reduction:—Reason 1. Preventing a plaintiff from making a man defendant for the sake of vexing him;"—the parchment never going out of the office, nor the defendant, unless by accident, knowing anything about the matter. The works of Gilbert are a very galaxy of reasons; all of them of this stamp: the same logic, the same sincerity. *Ex pede Herculem:* and Gilbert is a very Hercules among lawyers. For the pleasure of frightening an adversary with an equity suit, sixpence would not be grudged by Irus; eightpence more would by Crœsus.

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

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

* Gilbert's Forum Romanum (Chan.) 39.

† Like causes produce everywhere like effects.

Extract from the speech of Lord Henry Petty in the House of Commons (Morning Chronicle for 22d May 1806.—)

"The matter was so contrived" (viz. under the existing establishments for the auditing of the public accounts,) "that the fees of the different officers depended on the number of accounts which they passed, so that he who was determined to do his duty strictly, and to examine narrowly into any accounts that came into his hands, was left almost without any business or fees; while he who was most negligent of his duty, who passed accounts without being very particular as to the justness or amount of the charges, was in high employment, and had his office crowded with accountants and with fees. If the vouchers were regularly drawn up, this was all that was here required. No particular inquiry was made as to the nature of the vouchers, and the manner in which they had been procured. The consequence certainly was, as may be presumed without fear of being in error, that great frauds and abuses were committed. Under these circumstances, the right honourable gentleman now no more, to whom I before adverted, saw that some change was necessary in the management of the public accounts, and, accordingly, in the year 1785, a bill was brought in, appointing five commissioners for the administration of the public accounts."

Amongst the objects of the inquiry instituted in 1792 by a committee of the House of Commons on the subject of imprisonment for debt, was that of the number of premature deaths produced by the abuses connected with that practice.

So far as these ends of judicature are pursued, so far must the ends of justice be sacrificed. But what the people and the sovereign expect and demand is, that the ends of justice be pursued. Here, then, it becomes necessary to make a sort of compromise, and, to preserve appearances, for the purpose of keeping the public deceived and quiet, to sacrifice, to a certain degree, the pursuit of the ends of judicature for, that the ends of justice might in general be supposed to be pursued steadily and exclusively, it was necessary that, to a certain degree, they should be actually pursued—that they should be pursued in all cases in which the pursuit of them was not adverse, and even in some cases in which it was adverse, to the pursuit of the ends of judicature. Thus, when, in other stations, public functionaries receive public money with a view of extracting what they can of it to their own use, in the way of embezzlement or peculation,—it becomes necessary to them notwithstanding (to the prejudice, and *pro tanto* to the sacrifice, of these their objects) to apply a part of such moneys, commonly by much the greater part, to the services for which it was designed

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

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

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

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

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

§ 2 *Alliance between the sinister interest of judges and that of professional lawyers.*

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

The same motives by which, in every other

No proposition in history is more completely out of doubt, than that this practice was set on foot by the judges, in the teeth of the then established law, to serve as an instrument of extortion in their hands.

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

line of money-getting business, a man is stimulated to raise to its maximum the quantity of his business, will of course apply themselves to this, and with equal energy. The interest of the judge was, that there should be as many suits as possible the interest of the professional lawyer was the same Here then is a community of interests, between the judge on the one part, and the professional lawyer on the other and this community of interest is, upon the face of it, perfect and entire. It was the interest of each, that the mass of business (understand always profit-yielding business) should be as great as possible: it was the interest of each, that any exertions of his own, by which any addition could be made to that mass, should not be spared. Fellow labourers towards one common end, the acquisition of pecuniary profit — co-operators throughout the whole of the career, yet in no part of it competitors, — a sort of virtual partnership was thus established between these two species of lawyers a species of connexion (be it ever remembered) constituted entirely by the mode of payment established in the case of the judge, a connexion ever existing where that mode of payment exists, never existing either where the judge receives no pecuniary retribution in any shape, or where, receiving one, he receives it in the shape of salary only, and without fees

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

Whenever it happened that, in the transaction of the business, the party, the client, was himself present, as well as the professional lawyer, his assistant, — the presence of a person whose interest it was, that, of the business for which he was to pay, not more should be done than was necessary to his purpose, operated as a check to the exertions of the partnership in that part of their industry which consisted in the art of making business. Both parties felt themselves stimulated by the strongest and most constantly acting interest, to make every exertion for the removal of so troublesome an obstacle An iniquity so glaring, so repugnant to the most obvious ends and perpetually recurring principles of justice, so opposite to the practice of every man that ever lived, in every case in which he had the discovery of truth really at heart, could not in any country be the work of a moment. In England in particular, it cost several centuries to bring this part of the system of exclusion to the perfection in which it exists at present.

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

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

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

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

The quantity of business made in each given cause being thus made to increase, by and with the number of hands employed in

* This was put an end to in 1654. Scobell, c. 36.—*Ed.*

it,—it has become the interest of all hands, and in particular of the superintending hand, to give every possible increase to the number of such hands In other words, the quantity of profit flowing under this system into the coffers of the judge receives a natural increase from the number of the channels through which it flows.

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

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

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

If the party for whose benefit (real or pretended) the lie is uttered, to and in the presence of the judge, is present at the uttering of it (whether it be by his own lips or another's that it is uttered,) there is a somebody who is responsible for it, and that somebody is he. What you can do, if there be any use in it, is to exempt him from all factitious punishment what you cannot do, is to exempt him from the natural punishment of present shame On the other hand, keep him out of the way, providing at the same time a gang of professional lawyers of different classes, through whose pens and lips it shall have to flow till it comes to the ear or the eye of the judge, the more numerous the band (lawyers alone, or, if the client be the author, lawyers and client together,) the more secure they are, all and each of them, from every the slightest flush of shame. The lawyers are there, but they (such is their misfortune) are misinstructed and deceived. the client, if he were there, would be exposed to shame, but he is not there—care has been taken that he shall not be.

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

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

Doubtless but, to any practical purpose, what effect results from these exceptions? Not absolutely none, but next to none. To constitute the effective partnership, to render the community of interests strong enough for every pernicious purpose, it is not necessary that the judge should come in for his share on every occasion, it is sufficient if there be any occasion on which he comes in for any share sufficient on every other supposition than this, viz that the aggregate amount of his share does not, *communibus annis*, constitute a sum sufficient in his station in life to exercise any corruptive influence.

The case is, that,—although upon a minute search and analysis made with this special view, a separation might be made between the two classes of cases—viz. those in which

* What is here said of the use of lies must not be understood without distinction. There are lies which the interest of the judge has called upon him to punish; there are lies which his interest has called upon him to cherish. Where the line of distinction ought to be, and accordingly where it has been, drawn, will soon be shown in its place. But, on condition of observing a distinction which has never yet failed to be observed, the encouragement given to lies is one of the most useful of those main branches, which we shall presently have occasion to display, of the art of making business.

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

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

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

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

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

What is more; were it possible to know, I should not be surprised to learn, that no instance had ever happened in which any judge now living was instrumental, knowingly and willingly, in the establishment of any fresh rule or practice, the effect of which was to make any addition to the amount of the profit of the firm.

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

But, having gone thus far, here I must stop. And, admitting on the part of the existing generation and their probable successors all this purity, no admission is made that is in any degree inconsistent with the supposition of a system rotten to the very core. Nothing is done by any man to make the practice worse. Some things are done now and then to make it better. But so thoroughly bad is it, having been so from the beginning — so thoroughly adverse to the people, so thoroughly favourable to the partnership, — that to attempt in any way to do anything to make it worse, would be an enterprise as unnecessary as it might be imprudent and unsafe. At the pace here supposed, improvement might go on century after century, and, after as many centuries as have elapsed since the Julian period, the system, in respect of its essential characters, might remain still the same — still subservient to the ends of judicature — still repugnant to the ends of justice. What these characters are, or at least some of them, will be endeavoured to be shown in the course of the next succeeding chapters

§ 3. *Interest of the partnership in depraving the moral and intellectual faculties of the people.*

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

To keep the moral and intellectual facul-

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

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

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

All this is plain and easy But the difficulty, I do not say is now, but one day *will be* — (posterity will feel it in all its force) — the difficulty will be, to conceive how it should be, that, in a state of society in many other respects so highly enlightened, a whole people, including the members of the sovereignty, should have been in such a state of infatuation as to give, in language or in practice, assent to two propositions, in which so much absurdity is combined with so much wickedness propositions, the persuasive force of which depends upon a constant and universal habit of blind assumption propositions in defence of which, when once put into question, not all the wit of mankind could furnish, in the way of argument, the value of a single syllable.

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

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

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

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

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

§ 4. *Interest of the partnership in the irrationality of the law.*

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

In every country that is not plunged in barbarism, — the inhabitants of it subject to the yoke of corruption or caprice under the mask of justice (but where is the country that in this respect has completely emerged out of the sink of barbarism?) — the will of the sovereign has, throughout every part of the field of justice subject to it, clothed itself in a determinate assemblage of words and those words it has adequately conveyed to the notice of each individual whose conduct is respectively required to conform itself to the respective portions of it. So far as this fundamental duty of the sovereign has been fulfilled, the office of conjecture is a sinecure When and so far as this duty has been left unperformed, there extends the province of conjecture. The materials which conjecture has to work upon, have by some means or other been locked up, and rendered inaccessible to the great mass of those whose conduct is to be regulated, or rather whose condition is to be disposed of, by a decision impossible to be foreknown, because not previously in existence. Here then it is that the demand for conjecture comes in, and the use of rationality, for the assistance of the individual in the performance of a task at once so important and so difficult.

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

Utility being the object towards which, with more or less skill and felicity, all eyes are directed, — what appears to each man the track of utility, is the track in which he expects to find, on each occasion, the footsteps of the judge. Positive law, actually created statute law, or known decisions of jurisprudential law, excepted, — this is the only chance which the ideas of any one individual have of meeting with the ideas of any other, the judge himself included The track of utility is the common place of rendezvous for all minds: meeting in it is the only chance which any one mind has of finding out any other The road being one which they are all but too apt to miss, hence the expectations of each concerning what will be the opinions of this or that other are proportionably apt to be disappointed but, be the disappointment ever so frequent, this is the only chance they have for escaping from it

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

From this unconjecturability, two intimately connected but perfectly distinct advantages accrue to the partnership, and, *pro interesse suo*, to the judge — 1 In proportion as the law really is unconjecturable, the failures made by the suitor in his attempts to find it out are frequent and, as often as the conjecture of one party points one way, while the conjecture of the adverse party (both being in a state of affluence adequate to the maintenance of a suit) points the opposite way, a suit takes place, and the partnership have the benefit of it. 2 In proportion as, to him who, in the quality of eventual suitor, thinks of it, it appears to be, with reference to himself, unconjecturable, in that same proportion rises the obligation he feels himself under of having recourse to the professional lawyer, by whom that faculty of conjecturing, of which he feels himself destitute, is supposed to be possessed: here then, suit or no suit, so much business is made for the professional lawyer in that shape, in the character of law-adviser or opinionist, whose business it is in each case to form conjectures concerning what in that case will be the eventual decision of the judge The judge's mind the firmament, the opinionist the astrologer, whose horoscope points itself to that seat of supercelestial influence.

To accomplish the object of the partnership (his own of course included in it,) it is evident enough how easy, on this occasion,

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

On this occasion he has but two purposes to accomplish; and neither of them very difficult to accomplish:—1. That the decision, with the ground he places it on, shall be irrational; and, 2. That, howsoever irrational, they shall not be in such sort and degree irrational, as that it shall be impossible to find for them any pretence which may serve to prevent their irrationality from presenting itself in its genuine colours to the eyes of the non-lawyers, whose interests are sacrificed by it.

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

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

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

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

The excrements of his body are the presents distributed by the Grand Lama to such of his votaries as he expects to find his account in honouring: jewels, gold, and silver, are the presents sent to him in return. The excrements of his brain are the dole distributed to the non-lawyer by the man of law; and the expected return comes to both impostors in the same valuable shapes.

§ 5. *Limits to the operation of the sinister interest.*

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

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

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

By the same principle by the action of which he is induced to nurse and encourage some sorts of misdeeds, he will be induced to aim with more or less energy and felicity at the prevention of others. The misdeeds he nurses, will be those from which he has most to gain and least to fear; the misdeeds he combats, will be those from which he has most to fear, and least to gain.

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

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

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* See farther on this subject, "*Justice and Codification Petitions*," (Vol. V. p. 407.)

† At the Old Bailey, in a case of theft, the

Taken together, the aggregate of criminal suits compose an object very little worth nursing, in comparison with the aggregate of non-criminal suits. Accordingly, it is in the former class of causes that the greatest regard will be manifested for the ends of justice — that most care will be taken for securing the conviction of the wrong-doer, the acquittal of the guiltless — and that the quantity of factitious expense, vexation, and delay, will be least considerable.

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

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

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

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

In this or that place he would be for a length of time (like John Doe) not to be found anywhere * in one place he would be for a score of years together, † in another for a century or two, ‡ in the state of a dormouse, — the day of his resurrection uncertain, or destined never to arrive

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

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

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

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

Even at the height of absolute or ill-checked power, reputation, it is true, can never be altogether without its value. But the opinion of the public at large can never operate as a check upon the enormities of lawyers, any

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same day has seen the offence committed, and the malefactor apprehended and definitively convicted: while in the Court of Chancery, if so it happened that a man who by a fraud had got possession of an estate, was disinclined to part with it, — a decree being, after a certain or rather uncertain number of years, obtained, another year was employed in "*spending the process of the court*," before the effect of the decree could be obtained — before "the plaintiff could have any effect from the suit;"[a] the defendant having that time given him to spend the plaintiff's money, while the partnership were feeding upon both

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

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

[a] Gilbert, Forum Romanum, ch. v. pp. 84, 85.

[b] Prosecutors and their witnesses are not allowed more than 3s. 6d. a-day for their attendance, except in particular cases. — *Ed.*

* England before Henry III.

† England at various times during the cessation of Parliaments.

‡ France and Spain.

further than as the people are in a condition to see through the artifices of lawyers: and so completely has the field been everywhere rendered impenetrable and repulsive to unlearned eyes, that the people, be their sufferings ever so acute, know not so much as to point to the seat of the disease, much less to choose and call for an appropriate remedy.

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

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

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

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

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

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

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

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

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

§ 6. *Vices of established judicature, how far the effect of design.*

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

The leading features having been traced by design, — a large part, perhaps in bulk the largest, may easily have been filled in by imbecility and indifference

Imbecility (understand always *relative* imbecility) was a natural consequence of the original choice made of the sinister ends. To delude the other branches of the government, and the people in the character of suitors, it was necessary that the real mischief underneath should receive a covering of apparent good, from something wearing the name of reason. The nature of things not affording any good reason, a bad one was to be fabricated. But the same sinister interest that produced the fabrication of the bad reason on the part of one man in the character of judge, produced the adoption of it on the part of his colleagues and successors and to adopt the bad reason with as little violence to conscience as might be, it was necessary to take that course which is taken by all men under the influence of sinister interest, viz to turn aside from all considerations tending to evince the absurdity of the doctrine — to pin down the attention to all considerations tending to conceal the absurdity from view When the practice is completely absurd and mischievous, without a grain of utility among its effects, the considerations tending to *show* the absurdity of it will be all the considerations belonging to the particular case in hand. the considerations tending to *conceal* the absurdity of it will be those general considerations which for this sort of work compose the standing stock of instruments. the great learning and venerable character of the prime author (known or unknown) — the difficulty of fathoming the depths of the science — the danger of forming a hasty conclusion from the superficial and partial appearances presented by a first view — the observation, that when, in consequence of any such hasty and incorrect views, alterations have been made, the mischief of the alteration, and thence the wisdom of the preceding practice, has been manifested by subsequent experience.

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

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

This partial sort of mental palsy is not incompatible with an ordinary, nor even with an extraordinary, degree of strength in the other part of the mental frame. The Herculean mind of Johnson, driven to the confines of insanity by the *veteres aviæ* that had taken possession of his bosom in early youth, laboured under a palsy of this kind, and had lost the faculty of reasoning on certain topics connected with religion, as may be seen in the hints given by his biographers

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

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

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

Neither on any of these grounds are the characters of dupe and impostor incapacitated from meeting in the same person at the same time.

The alchymist sells the art of making gold:

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

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

What, under the system of technical procedure, the judge cannot but see, is, that the decisions he pronounces are frequently, the course of procedure to which he sees the suitors confined is constantly, in a state of repugnance to the ends of justice. What it is possible he may not see, is, that this repugnance is the work of his predecessors in power and office — that it has not its root in the nature of things. To the ends of justice, from his first entrance upon the career, he has never been accustomed to turn his eyes. The objects, the only objects, towards which he has been accustomed to look with any degree of complacency, are the principles and rules actually established: established, probably under the pretence, possibly under the notion, but, whether pretence or notion, certainly false, of their being so many means conducive to the true ends of justice. Are they really thus conducive? A proposition this, which he has ever found it altogether easy and convenient to assume and take for granted; not at all easy, and altogether inconvenient, to inquire into. For appearing to regard them as being thus conducive, as being practically necessary, to the ends of justice, he has as good a pretence and (as towards the public) a justification, as heart can wish: he has the unanimous certificate of all those who are generally supposed to know, or to be capable of knowing, anything about the matter. That the decisions prescribed by the system he pursues are, in abundance of instances, repugnant to the direct ends of justice, is a truth continually before his eyes: what he does not see is, that there exists any other system, by the observance of which the frequency of such repugnance would be diminished. How happens it that this better system is never seen by him? Because there would be no profit, no pleasure, nothing but difficulty and toil, in looking for it; no profit, no pleasure, nothing but shame and fear, in finding it.

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

To sum up the result of the foregoing observations: — what may be open to doubt is, in what degree, on this or that occasion, this or that individual may have been actuated by a deliberate intention to sacrifice the ends of justice: how much of the effect may have been produced by the direct and acknowledged operation of the sinister interest, how much by the unperceived influence of a prejudice produced by the unperceived operation of that interest, how much by honest blindness and negligence. What does not admit of doubt is, that, supposing such to have been the views and wishes, they could not by any other arrangements have been more fully accomplished, than they have been by these existing ones.

§ 7. *Recapitulation.*

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

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

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

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

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

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

6. That the judges of modern times, —

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

7. That, in this perpetual fabrication of mischief and distribution of injustice, there is nothing in any way inconsistent with that perfect purity and uncorruption which has so long been regarded as a characteristic, and perhaps, in the degree in which it is possessed, the peculiar virtue of an English (say also British) judge the measure of profit regularly received by those judges according to law, being probably greater than, under the most corrupt administration of justice in any other country, was ever received by judges of the like rank in the way of bribes, and contrary to law.

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

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

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

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

12 That, by no institution which should have for its professed object the propagation of vice, could vice (in three of its most pernicious shapes, mendacity, insincerity, and injustice) be more assiduously or successfully propagated, than it is by and for the profit of the principal courts of justice And of what vices? Not those of which (as in case of drunkenness) pleasure is the sure and present, pain but the future and contingent, fruit; but those of which pain, present and future, pure and unmixed evil, is the result.

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

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

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

16 That, against the mal-practices committed by individuals under the system, no tolerably efficacious remedy can be applied by the punishment of those individuals—that the root of the evil lies in the system itself

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

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

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

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

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

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

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

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

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

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

There is yet another circumstance, by which the value of any opinions of this description (if they had any) would be diminished, not to say, done away. In the quarter from which such opinions are supposed to come, there exists, of necessity, the most thorough knowledge of all the matters of fact, out of which just ground of defence in the one case, of opposition and censure in the other case, are capable of being made. All the materials of defence that the subject furnishes—all these materials of defence (if any such exist,) are constantly at your elbow: the handling them, turning them about, and, at a moment's warning, making application of them to any given purpose at command, is the constant occupation of your whole life. With so mighty

an advantage in respect of the materials for making an appropriate and proper defence, if the nature of the case admits of any,—do you, notwithstanding, betake yourself to generals, and confine yourself to generals?—to a sort of argument equally at the command of the best cause and the worst? Confining yourselves to such arguments, you give judgment against yourselves.

CHAPTER IV.

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

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

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

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

Exemplification the first:—

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

Number of causes so delayed by appeals called writs of error, made to two courts (viz to the King's Bench from the Common Pleas, and to the Exchequer Chamber from the King's Bench) in three years ending 1797, ...	1,809
Whereof to the King's Bench, . .	550
—— to the Exchequer Chamber,	1,259
Whereof argued in the Exchequer,	12
—— —— in the King's Bench,	7
Not argued (the party, at the time of his asserting the existence of error, being conscious of the falsity of such assertion, and never intending to take the opinion of the court, knowing that it could not but be against him, in virtue of which consciousness, the writ of error comes under the denomination of a sham writ)—	
In the King's Bench, ...	543
In the Exchequer, . . .	1,247
Number of such sham writs per year, on an average of the three years—	
In the King's Bench, . . .	181
In the Exchequer, ...	415
Length of delay, and consequent advantages (including interest of money) gained by defendant on such sham writ of error, .	"nearly twelve months"†
Year's profit of the Lord Chief-Justice of the King's Bench, by fees upon writs of error (viz either the 550, whereof all but 7 sham, or the whole 1,809, whereof all but 19 sham,)‡	£1,434‖

The official *custos morum* of the nation, concurring with six hundred men in a year, in the defrauding of so many creditors, by uttering so many false pretences, by which he gets so much a-piece while, for a fiftieth part of the money, obtained by each on a single false pretence, wretches are hanged or trans-

* The reader will remember that this was written previously to Mr. Peel's recent law reforms. By one of these [6 Geo IV. c 96,] a partial, and but a partial, remedy, was applied to the abuse here in question; which, however, will equally serve the purpose of history, and of illustration.—*Editor.*

† 27th Report of Committee of Finance, pp. 5, 12.

‡ Ib. pp. 160, 161. [It will be observed, that the estimates of the number of causes apply to *three* years, the amount of profit to *one*. See *Scotch Reform*, Table X —*Ed*.]

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

ported by this same guardian of the public morals, by scores and hundreds.

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

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

As little be it supposed that the £1,434 forming the Chief-Justice's share of the price of the delay on the writ of error account, was the whole of his profit upon the aggregate of the suits—the whole of the profit produced to him by this point of practice. Of these 600 suits in a year, each yielding a writ of error for delay,—but for the delay thus purchaseable, perhaps not one would have come into existence. In each of these instances, the year's delay yielded by the writ of error was preceded by a quantity (perhaps, upon an average, about an equal quantity) of delay manufactured in the course and by means of the suit to which the judgment thus appealed from professed to put an end. If the suit by appeal had no question in it, it was because the original suit had no question in it. Whether they would or would not have been defended, and so kept up, had it not been for the assurance of the twelve-month's delay after judgment,—these 600 original suits were so many *malâ fide* suits (*malâ fide* on the part of the defendant,) generated by the technical system: so many suits that would not have had existence, had the ends of judicature, and the practice in conformity to these ends, been in a state of conformity instead of repugnance to the ends of justice.

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

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

For a general rule,—the judgment being in favour of the plaintiff,—notwithstanding the appeal, let the judgment take its effect, just as if there were no appeal; security being found by the plaintiff for eventual restitution, in case of reversal or modification, according to the decision of the court above.

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

Thus upon general principles: laying the scene anywhere. Lay it in England; apply it to the courts in question, in the characters of court below and court above; nothing can be more evidently impossible than the sincerity of any such fears. By the fortuitous concourse of technical atoms, the King's Bench happens to stand above the Common Pleas; but, on this occasion or on any other, who

ever supposed that a grain more or a grain less of confidence was due to the one court than to the other? Of the whole assemblage of our judges, is there a single one that is not, in his turn, with no other check than that of a not unjustly obsequious jury, sole arbiter of life and death?

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

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

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

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

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

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

II Sham motions—Chancery an open delay-shop

Exemplification the second —

Delay sold in Chancery, on the following terms

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

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

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

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

It commonly happens that by the defendant's first answer a need is produced of further questions, under the name of *amendments* to the bill To this demand it may happen to present itself any number of times for it is only in this way that that security for correctness and completeness, which is afforded by the faculty of grounding questions upon answers, can be obtained at the end of a cer-

* (Written in 1806.)

† *Vide infrà*, Chap. XXVIII.

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

tain number of months; that security which, in an examination *vivâ voce*, as before a jury, may be obtained in so many minutes. The allowance of time on an amended bill is precisely the same as that on the original bill, except that a third application is not allowed. By every such set of amendments, therefore, a title is given to the defendant to purchase a further quantity of delay, to the amount following:—

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

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

The case, and the only case, in which it is not sold, is where a special case is made for extra-delay, on some special ground. The supposed facts constitutive of the supposed ground are then brought before the court by motion not of course; supported by evidence (though in the incongruous shape of affidavit evidence,) with liberty on the other side to oppose, with or without counter-evidence in the same shape. The judgment of the court is in that case exercised, and, whatsoever may be the fees received, the term *sale*, if here applied, would be incongruous.

Price of the quantity sold at each motion of course:—

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

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

Exemplification the third:—

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

In the Court of Chancery, the masters are so many subordinate judges, eleven in number, by whom, each of them sitting singly in his closet, judicial decisions in great variety, and to any degree of pecuniary importance, are pronounced in the first instance. The master is attended by the solicitors (attorneys) on both sides: each attendance is preceded by a sort of summons or notice, addressed by the master, at the instance of the solicitor on one side, to the solicitor on the other side. This instrument is called a *warrant:* and for each warrant the master receives a shilling, a fee settled at a time when that sum was worth perhaps some number of times what it is now. By a custom which is never departed from, but of which the exact time of commencement is now inscrutable, no real attendance ever takes place till after the third warrant.‡ By an habitual connivance on the part of these subordinate dispensers of equity, for the purpose of trebling the emolument lawfully receivable by them, the quantity of delay is thus trebled to the suitors: to the proportionable distress of the suitors on one or both sides, according as the persuasion of the justice of a man's cause is entertained on one side only, or on both.

For the more effectual attainment of the same ends, the quantity of time bestowed by the master at any one attendance is never more than an hour, but may be to any amount less. On these several occasions, what actually passes is no more to be known than what passes in the divan at Constantinople: but, by whatever cause the custom of three warrants for an attendance was produced, by the same cause, of course, the rate at which business is done, when the partnership are ashamed or afraid to put it off any longer, is regulated. As often as the suit affords a party who by dishonesty or insolvency is engaged to seek delay, here is an individual whose interest it is, that, on each attendance, the quantity of business done shall be as small as possible; and, whether the suit affords any such party or no, it affords two professional lawyers, whose interest it is, as well as that of the judge, that this maximum of delay shall be produced. Here, then, exists a corrupt interest, constantly acting upon a set of persons who are known to pay habitual obedience to it, and who, amongst them, without the smallest danger of punishment, or so much as shame, have it completely in their power to put themselves in possession of the corrupt profit which that interest invites them to receive.

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

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

‡ *Vide supra*, Vol. V. p. 349.

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

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

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

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

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

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

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

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

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

* Accident once led me to an examination, said to be taken by an alderman of our great metropolis: the clerk found thought and words, the alderman yielded auspices. Yet the alderman had been a lawyer in his day, and this was in a large and crowded place. What had it been in a closet?

† So long ago as in 1734 (18th March,) there was an assembly of chancery officers sitting, under the appellation of a jury, to inquire into the reasonableness of their own fees [a] On this subject, one of the findings of this jury was, that, though the recompense received by the masters was not, on the whole, an adequate one, yet, adequate compensation being made, those "fees on warrants should be taken away:" and that, this done, "rules should be laid down for preventing the like consequential expenses being continued on the suitors, after such new regulation"

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

Several times, at the instance of the official lawyers, have augmentations been made to the salary of these subordinate judges. At no time

[a] 27th Fin. Rep. p. 20. [b] Ib. p. 56.

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

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

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

"Lord Alvanley had been of opinion that the master was authorized, and that it was his duty, without any order, to exercise his discretion in every case of the kind. Were his lordship of that opinion, he should think any order unnecessary, and therefore improper. When, however, he looked at the practice of the court for the last twenty-five years, and considered that hundreds of orders of the kind had been made within that period, he could not persuade himself that all of them had been granted for no earthly purpose, but must suppose, without such order, that the right of the master to do what was here required, did not exist. His lordship therefore granted the order to the master, subject to the master's exercising his own judgment, having obtained the power to act, whether the circumstances of the case rendered it necessary for him to do so every day or not."

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

Here, then, we see a perpetual writ of injunction issued by the superior judge of the high court to his eleven subordinates, prohibiting them from doing justice. A prohibition on justice: and to what end? That, as often as a party's impatience for justice is too strong for controul, an attempt may be made to purchase it at the expense of an incidental suit, carried on by affidavit evidence: a suit which, if needful, shall, for that once, render it so far possible to do justice.* Injustice established as a rule of practice, to produce motion causes with their fees, and such causes actually produced to the number of hundreds (how many hundreds is not said) in the course of five-and-twenty years.†

has the mouth of any lawyer been opened, to stop these judges from the receipt of fees on false pretences.

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

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

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

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

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

† Description of the mode of proceedings before a Master in Chancery; from the "Apology for the Conduct of Mrs. Teresa Constantia Phillips," anno 1761, vol. iii. p. 173–178.

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

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

"At other times, Mr. W. would promise to take a warrant out for the next attendance, as it came in his turn; and, if he kept his word (which seldom happened, for he generally chose to forget it,) he would take it out three or four days later than he agreed to do." [*A* warrant—Here was every exertion made that could be made, to make delay: if, at this time, the practice of taking out three warrants constantly for three different days to procure one attendance had been established, would not some notice have been taken of it?] "In fine, thus was she played off and amused by these gentlemen: it was looked upon as a great point gained *if one warrant in six was spoken to; and then it was only to go the*

[a] Morning Chronicle, Feb. 5, 1806.

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

On passing accounts before the court of grand sessions upon the Chester division of the Welsh circuits, "*each* side is to file its interrogatories with the registrar, and to take out *three* warrants, for the other side to be present at settling them" (six notices, to produce the effect of one,) "else on the third warrant the registrar proceeds *ex parte*."* August 1789 is stated as the time at which this practice was perhaps instituted, more probably recognised

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

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

P 114 "Where there is a replication, there must be a publication [of the evidence,] though no witness be examined," *i. e* though there is nothing to publish To what end thus attack impossibility, and vanquish it? Answer That the plaintiff may move (*i. e.* fee counsel to move) that that which cannot be done may be done Take the passage at length —"If defendant neglects to take it out and execute it" [a commission for the examination of witnesses,] "plaintiff may *next circuit* (*i e* next half year,) move for publication, though no witness be examined;

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same matter over and over again, with all the sophistry their imaginations could furnish.

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

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

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

"But at last, in 1744, she obtained a report in her favour, after being obliged to put in *six or seven different answers;* for, if by any chance there was the word *then* instead of *than*, they blotted it out to oblige her to put in *another, and then another*, till, finding no possibility of cavil, even at a *word*, they were obliged to give it up, after two years and some months close attendance, and that *monstrous expense*

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

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

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

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

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

"The poor old gentleman generally consented; for it is not to be imagined an apothecary would be against a *repetitum*."

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

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

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

† Preface to the same work, p. xxviii.

for, where there is a replication, there must be a publication, though no witness be examined." Here, too, we see a sample of equity logic, from the school of Gilbert and Blackstone. Take any arrangement that comes uppermost, the more irrational the better,—if you want a *reason* for it, write it over again, with a *for* before it. The use of such logic is, to enable such morality to pass without notice.

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

Exemplification the fourth:—

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

Is it your misfortune to have a demand upon a corporation? You must let off upon them three writs, or three pair of writs, one after another. By the help of these three writs, at the end of about seven or eight months the suit is just begun, the corporation having made what is called an *appearance*, that is, employed an attorney to act for them, but nothing as yet done. These three writs are worth beyond comparison more than the three warrants; but then there is an end to the writs, which there never is to the warrants.

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

In Mr. Fowler's account of the practice of the Court of Exchequer* (equity side,) are to be found three original and highly instructive cases, from which the above instruction was composed. Corporations squeezed:—1. Corporation of Bridgewater; 2. East-India Company; and 3. A free grammar school.

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

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

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

V. Sham representations—Scotland—Court of Session a delay-shop—Lord Ordinary the shop-keeper.

Exemplification the fifth:—

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

As with most other functionaries, so with judges, in the calculation of common sense, the chance of right decision is (because responsibility is) in the *inverse* ratio of the num-

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* V. 198.

† Sellon's Crompton, I. 217; II. 76, 77.

‡ At the time when this appears to have been written (1806,) the fifteen judges of the Court of Session were in the practice of sitting as a sort of deliberative assembly, and, like a legislative body, they are known to have been divided into parties on important legal points, the debates being often conducted with great acrimony. In 1808 (48 G. III. c. 151) the court was separated into two divisions. In 1825 (6 G. IV. c. 120) seven of the judges were appointed to sit, under the title of Lords Ordinary, as single judges, deciding cases in the primary instance. In 1830 (11 G. IV. & 1 W. IV. c. 69) the number of judges was reduced to thirteen, and there are now (1839) five judges who individually decide cases in the first instance, and two courts of further recourse, each consisting of four judges. In cases of difficulty, it is still, however, the practice to take the opinions of all the thirteen judges.—*Ed.*

bet: in French calculation in the *direct* ratio: a thick quarto volume of calculations is built upon that ground. In France, sale of offices (and amongst others of judicial offices) was an object of revenue. Before she gave kings to England,—drawn by necessity, Scotland clung to France. French law *shows* through Scotch law in a thousand places.

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

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

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

This privilege of not judging, does he frequently avail himself of it? This would be worth knowing. If this modesty is general, the result is curious. Here is a court composed of fifteen judges, each of them, by his own acknowledgment, unfit to be a judge

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

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

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

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

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

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

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

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

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

4 "The Lord Ordinary, after reading the representation, will either refuse the desire thereof, or ordain the same to be answered by the other party, either of which shall keep the matter open until a new interlocutor is pronounced"‖ [Failing both, it may thence be inferred, the cause would be at an end. A catastrophe of this sort, does it ever happen? If seldom, the unfrequency of it is a proof of the constancy of his lordship's vigilance How should there be any failure of that virtue? The cause gone, with it go the *representations* and the fees]

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

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

6. "If the Lord Ordinary, after repeated representations, shall continue to adhere to his former interlocutor, the party who complains must either acquiesce, or apply to the Lords in the Inner-house by petition."

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

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* Bell's System of Deeds, VI. 75.

* Russell [viz. "The Form of Process in the Court of Session and Court of Teinds, to which is prefixed a General Account of the College of Justice. By John Russell, Clerk to the Signet." Edin. 1768,] p. 51.

† Bell, VI. 75. ‡ Russell, p. 64.

‖ Russell, p. 65. § Ib. p. 66.

¶ Lawrie [viz. "New Form of Process before the Court of Session and the Commission of Teinds,

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

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

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

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

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

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

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

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

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

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

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

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

Two courts, through which almost every cause (at least every cause worth retaining)

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with a General Account of the College of Justice, and a Table of the Fees payable to the Clerks and Officers of the Court. By a Member of the College of Justice,"] p. 91.

* Lawrie, p. 90. † Ib. p. 383.

‡ Lawrie, p. 91. ‖ Ib. p. 383.

is doomed to travel: one in which his single lordship would not get on if he could, the other in which their whole lordships could not get on if they would.

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

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

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

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

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

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

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

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

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

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

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

* The forms of procedure, against which the above remarks are levelled, have been altered to so great an extent, that the technical phraseology made use of, has in a great measure ceased to be applicable to the practice of the Court of Session —for instance, the document termed a Representation, is now unknown Without descending into the minutiæ of these alterations, it may simply be observed, that the tendency of modern legislation has been to increase the powers and duties of the Lords Ordinary, and to render procedure before them more brief and effectual When the works quoted in the text were written, there was but one Lord Ordinary, there are now five (*vide supra*, p. 221, N. ‡) When a Lord Ordinary has given his decision, there is no means of again opening up the case in the manner alluded to: there is still, however, recourse to the Inner-house, and thence appeal to the House of Lords The judges have no interest in any fees collected. Many of the minor officials of the court depended long on this source of income; but in 1838, an act was passed (1 & 2 Vict. c. 118,) appointing them to be paid by salary; all fees (except mere remuneration for copying documents) being collected into a general fund to assist in the expenses of the establishment. See farther on this subject, the *Letters on Scotch Reform*, in Vol. V.—*Ed.*

† Russell, 66. 17th Jan. 1756.

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

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

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

CHAPTER V.

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

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

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

There will be a convenience in seeing the list of these engines of iniquity in one view. For enabling the reader to enter into the conception of them, a variety of expressions have been employed. Where one fails, another may answer the purpose. Not having been noticed, at least sufficiently noticed, they have never as yet been named.

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

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

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

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

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

6. Pleading, and more especially special pleading.

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

8. Principle of fiction, in all its various branches — the habit of giving from the bench lies for reasons — of telling lies to entrap and fleece the parties — of encouraging parties to tell lies — of compelling parties to tell lies — of punishing parties for not telling lies — of encouraging jurors, and even compelling them by torture, to commit perjury.

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

10. Double fountain principle.

11. Eulogization, puffing of jurisprudential law.

12. Multiplication of offices.

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

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

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

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

4. In proportion as the institution of them respectively is found to be repugnant to the several ends of justice, one, more, or all of them together (which, in the case of every one of these devices, will be found to be actually the case,) they will serve to bring to view and demonstrate the existence of so many virtues in the natural, so many vices in the technical system; characterizing the natural system by their absence, the technical system by their presence: — so many *vices*, and (as being the result and product of great labour, carried on by generation after generation, from age to age, and under the impulse of a sinister interest created by the fee-gathering system) so many *abuses*.

5. They will form so many topics for the exercise of the ingenuity and eloquence of the advocates of the technical system — for the professional advocate, the official judge, the official lecturer or general institutionalist, the unofficial compiler or particular institutionalist. Under each head, a perpetual invitation is given to all these learned persons. In any

* For further remarks on the subject of this chapter, see "*Justice and Codification Petitions*" (Vol. V.) and "*Delay and Complication Tables*," attached to the Letters on Scotch Reform in the same Volume.

court of natural procedure has it any place? Of the courts of technical procedure, is there any one in which it has not a place? Is it not more or less conducive to the mischief opposite at least to some one of the ends of justice,—delay, or expense, for example, or both? Can you make it appear that, to any other of the ends of justice, it is in any preponderant degree, or so much as in any degree, conducive? Here is so much delay from it; here is so much expense from it, here is so much vexation from it —now, where is the use of it?

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

Of these, there are few which have not place in common, in every civilized country in which the technical system is established, that is, in every civilized country on the face of the globe.

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

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

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

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

CHAPTER VI.

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

§ 1. *Mischiefs of the exclusion.*

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

By exclusion of the parties from the presence of the judge, must here be understood exclusion of their allegations, in the character of testimony, applicable to the purpose of grounding a decision, giving termination to the suit. An express exclusion put upon their persons would have been too flagrantly odious, and more than was necessary to the purpose.* It was done by so ordering matters that a party should have nothing at all to gain by attendance, while he had as much as possible to suffer and to lose. Nothing at all to gain, when he could neither gain credit for any testimony of his own, nor extract any testimony from the lips of his antagonist, nor so much as comprehend, through the jargon in which it had for this purpose been enveloped, what had been done, or was intended to be done. Much to suffer, partly from the natural causes of vexation, expense, and delay, the unavoidable concomitants of judicial attendance: but a great deal more by the arrangements that had been established for the purpose of wearing out his patience, rendering the burden of attendance intolerable: and thus forcing him into the arms of the pensioners and dependants of the judge, the professional substitutes and assistants.†

It is in virtue of this commanding feature, that a glance, however rapid, over the whole expanse of the technical system, became so indispensable a part of the present work. Exclusion of parties is exclusion of witnesses,—of the persons in whose instance an acquaintance more or less intimate with the mass of facts pertaining to the cause, or at least with some of them, is matter of course; and that acquaintance frequently most inti-

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* The French practice of trying and giving judgment on offenders in their absence, is frequently alluded to in terms of reproach; yet a similar one is pursued in England, in the Court of Queen's Bench. In misdemeanours tried in that court, it is not necessary, nor is it required, that the defendant should be present; the court looks to his sureties. It is by no means clear that the accused must be present, even in cases of felony. About two years ago, two gentlemen were charged with a capital felony, on the Norfolk Circuit, and the case was moved by *certiorari* from the assizes into the King's Bench. It was argued at great length, that the accused need not be present at their trial, and no precedent could be found to the contrary. Without deciding the point, Mr Justice Littledale said he should object to try them in their absence, and they accordingly appeared on the floor of the court.—*Ed.*

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

mate, not unfrequently peculiar—the cause affording no other witnesses.

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

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

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

When the party is not present, his presence may either remain altogether unsupplied, or supplied (in so far as it is capable thus to be supplied) by an agent or substitute, private,† or professional,‡ or both.

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

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

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

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

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

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

† Husband, father, guardian, private friend.

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

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

In the greater, the far greater, number of suits (understand individual suits, not sorts of suits,) professional assistance will be needless; and, if needless, of course mischievous. But some there will always be, in which the exclusion of professional assistance might be the exclusion of justice. Various are the deficiencies, the natural deficiencies, any of which may be sufficient to prevent the suitor from doing justice to his own cause. Minority, superannuation, mental infirmity in any shape: regard being always had to the quantity and quality of mental qualification, the demand for which is presented by the nature of the case. If gratuitous assistance, the fruit of natural relationship or of any other source of sympathy, be forthcoming, and that competent to the task, so much the better: if not, the assistance of strangers must be obtained, upon the only terms on which the assistance of a stranger can be made sure of: or, the lamb being opposed to the wolf, and without a shepherd, the consequence is obvious. The

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

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

2. To state on what *title* such demand is grounded, viz. in point of law: ex gr. *delinquency*, *contract*, *succession*, &c &c., referring to the tenor of the *law*, where there exists a law — *i. e.* to the words of the statute, where there exists a statute, in other words, where the legislator has rendered it possible for the subject to be apprized of, and to observe, the law, for the non-observance of which he is doomed to suffer.

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

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

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

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

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

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

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

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

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

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

* For a further statement of the author's views on the subjects treated of in the ensuing pages, see "*Principles of Judicial Procedure*," Vol. II.

† See Dumont, "Traités de Legislation." See also "*View of a Complete Code of Laws*" Chap. XV. (Vol. III. p. 186.)

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

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

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

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

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

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

II. *Facienda* by the defendant: —

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

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

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

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

5. If (by his own confession or otherwise) the justice of the plaintiff's demand has been established (or provisionally, in the event of its being established) — and if the nature of the obligation in that event imposed on him requires it, — to declare whether he is able to fulfil it (for example, to endure the punishment, render the satisfaction, pay the money due, deliver up the thing due, &c.) upon the spot, or at what other time or times, place or places, &c.

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

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

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

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

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

In the most vexatious of all suits (at least all English suits,) an equity suit, — in the instrument called a *bill*,[a] by which it is commenced, a statement of the existence of such previous demand is at least frequent, if not constant: not that, whether such demand was ever made or no, is a fact concerning which the draughtsman ever deems it worth his while to inquire. To the party, it is perfectly useless, the judge never taking any the slightest cognizance of it: the only use it is of, is to the partnership, by swelling the quantity of profit-yielding surplusage. The charge is inserted under the *mendacity-licence*, — of which in its place. In a suit at common law, nothing is ever said about it.

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

[a] 2 Maddock's Chanc. p. 202.

9. For his own benefit, — to receive communication of the plaintiff's self-serving, and (if any) self-disserving, testimony, as above to the end that, by counter-interrogation, and (if the facts admit of it) by counter-evidence, he may do what lies in his power towards securing the completeness and correctness, or exposing the incompleteness or incorrectness, of the plaintiff's testimony and declarations

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

III. *Facienda* by both parties in concert —

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

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

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

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

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

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

The use here in question is over and above that which consists in the party's being personally responsible for every breach of sincerity or probity committed on his side of the cause. Such responsibility might be made, and is made,‡ to attach upon him, without his ever finding himself in the presence either of the adverse party, or of the judge

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

* See *infrà*, Book IX. *Evclusion*, Part II. *Proper*; Chap. VII. *Remedies succedaneous to Exclusion.*

† See Book IX. Part II.

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

‖ So successfully has the industry of the technical system exerted itself, that not only this corroborative to personal responsibility has been cleared away, but the very foundation of it, the responsibility itself: and this so effectually, that neither shall the party himself be responsible for the falsehood or dishonest trick by which he profits, nor yet the person or persons, the professional assistant or assistants, to whom, in the character of instruments or assistants, he is indebted for it. The licence thus granted to insincerity and malpractice requires, it is true, the removal of the check here in question, — requires the exclusion of the parties from the presence of each other and the judge, — requires the withdrawing out of the joint presence of his adversary and the judge, the party on whose behalf the dictates of sincerity or probity are to be transgressed; but, to render the licence complete, and completely effectual, ulterior devices (of which presently) were necessary, and have accordingly been employed. It was necessary, that for every such transgression a safe author or accomplice should be provided: and that matters should be so managed, that, whatsoever be the transgression, and whatsoever the advantage reaped or sought from it, no inconvenience, either on the score of punishment or on the score of satisfaction, should fall anywhere. To this purpose the exemption here in question was indeed necessary, but was not sufficient. It was

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

In whatever court this basis of all justice has been restored, or suffered to remain, the best evidence, so far as it applies, takes place; and, besides furnishing such lights as frequently are not to be had from any other quarter, saves the vexation, expense, and delay, attached to the production of inferior evidence: and the cause receives the very speediest, as well as least expensive, and in every way least vexatious, conclusion, which the nature of it admits.

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

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

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

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

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

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

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

Again, in some cases it may be necessary, for security, to apprehend the person of the defendant without warning; and, by that means, at some casual and unforeseeable time and place. In all such cases, the ends of justice require, as peremptorily as the ends of judicature have forbidden, that, without loss of time, and (if possible) antecedently to his being inclosed within the walls of any prison (ordinary or extraordinary,) he be conducted into the presence of the judge.† In

necessary that, besides improbity in other shapes, a full and unrestrained liberty of lying should be secured to the party, for himself, and any number of assistants at his nomination, they being members of the partnership: and this accordingly is what has been done. See Chap. XV. *Mendacity-licence.*

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

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

[a] 3 Wilson, 368. Barker *v.* Braham and Norwood.

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

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

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

So, again, in what cases the reciprocal examination incidental to the meeting of the parties in the presence of the same judge shall give place to a reciprocal *ex parte* examination; viz. of the plaintiff before one judge, of the defendant before another, whose seat may be at the antipodes

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

§ 2. *Uses of the exclusion to Judge & Co.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"What the eye does not see, the heart does not rue." Nowhere has the truth and value of this proverb been more fully understood, and more completely profited by, than in the great hall at Westminster. Hence, the miseries and iniquities of which the English system of imprisonment for debt is composed,† — a mass of abomination not to be matched in any other clime, a source of profit as religiously protected as it has been elaborately organized, — have ever found as much sympathy in the stones of which the pavement is composed, as in the bosoms of those who walk upon it. Misery in abundance; but the heart never rues it, care having been taken, and that so effectually, that the eye shall never see it.

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

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

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* *Vide supra*, p. 199.—*Ed.*

† *Vide supra*, Vol. VI. p. 173, Note.—*Ed.*

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

Accordingly, in no one judicatory under the technical system, has any such rule been acted under or established. Of its non-establishment one cause probably may have been, that in all probability the people of the country could not have endured it: another cause probably was, that,—if a hearing must be given,—with the advantage of a power to make those to whom it is given pay for it, more money may be to be got by allowing the privilege to two or more parties, than if it were confined to one.

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

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

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

In Mexico, a rule was established, giving power to a certain person or set of persons in authority, on condition of pronouncing some word or other, translated by us into the word *sacrifice*, to murder any and as many persons as he pleased. In some newly-discovered islands

CHAPTER VII.

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

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

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

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

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

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

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

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

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

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

On the one hand, anarchy, failure of justice, the equivalent of constant misdecision

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of the South Sea, the like rule has place, and is acted upon to this day.

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

But, supposing this said rule actually established, and still in force, and a motion now made tending to the abolition of it,—would such a motion pass *nemine contradicente*? So far from it, that, if at all, it would not pass but at the end of a considerable number of years: during which, every session, would have been emptied upon it the whole quiver full of those fallacies which, having for their common property that of being irrelevant with relation to every proposition which they are employed to combat, would apply with equal force and propriety to a proposition for divesting a king of the prerogative of murdering an unlimited number of his subjects at his pleasure, and to a proposition for divesting a king's nominees, under the name of judges, of the privilege of destroying every year, by a slow death, an unlimited number of those same subjects; having first brought them to ruin, under and by virtue of a violation of that primary principle of justice, which prescribes as the first step proper to be taken by a judge, the giving to the parties on both sides (with or without their respective agents) a real hearing in his presence.

* In Scotland, the course of modern legislation has tended to devolve on the local courts of the Sheriffs, several very important branches of jurisdiction, formerly peculiar to the Court of Session. See especially 1 & 2 Vict. c. 119, and 2 & 3 Vict. c. 41.—*Ed.*

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

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

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

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

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

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

The more remote the province, the more intolerable the vexation of journeys and demurrage to and from the head seat of judicature: especially in a state of society which afforded neither roads, nor carriages, nor inns, nor lodging-houses, nor security against robbers. But, the more intolerable the burthen of attendance, the more anxious the solicitude to obtain permission for the employing of professional substitutes: who, when once admitted for the relief of distant suitors, soon found means to render it as impracticable to suitors to do their business in Westminster Hall without the help of lawyers, as it is to stockholders to make transfers at the Bank without the help of brokers.

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

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

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

This advantage came in gradually, as the technical system, with its ever-increasing mass of delay, vexation, and expense, took place of the natural, in the superior courts. In the local courts, the mode of procedure would of course continue, if not purely natural, at any rate, in comparison, undilatory, unvexatious, unexpensive.†

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

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

John Poor and Thomas Rich live both in Cornwall. Rich is able to bear the charge of journey and demurrage to London; Poor not. From the Cornish courts, a defendant has the power of removing the cause to the London courts. What chance has Poor for justice against Rich? None whatever. Rich removes the cause from London, and Poor gets his labour for his pains.

* See Chap. IV. of this Book (*supra*, p. 217.)

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

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

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

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

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

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

In general, and after allowance made for a few narrow exceptions,† there can be no sufficient reason for taking any sort of cause out of the jurisdiction of the local court, in any other way than by appeal

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

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

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

CHAPTER VIII

THIRD DEVICE — BANDYING THE CAUSE FROM COURT TO COURT

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

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

The principal of them will be found comprisable under the following description — One court to decide, another court to collect the evidence on which the decision is to be grounded For illustration, the following may suffice —

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

2 So in informations, *in criminali*.

3 *In civili*, uniform practice of the King's Bench, Common Pleas, and common-law side of the Exchequer: — The cause bandied between these courts respectively, and the courts of Nisi Prius and assize: projected from the

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

† Example of exceptions proposable, with their grounds and reasons. —

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

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

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

metropolis by a centrifugal, and drawn back again by a centripetal force. Fragments of causes, projected now and then under the name of *issues* from the court of Chancery and the equity side of the Exchequer to a common-law court, and then re-absorbed, are to the others what comets are to planets.

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

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

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

7. In Scotch judicature, the practice of the Court of Session, on this ground, forms a system of itself. The cause a very shuttlecock: between the outer-house and the inner-house, vibrations and vibratiuncles, more than Hartley ever imagined. While this game is playing, the property of the suitors told over a gridiron in each house. "A plague on both your houses!" would be the cry of the agonizing suitor, if this fragment of a line in the part of Mercutio could be pronounced with safety on the Edinburgh theatre.*

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

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

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

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

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

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

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

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

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

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

From the extent given to the bandying system in one direction, and the limits set to it in another, — from this incongruity, coupled with the gigantic length of arm given to the metropolitan courts, and the licence given to the prosecutor to choose his court, — results an addition of no mean importance to the mischievousness of the system to the people on the one hand, and the advantage made of it by its creators and preservers on the other. At the sessions, there is no bandying: sentence is pronounced, pronounced on the spot, by the president of a bench of judges, who, at the same time with the jury, have been hearing the evidence. At the assizes, as we have seen, the bandying system reigns. One judge, along with the jury, hears the evidence; the court of King's Bench, composed of four judges, of which that judge may or may not be one as it happens, (the chances are exactly two to one against it,) pronounces the decision — the sentence, which professes to ground itself on that evidence.

* The "vibrations" between court and court in Scotland, have been in a great measure remedied since the above was written (*vide supra*, p. 224, Note *.) Appeal, or removal of the process, from a lower to a higher court, still exists, however, to such an extent, that a cause may, and frequently does, pass through five grades of judicature. Commencing in the court of the sheriff-substitute, it proceeds to that of the sheriff; thence to the Outer-house of the Court of Session; thence to the Inner-house; and thence to the House of Lords.—*Ed.*

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

The magnitude of the punishment, consequently, is in the joint ratio of the animosity of the prosecutor, and the distance of the abode of the defendant from the great shop in which the sweets of revenge are dealt out in lots proportioned to the price which the customer is content to pay for them. Whatever be the county, town revenge is always to be had in much larger quantity than any which any such country shop can afford but, to a man who has a taste for the sweets of revenge, a Surrey man, in the character of a defendant, brought up to town, will afford poor sport, in comparison with a Cornish man, or a man of Cumberland

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

As to the King's Bench,—what in that sanctuary befals the hapless sinner, dispensation being either not applied for or refused—with what solemnity, after hearing his sins poured over his head for the second or third time, by affidavits upon affidavits, enforced by comments upon comments—with what solemnity he is committed one day without sentence, that he may be brought up another day to receive sentence—in what pathetic strains (the day of doom at length arrived) the wickedness of the age hears itself deplored by the senior and most reverend of the three reverend and learned ministers of technical justice,—these are topics not exactly assorted to this place. The reiterations and protractions given by the deliberations of the cat to the sufferings of the offending mouse, may, to any one to whom it has happened to witness any such dispensation of domestic justice, furnish a general idea of it.

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

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

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

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

On the part of the judge whose province it is to frame a decision upon the evidence, the most consummate ability may be rendered useless by a want of ability on the part of him by or under whom it is collected

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

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

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

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

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

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

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

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

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

Use to Judge and Co.—

1. Making business—constant, standing business, with its equally constant profits. The more courts, with their respective sub-offices,—the more operations, the more fees. In what court, in what office, is anything done without a fee?

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

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

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

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

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

CHAPTER IX.

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

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

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

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

Thus necessary is it, on the occasion of each cause, that, in respect of fixation of times, the conduct of the judge should be governed by considerations peculiar to that individual cause.

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

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

for the other device—the one abuse forms a cover for the other abuse.

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

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

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

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

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

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

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

Uses to Judge and Co —

Use 1. Making business.

In each case, whatever be the length of time thus blindly fixed, it will almost always be either too long or too short · longer than necessary, or too short to admit that to be done (or at least properly done) which is required to be done

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

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

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

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

Use 3 Affording materials for the system of mechanical judicature, or decision without thought, for which see Chapter XII

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

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

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

* See Chap. XIV. *Nullification.*

† See Chap XI. *Motion Business.*

‡ The principal cause, if tried, will or will not be tried upon evidence in a fit shape: but the shape in which the evidence for or against these applications is presented, is never any other than an unfit shape. The principal cause, if tried, would (suppose) have been tried upon good evidence; but it is prevented from being tried—prevented by the result of an application supported and opposed by bad evidence—by mendacity undetected,—undetected because presented in that fallacious shape. Trial put off, upon affidavit (suppose) of the temporary absence of a material witness. The alleged material witness has no existence: in the meantime, a really existing material and necessary witness, on the other side, dies, or goes out of reach.

CHAPTER X.

FIFTH DEVICE—SITTINGS AT LONG INTERVALS.

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

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

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

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

Terms in the year, four; each containing three weeks and a day, upon an average: nineteen days, deducting Sundays.* Of the thirteen months (lunar months) in the year, not so many as four in which anything is done under the name of justice. Under the name of *vacation* time, all the rest of the year is a blank: all the rest of the year so much holiday time given to injustice.

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

* *Term.*	*First day.*	*Last day.*	*No. of days.*
Hilary . . .	Jan. 23.	Feb. 12.	20
Easter . . .	Variable[a]	Variable	27[b]
Trinity . .	Variable[c]	Variable	20
Michaelmas .	Nov. 6.	Nov. 28.	22
			89
	Deduct Sundays,		12
	Remain, . . .		77

[a] Seventeen days after Easter-Sunday.

[b] Easter Term sometimes, instead of the twenty-seven, contains but twenty-six.

[c] Eighteen days after the conclusion of Easter.

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

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

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

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

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

"Profanation," the wickedest of all wicked things, broke out in different shapes: administering justice upon all days alike, was one of them. Among other sins of the primitive Christians, "holy church," when it came into power, took this profanation in hand to correct it. Taking into consideration five holy seasons, Advent, Christmas, Lent, Easter, and Pentecost, it beheld in them so many reasons for four intervening vacations — so many reasons for being months together without so much as pretending to administer justice. Of the necessity of the three short vacations, considering that holy mother church was at that time a Papist, Blackstone seems to have entertained a sort of half-disclosed suspicion: but, as to the long vacation, a season so comfortable to lawyers, with that he seems to have been completely satisfied. Here, to the general spiritual reasons, he adds

† Although a great portion of the year is included in what is technically called *vacation*, it must not be supposed, that during that time the judges are enjoying holidays. Independent of the sittings at *Nisi Prius*, after the terms, there is the daily attendance at chambers, where a great deal of business is transacted, the spring and summer circuits, and the twelve sessions of the central criminal court. The terms are now all fixed by the 11 Geo IV. and 1 Will. IV. c. 70, amended by the 1 Will. IV. c. 3, and by the 1 & 2 Vict. c. 32. Sittings in bank may be held in vacation, at the discretion of the judges, for the dispatch of pressing business.—*Ed.*

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

a temporal one; a reason, which, if good in those days of popery, is certainly not less good in these days of reformation: this is the demand presented for denial of justice, by the "hay-time and harvest."

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

Such is the cogency of this reason, that, in the city of London courts, whose jurisdiction ends before fields begin, long vacations are kept up no less religiously than in Westminster Hall. Not to speak of the profanation, care was taken not to call off the harvest-men from their labours in Cheapside.*

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

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

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

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

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

Excepting that class of causes, from the trial of which, as above, all fit evidence is excluded, with a few other exceptions, of too narrow an extent in the whole to be worth

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

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

The insinuation about the harvest is understood already.

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

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

The other extreme was still wanting; these pagan institutions furnish it: the system of *dies fasti* and *nefasti*; *fasti*, the term-days—*nefasti*, the vacation-days. What! had the Romans, then, a long vacation, an uninterrupted mass of *dies nefasti*, longer than our long vacation, and as much longer as the 120 days of our long vacation are longer than one? So far from it, the *dies nefasti* were, originally at least, but a few holidays, sprinkled (as the expression itself imports) in an otherwise unbroken ground of term-time. The really *extreme* course, then, where is it to be found? In the very course for which, to mask its repugnance to justice, he can find nothing better to say than that it is a mean between two extremes—two such extremes as these.

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

† 3 E. I. c. 51. ‡ III. Comm. 277.

particularizing, the business done in term is so much made business: business manufactured by the principle of fixed days, as above, or some other device or devices;* business for which in the natural system there is no place, and the transaction of which is repugnant, instead of being subservient, to the ends of justice. In a general point of view, term business may be set down to the account of sham business. The real business, the business by which anything is done towards the ends of justice, is what is done at the *trial;* and, in causes non-criminal (not to speak of the inferior criminal ones,) the trial, under the operation of the bandying principle, as above explained, is performed at the courts of Nisi Prius, and the circuit courts: Nisi Prius courts in town causes, circuit courts in country causes.

Counties in all England (Wales not included,) 40; deducting Middlesex, as not comprised in the circuits, 39. Counties to which the judges in their circuits go twice in the year, 35; counties to which they go but once in the year, the remaining 4.† Average number of days in the year, on which the circuit courts sit in each place, at both seasons put together — gross number, 6; employable number (allowance being made for journeys, and for days of entry, on which in general nothing can be done,) at the utmost, 5. Out of the 365, — number of days during which justice, or something that goes by the name of justice, is administered, those 5; number of days in which nothing under the name of justice is so much as pretended to be administered in these courts, anywhere but in the metropolis, the remaining 360. Term-times for real business, two in the year, lasting $2\frac{1}{2}$ days each; vacations between those term-times, two, of 180 days each: four counties excepted, in which the vacation, instead of the 180 days, lasts about 360 out of the 365; the four northernmost counties being as well able to live without justice for a whole year, as their next neighbours for half a year: as some animals are able to live longer without air than others.

Blackstone, besides the care and cheapness, bids us admire the system for the "expedition" which characterizes it. Expeditious indeed, if, out of the 365 days, 360 be but thrown out of the account — the 360 in which nothing can be done! — expeditious, indeed, on these terms, as if Procrustes himself had planned it!

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

Meantime, whatever delay is created by the 360 or $362\frac{1}{2}$ vacation days, is amply made up for in the remaining 5; excess of delay finds, in excess of precipitation, a counterpart, and, in the eye of the law, a remedy. The space being marked out, it is for the causes to squeeze themselves into it, as they can, like negroes on the long passage.‖

When the natural course of things is departed from, and that to such a degree that there are more *no-justice days* than *justice days*, — in such a state of things, in regard to justice days, what is of much more importance than the number of them in the year, is the degree of *equality* with which they are *distributed.*

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

With this proportion in both cases,—under the system of the greatest equality, suppose the causes to be all of them of a simple cast, and to such a degree simple as that none of them shall be capable of being protracted beyond the first sitting. In this case, though the provision made in this respect for the fulfilment of the ends of justice would fall considerably short of that made by the natural system of all justice-days, — still, in comparison with the system of greatest inequality, the

* Viz. Pleadings in writing; nullification principle.

† *Vide supra*, p. 51, sub-note [a].—*Ed.*

‡ Glanville, lib. 8.—*Ed.*

‖ On the Norfolk circuit, each perambulation affords about sixty causes; on the western, more than thrice as many. The $2\frac{1}{2}$ or a little more, allowed at each place on the western circuit, serve as well for the west country causes, as the $2\frac{1}{2}$ or something less, serve for a third part of the number in the east. If days are not elastic, causes are, which comes to the same thing.

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

denial of justice would be comparatively inconsiderable. On the one hand, the inconvenience resulting to the suitors from the subtraction of the six days out of the seven would be comparatively inconsiderable; on the other hand, the benefit to the law partnership would be absolutely nothing, or next to nothing. Suppose the cause complex enough to require an adjournment, then the inconvenience to the suitor, and what (as will be seen) would keep pace with it, the benefit to the man of law, will begin to be sensible. Suppose, with or without a fresh adjournment, another week,—the inconvenience on one side, the advantage on the other, would rise in value: and so on without end.

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

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

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

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

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

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

Use 3 Making business by delay; viz. the delay manufactured by the nullification machine. Of this engine of iniquity (one of the most capital ones in the whole factory,) a draught will be given in another chapter.* According to the application made of it, sometimes ultimate misdecision, sometimes mere delay, is the product. When it is delay only, it is for the sake of the delay with the casual benefits attached to it—of the delay, and nothing else,—that the suitor applies to have the engine set to work The delay is the commodity which he obtains by the application the costs of the application (by which party soever ultimately paid,) are the price of it. Were it not for the delay, he would get nothing by the application; the costs of it would be so much pure loss to him. he would never make it. What use would there be in making a flaw, if it were cured as soon as made?

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

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

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

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

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

* It was by the system of terms and vacations that the delay was manufactured, by the sale of which, in lots of a year's length, the chief justice of the King's Bench, in Lord Kenyon's time, used to make his £1,700 a-year: £1,700 a-year and more, by this one article. In a court of conscience, or in the study of a justice of the peace, not a farthing was ever made by it.

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

* *Vide* Chap. XIV.

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

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

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

CHAPTER XI.

SIXTH DEVICE — MOTION BUSINESS.

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

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

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

All motions not of course have two common properties or characteristic differences, by which they are distinguished from motions of course: — 1. Each of them has for its ground and support a mass of evidence; 2. That mass, the whole of it, is of a sort which not only is, but, by all those by whom on a disputed case it is thus employed, is perfectly known, and, upon occasion, openly acknowledged, to be of an inferior and untrustworthy complexion: so untrustworthy, that, when better is to be had without preponderant delay, vexation, and expense (and it is seldom indeed in which it is not to be had even with less delay, vexation, and expense,) it is altogether unfit to be, on any disputed occasion, ever received in any court of justice.

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

Incidental motions arise most of them out of factitious business, the business made at the offices. With the help of so many devices, all directed to this end, — exclusion of the parties, mechanical judicature, jargon, fiction, mendacity-licence, nullification, — blunders are made, or pretended to have been made, that application may be made for setting them to rights: these applications are called motions; the incidental motions.

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

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

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

Motions of course, are again distinguishable

* Of late years this class of motions has been very considerably reduced by rules of court issued by the judges.—*Ed.*

into two other classes — 1. Motions made; 2. Motions not made.

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

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

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

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

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

CHAPTER XII

SEVENTH DEVICE, — DECISION WITHOUT THOUGHT, OR MECHANICAL JUDICATURE

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

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

Something which, on a particular day, according to a rule declared, or not declared, ought to have been done — done by the defendant's attorney — is not done: from this omission, without anything more, the judge, by his decision, deals with the defendant as if he were proved to be in the wrong. Not that he thinks him in the wrong, for he thinks nothing about the matter: but, from this omission on the part of one member of the partnership, the other takes occasion, without knowing anything about the cause, to act as if he had tried it; and to punish the client for the fault, real or pretended, of his lawyers. Like default on the part of the plaintiff's attorney, judgment for the defendant: judgment against the attorney's client, the plaintiff.

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

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

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

Regularity is thus maintained: and, on the strength of that endowment, the system is

* To prove, for the amusement of readers, that a case may exist, in which, without inconvenience, a man may be a judge in his own cause, Blackstone introduces an imaginary pope adjudging himself to be burnt, and burnt accordingly. Why go to all that distance, and for a single precedent? Why not say — there exists a country in which every attorney is judge in his own cause: and this country is precisely that in which "everything is as it should be"? In Italy, the judge, though a saint, did not become so till he was burnt: in the English Utopia, every attorney, without any expense of fuel, is as much a saint as *he* was.

† Reg. Gen. H. T. 2 Will. IV.—*Ed.*

‡ This practice is now altered by the 2 Will. IV. c. 39.—*Ed.*

(for praise and honour) compared to a piece of clock-work. The parallel need not stop there: for, under a set of rules so organized, it is just as impossible to a judge of flesh and blood, as it is to a judge of leather and prunella, with bowels of brass and iron, to do anything better than receive fees.

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

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

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

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

If, in imitation of the law still existing, in some places in regard to flour-mills, a barber secured by privilege in the possession of the whole custom of his district were to set up an engine, by which, instead of corn ground, beards were to be shaved, the patients standing in rows to apply their faces to the circumference of a wheel,—the advantage to the professional man would be obvious and indisputable: business to any amount might be done within a given time; and, should any mischance takes place, such as the drawing of blood, or the levelling of protuberances not intended to be levelled, the responsibility, instead of falling upon the professional man, would be divided between the patient and the wheel.

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

In the system of mechanical judicature, the supposition of the existence of *notice*, apposite and adequate *notice*, is necessarily involved. In many cases, and, of course, in as many as possible, the supposition belongs (as will be seen) to the category of *fiction*; it is false; the study having been to make it so. But, as appearances must to a certain degree be preserved, and punishment, or other hardship, avowedly inflicted without notice (that is, without possibility of defence,) would not be consistent with the preservation of appearances,—it is not the less true, that (on whatsoever principles performed, rational or mechanical) judicature *supposes* notice.

Under the system of fixed times,—in so far as the fixation extends, and is not disturbed by incidental application,—the fixation, being *supposed* to be foreknown, is thereby supposed to convey the requisite information; to operate as notice. To this

class of cases extends what may be called *general* or pre-established notice.

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

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

For an exemplification of this policy, the practice of *outlawry** in actions called civil actions, is of itself a host of cases. But, as to this, see the chapter in which the *chicaneries about notice* are particularly brought to view.

Uses to Judge and Co. —

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

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

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

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

Use 4. Affording ease; viz. by exempting the judge from all responsibility, and apprehension of responsibility. A judge, when he has thus converted himself into a machine, shares this advantage with other machines.

Use 5. Affording ease; viz. by giving to the judge the profit of inhumanity, clear from the opprobrium.

Use 6. — and from that pain of sympathy, which, by the view of the party thus injured and distressed, while suffering under the distress, might by possibility, in some cases, have been excited.

The most striking peculiarity of this device, as compared with most of the others, is the shelter which it affords to the judge against responsibility.

When the fate of the several parties interested is seen to have the judge for its author, to have a decision pronounced by the judge on the ground of appropriate evidence for its cause, a certain share of responsibility attaches of course upon the judge. Should the parties, or any of them, labour in consequence under any evil imposed upon them in contravention of the ends of justice, the odium at least (if nothing more) is carried naturally, and of course, to the account of the judge. Should any profit be thrown into his hands by the operation of the same cause, such profit will be apt to be also carried by the public mind to the account of the judge; and the expectation of the profit on the one part will be in danger of being looked to, as the cause of the suffering on the other.

That so inconvenient a check should be removed, was of essential importance to the ends of judicature. The principle of *decision without thought*, presented itself for this purpose. Whatever is done — whatever cruelty, whatever extortion is practised, takes place without any thought, and, therefore, without any need of thought, on the part of the judge — takes place, in virtue of certain pre-established rules. These rules — having been established so long ago, nobody knows when, nor by whom, nor why, nor wherefore — are of course presumed to be the fruits of the most consummate wisdom; — and whatever misery is seen to flow from them, is placed to the account of necessity, and the nature of things, the imperfection of human institutions, and so forth. Who have been the sufferers, or to what amount, the judge neither knows nor cares. The judge who knows what it is he does, is exposed to the imputation of partiality. Let things be so arranged, that, on as many occasions as possible, he shall act, and be known to act, without knowing what he does, and that men in general shall understand as much, and be satisfied with it, — malice itself cannot find any pretence for disturbing him with any such charge. The judge secures the praise of probity, inflexible probity, — and by what? By that very arrangement, by which, for the purposes of extortion, justice has been rendered impossible.

The judge is thus, almost from first to last, the passive, the unconscious, and consequently the innocent and irresponsible, instrument of all the mischief that is done by his authority, and for his benefit. Whatever distress, extortion, and injury, comes to be manufactured for his use, means have been found for saving him from everything that could have been unpleasant to his feelings; from the tears of the afflicted, from the cries of the oppressed, from the reproaches of the injured. Whatever mischief is done, either

* *Vide* 2 Will. IV. c. 39, §§ 5 & 6.—*Ed.*

he never hears of it, or, if he does, it is through the medium of friends and partners, engaged by a common interest, in reality to make it as heavy, in appearance to make it as light, as possible.

In the simplicity of ancient times, saving his ears from being stunned with noise (*ne amplius clamorem audiamus*) was the only motive to which it was thought needful for the monarch to ascribe his alleged disposition to do justice. Under the technical system, his substitute, the judge, has contrived to withdraw himself out of the reach even of this motive.

CHAPTER XIII.

EIGHTH DEVICE — CHICANERIES ABOUT NOTICE.

WHENSOEVER, for the purposes of justice, an obligation to any effect is imposed upon a man, knowledge of the existence of such obligation is necessary to the fulfilment of it; or at any rate to the affording the requisite security for its being fulfilled. What in some cases may happen, is, that, without knowledge of the obligation, a man may be led by other causes to do that which it is the object of the obligation to engage him to do: but, in so far as the obligation is either necessary or conducive to his performing that act which, being performed, is the fulfilment of it, — so far the knowledge of the existence of the obligation is necessary to the fulfilment of it.

On the part of the individual, fraud and injustice operating on the subject of *notice*, must assume one or other of two forms:

One consists in wilful omission to give notice, viz. in the not furnishing the person by whom the performance (or the opportunity of performance) of the act in question is necessary to justice, with information of the existence of the fact, the contemplation of which is to present to him the motive for such performance.

The other consists in the not acknowledging the receipt of notice: to wit, by him by whom it has actually been received.

Under the fee-gathering system, fraud in these shapes, as in all other shapes, being in some way or other beneficial to the partnership, — among the objects of that system has accordingly been that of giving encouragement to fraud in both these shapes.

One device has consisted in the enabling a fraudulent party (for the joint benefit of himself and the partnership) to impose upon his adversary, without effective notice given, this or that burthensome obligation: the imposition of which, on the supposition of the *receipt* of effective notice, may be just or not just, but, at any rate, on the supposition of the *non-receipt* of such notice, is not just.

The opposite device has consisted in the enabling the fraudulent party, by whom effective notice has been received, to escape from this or that burthensome obligation, the imposition of which is necessary to the giving effect to the correspondent right on the part of his adversary: to escape, viz. on the supposition that the effective notice so received had failed of being received: failed, viz. either because it never had been received at all, or because it had not been received at such time, and in such manner, as to enable it to answer the purpose for which it ought to have been given.

On these two devices taken together has been engrafted a third, consisting in the needless diversification of the modes and forms of notice: the written instruments required to be employed, and the steps or operations required to be performed, in relation to such instruments.

This diversification has had two main sources: — 1. The diversity of courts — the fertile source of confusion and injustice on so many other grounds besides this; 2. The diversity of occasions on which the demand for notice may have been presented by incidents arising in the same court; viz. whether in causes of the same sort, or in causes of different sorts carried on in the same court.

The demand for the notice is produced by the obligation grafted on it — by the obligation, to the justice of which the existence of such receipt is a necessary condition. This obligation will in every case be bottomed upon two inseparably connected grounds: — 1. The existence of the law, or rule of law, by which the quality of giving birth to the obligation in question has been conferred on a fact or facts of the description in question; 2. The existence of such fact or facts.

As to the law, — as on this occasion, so in all others, — to *prevent* it from having been present to the minds of those who are subjected to its operation, on the supposition of its *having* been, on the occasion in question, present to their minds, is among the fundamental policies and constant endeavours of the fee-gathering or technical system, in every part of its course.

The keeping of the requisite *facts* also out of the reach of the minds of those who are to be thus operated upon, is a more special and diversified application of the same industrious policy. Examples will meet us as we advance.

After what has been said, or even without anything of what has been said, two propositions, it is supposed, may pass without any dispute: — 1. That, whenever appropriate notice is necessary to justice, it ought to be effectively given; 2. That, whenever it has been effectively given, and thence effectively received, it ought to be deemed and taken to

have been received; *i. e. that* ought to be done, the doing of which, in the case in question, is, upon the supposition of such actual receipt of notice, conformable to justice.

Hence,—to any one whose desire it really were that in all cases, as far as possible, justice should be done,—a main question would naturally at the outset present itself: What in general is the most effective, and upon the whole the most eligible, mode for the conveyance of effective notice?

In the endeavour to find an answer to this question, the first observation that presents itself is, that to this purpose not merely the efficiency of the notice ought to be attended to, but likewise the other consideration so inseparably connected with many questions relative to the subject of procedure,—the consideration of the circumstances of delay, vexation, and expense. Thence comes the question in its amended state What is the most eligible mode to be taken for conveying effective notice, regard being had to the collateral considerations of delay, vexation, and expense?

To find an answer to this question, the first object to be looked to is the *occasion*: understanding, in this instance, the occasion as constituted by the *stage* of the suit by the stage in which it is proposed that the notice in question, be it what it may, shall be given and received.

The person by whom it is proposed that the notice be received, will, in each case, be either willing, or not willing, to receive it

In so far as he is willing—the proposed giver of the notice being also by the supposition willing to give it—there can exist no difficulty. In the ordinary and amicable intercourse of life, those who wish to hold intercourse with one another, and are at the same time free to do so, never experience any other difficulty than those which are opposed by the circumstances of time and place.

Unfortunately, as between parties litigant, the case in general is unhappily the reverse by whatever motive one party is prompted to give the notice, by some correspondent motive the other party is prompted to avoid, if possible, the receiving it, or rather, the being *deemed* to have received it. If the notice has been received, such and such proceedings, tending to impose a burthen in some shape upon such receiver, are lawful, and productive of such their intended effect, if not, not. But his endeavour is of course to avoid being subjected to that burthen: therefore his wish and endeavour is, that,—whether the notice was or was not received by him,—the supposition entertained, or at least acted upon, by the judge, may be in the negative.

Under the natural system of procedure, in so far as it governs, whether in the private circle of a family or in a public sphere—in so far as this primitive mode has been preserved or restored by law—the most eligible course is not only to the last degree obvious, but (in so far as legal powers have happened to extend) is exemplified in every day's practice; though, as to the execution of what is determined to be endeavoured at, difficulties will of course be apt to present themselves, and in as great abundance and force as one of the parties can contrive to give to them; yet, as to the determining of what shall be endeavoured at, difficulty has scarcely any place.

Where, for this or for any other purpose, two parties are really and mutually wishing to hold intercourse with each other,—they embrace of course the most effective, and (regard being had to delay, vexation, and expense) the most convenient, modes, which the state of society in the place and at the times in question happens to afford. special messengers on foot, special messengers on horseback, letter-post, mail coaches, telegraphs, and so forth.

The problem and the difficulty, the only difficulty, is, how to render that party willing who of himself is not so; or, where that is impracticable, to supply the place of willingness on his part by other means Under the natural system, the solution of this problem will depend upon the stage of the cause.

When the judge is honest, and not ashamed or afraid to face the parties, the business of notice is attended with little difficulty.

At the outset of the cause (suppose) a meeting is produced, after this, all difficulty is at an end. A mode of intercourse is settled for each, and by mutual consent. Declare (says the judge) on pain of losing your cause, at what place delivered, and how directed, it may be taken for granted that a letter has reached your hands. So delivered and directed, by accident should it happen to any letters to have miscarried, the inconvenience, whatever it be, shall ultimately rest, no part upon your adversary, the whole of it upon you. This arrangement lasts so long as the cause lasts, the cause lasts, as to this purpose, till to this purpose I have declared it to be at an end.

As to the mode of procuring the initial meeting, in general a simple summons will suffice. But if there be any apprehension of latitancy, and that apprehension declared upon oath (or what is equivalent,) and registered, so as to render the plaintiff responsible in case of vexation, the security afforded by personal arrestation need not be grudged. In this or any other shape, the danger of wilful and needless vexation cannot be great, where the author, in case of its being deemed so, is sure to smart for it.

Arrest, when it is (what it ought to be, and might so easily be) neither more nor less than a visit to the judge, is at the worst but a forced visit. Every forced visit is unplea-

sant; but by what human means shall a man be exempted from the occasional vexation of making and receiving unpleasant visits?

Arrest, as under technical procedure it is, and, so long as that system of abominations remains unextirpated, will be, is indeed a most barbarous oppression, a most enormous grievance. The visit is not to the judge, but to a jail; that, in that seat of misery, indigence may be stript of its last rag, out of the sight, and for the benefit of the judge,* his protegés, and under-partners.

A third person—a person who is not a party— a person whose presence, although he be not a party, may, in the character of witness, or any other, be necessary to justice, —is in this respect in the situation which the defendant is in, antecedently to the first judicial meeting so often spoken of.

In case of necessity, not on parties only, but on third persons, from whom information, or any other service, is necessary to justice, might this mode of enforcing it be practised without reserve; always understood, that in case of purposed vexation, the author is at the same time himself standing in the presence of the judge, ready by his immediate appointment to pay for the injury by due satisfaction or condign punishment.

By the laws of the Twelve Tables, any man might lead or drag into the presence of the judge any other, *obtorto collo*, giving his neck a twist at the same time. The twist in the neck might have been spared: that omitted, and responsibility for vexation added, the provision would not be less conducive to justice now than then, in London than in Rome.

Lawyer.—And would you have the whole time of a leading member of parliament, of a first minister, liable to be thus consumed by a conspiracy of blackguards, or, on condition of perseverance, by a single blackguard?

Non-Lawyer.—No, certainly: but your conspiracy, what length could it go before it were discovered? And your single blackguard, or the first of your conspirators, punished as he would be for his very first exploit, stopped in his career at the very outset, where would be his perseverance? As to your own all-perfect system,—what it *does* admit, is your apprehended mischief: what it does *not* admit, is this natural, or any other, remedy. At the instance of Mr. Horne Tooke, when on his trial for treason, Pitt, the minister of the day, with a crowd of other state-worthies, delivered his reluctant testimony. The relevance was at any rate not very close: suppose irrelevance as complete as possible; what burthen, under the name of punishment or satisfaction, could have been imposed on the author of the vexation? None whatever.

Default is the non-performance of that act to secure the performance of which, any act prescribed in the character of an act of *notice*, was really or professedly designed.

On an occasion of this sort, is it necessary can it be necessary, to state to common sense what would be the part taken by common honesty?

Under the natural system, the occasion for notice, and eventually default (be it what it may,) will be either subsequent to the first appearance of the party before the judge, or antecedent, consisting in non-appearance.

If subsequent to such appearance, there can be no difficulty. At the first appearance, measures are supposed to be already taken (since in every case they may be taken)—effectual measures, taken without difficulty, and with full warning of the consequences of neglect for the continuation of the intercourse as long as it can be necessary for any of the purposes of justice. If antecedent to such appearance —then, for the purpose of giving him official and sufficient *notice*, sufficient information of the nature of the burthen to which default may subject him,—personal intercourse with the party himself is by the supposition impracticable. But, with the adverse party, the plaintiff,—the party at whose instance the rendering of this service by or at the charge of him the defendant is prayed for,—this intercourse has, by the supposition, taken place. The defendant by the supposition is not forthcoming: intercourse with him hath as yet been found impracticable: simple latency, abscondition, expatriation, exprovinciation;—which of all these accidents is the cause? Whosoever he be, whosoever he is or has been,—relations, neighbours, acquaintance, some or all of these, if he is a human creature, he must have had. From these sources, or some of them (if the acquaintance which the plaintiff, his adversary, has with him, be not of itself sufficient,) information concerning him will be to be obtained: and, for the indication of these sources of information, the plaintiff who is so much concerned in interest to afford it—the plaintiff, if it be not in his power of himself to afford sufficient information, may at any rate be relied on as a sure resource.

Though a channel of correspondence be settled upon, and agreed to be employed, yet on legal occasions, as on those of ordinary life, the process is exposed to failure; the channel that ought to have been employed has not been employed; or, though employed, the intended communication has, after all, failed of being received by the person to whom it should have been made.

On this head, in natural procedure, as in ordinary life, the first question is, of course,—received or not received? If not received, then sometimes comes in the ulterior question,—to whom shall the failure be imputed? to the party by whom the notice should have

* Comm. Rep. on Imprisonment, April 1792. 27 Rep. of Committee of Finance—Appendix—Prison Fees.—[*Vide supra*, Vol. VI. p. 178, Note.]

been received? or to the party at whose instance, and by whose instrumentality (in the first instance at least,) the communication ought to have been made?

Under the technical system, the question, *received or no?* is a question never made: instead of it, *good or bad?* is the only question ever heard of, in regard to notice. If *good*, no matter whether received or no. it will be deemed to have been, or (what is the only material thing) acted upon as if it had been, received. If bad, no matter, again, whether received or no: it will be deemed not to have been received; and upon that supposition will the conduct of the judge be grounded

The notice is regarded as *good*, when the communication is supposed to have been made according to the forms which have been settled, or supposed to be settled. Made according to these forms, it is not the less good for not having been received Made in a manner varying, or supposed to vary, in any respect, from these forms, it is not the *better* for having been received.

According to the principles of common honesty, the points aimed at have been already stated: that, wherever notice is requisite to justice, notice be not given only, but, wherever actually received, be deemed to have been received; and that the operations employed for the giving and the receiving of it be as free from delay, vexation, and expense, as possible.

Given the situation of the north, given also the situation of the south Given the points aimed at by common honesty, given, in like manner, are the points aimed at by common law:—that the notice requisite to justice may, as frequently as possible, fail of being received; that, when actually received, it may as frequently as possible fail of being deemed to have been received, to the end that he by whom it was given may be dealt with as if he had not given it; and that the operations relative to it may be in such manner attended with delay, vexation, and expense, as to yield to the partnership as large a mass of profit as possible.

The courses taken for the fulfilment of these ends are by far too multifarious to be here particularized. The diversifications agree in this, viz. that, besides being needlessly dilatory, vexatious, and expensive, they are as inadequate as they can be made: the commodious channels presented by the improved state of society being industriously neglected, all real means of intercourse being inexorably declined. How should it be otherwise? To employ them, the judge would have to see and hear parties with his own eyes and ears: and to see and hear parties would be to give up the ends of judicature.

On favourable occasions, sham communications are employed without disguise: the forms of communication being employed, under circumstances in which it is known that the information pretended to be communicated will not be received; viz. either will not be received at all, or will not be received time enough to answer the pretended, and not intended, purpose.*

The forms prescribed to be employed in the first instance being elaborately inadequate, profit flows in through a variety of channels. Suits on the question whether the notice given was good or bad. the notice, though good, not having been received, suits for relief from the consequences: notice given in the first instance being found bad, demand for fresh notice: the only form of communication allowed to be given in the first instance, being upon the face of it, or by experience found to be ineffective, or reasonably or unreasonably apprehended so to be,—*motion* that communication made in some other way may *pro hâc vice* be held good.†

Parties excluded, discussions about notice rest of course on the ground of affidavit evidence. No questions asked! the essential character and use of affidavit evidence. No questions asked! the resource and motto of fraud, on all occasions, and in all places. No questions asked by receivers of stolen goods —no questions asked by learned judges.

Notice of the fact, on which, according to law, a proceeding at the charge of one or other of the parties is to be grounded,—notice of any such fact is nothing, unless the notice of the law accompany it: *means* of compliance are presented to view; *motives* for compliance, not.

One grand and standing object is, accordingly, to keep the law in a state as incapable as possible of being conveyed to notice. That which exists not, is not a subject of knowledge Hence the matter of another device; the unfeigned love and indefatigable magnification of that sham law, in England denoted by one of the half dozen senses of the term *common* law, and in France so much more ap-

* Of communication made in a form contrived for the purpose of being ineffective, the case of the three distringases[a] (though, in that case, compulsion is in a manner combined with notice) may serve in some sort for an example. Real object, the forcing the corporation to employ an attorney, that the suit may commence and go on in technical course: form of communication employed (instead of sending for an acting member of the corporation, and speaking to him,) a sort of pantomine; a few shillings-worth of their goods seized, or pretended to be seized, and a few months afterwards a few shillings-worth more. By virtue of this sort of communication, at the end of seven or eight months the attorney is set to work, and commencement given to the suit.

† That "*service*" (as the phrase is,) made in this or that particular way, may be "*good service.*"

[a] *Vide supra*, Chap. IV. p. 221.

propriately by *jurisprudential* law, or jurisprudence. Hence also the accessory devices embroidered upon that ground; jargon in all its forms, fiction, and the double-fountain principle: all which see.

In respect of the mode best adapted to the conveyance of notice; besides the diversifications above hinted at, as resulting from the state of society, others of a more permanent nature are suggested by circumstances of diversity, such as, under the system of common sense and natural procedure, are too obvious to be overlooked. The party *sui juris*, or under power: of one sex, or the other: in a state of perfect sanity, or in a state of comparative imbecility, through immaturity or caducity of age: the party a housekeeper, or not: if not a housekeeper, has he a fixed abode, or is he in a state of itinerancy: his abode known, or as yet not known: within, or not within, the geographical boundaries of the jurisdiction of the court. From these and other diversities in respect of condition in life, may arise a demand for diversification too obvious to need, and requiring too many words to admit of further mention here.

To these natural and rational sources of diversification, the technical system (in England at least) has substituted others, more suitable to its purposes, and more congenial to its nature: diversity of courts, diversity in the sorts of causes, and diversity of stages in the same cause.

In French practice, the defendant, after he had given authority to an attorney to act for him, was called upon to *elect* his *domicile*: meaning neither more nor less than this, viz. to name the house, to which, whatsoever communication for the purpose of the cause might require to be made, being made accordingly, shall be presumed to have reached his hands. The domicile so elected was the office of his attorney. Between client and attorney, so long as the relation and the confidence attached to it continues, it is not in the nature of things that any evasion or detrectation of intercourse should exist on either side.

In England, as in France, and everywhere else (even under the natural system,) to whomsoever the misfortune falls of being obliged to employ an attorney, the office of the attorney will in general be (regard being had to the interests of both parties) the most eligible domicile: and, if at the outset of the suit, so through every subsequent stage of the dispute, whatsoever turns it may happen to it to take.

Under the technical system in England, election of domicile does take place, and it does not take place.

It does take place, in this respect:—The greater part of the business done being sham business—business made to make fees, business which has nothing to do with the merits; what is done and received in the party's name is not communicated to him. Having (lest the uselessness of it shall be perceived) been rendered unintelligible to him, it is convenient to the lawyer, and not disadvantageous to the client, that he should be spared as much as possible the plague of hearing of it. Without any election, the domicile of each attorney is known or knowable to every other; and thus far, without any such election in form, the effect of it takes place.

It is the interest of the partnership that as much intercourse as possible should be kept up between the professional members of it on the opposite sides of the cause, the one with the other, and as little intercourse as possible between one party and the other, and between each party and the lawyer on the other side. Between the party and his lawyer, it is neither in their inclination nor in their power to prevent or impede the intercourse.

But, in addition to this sham business, in the course of which, though everything is *supposed* and *asserted* to be done by the party, nothing is done by him in *effect*—in addition to this sham business, to which the party is not, unless by accident, privy—business will every now and then arise, which cannot be done unless the party knows of it. Here then would be an occasion in respect of which, if justice instead of fees had been the object, election of domicile would have been made to take place: service on the client would have been performed by service on his attorney.

But among the sources of fees is evasion of notice: evasion, real on one side—apprehended, or pretended to be apprehended, on the other. By election of domicile, *Anglicè* by causing service on the attorney to be in all cases service on the client, this source of fees would have been dried up. Accordingly, such permanent election of domicile is unknown to English practice.

The persons to whom notice is addressed are either known or unknown: unknown, as in the case of creditors.

When the debtor is alive and forthcoming, common sense would direct men in the first instance to the debtor. Technical judicature finds always some other channel of correspondence better adapted to its purposes.

Scotch judicature for example,—besides the *pier and shore of Leith*, has the *Minute-book* and the *Wall:* the pier and shore for fugitives;* the minute-book and the wall for creditors.†

* The method of citing persons out of Scotland by proclamation at the pier and shore of Leith, is now abolished in almost all, if not in all cases in which it was formerly in use, and intimation by means of a record kept at the General Register-House, and printed for distribution, is substituted.—*Ed.*

† Lawrie, p. 180.

Rule: If notice be not conveyed to those whose interest it is to receive it, be sure that either its being received is not for the advantage, or that its not being received is for the advantage, of those on whom it depends.

Think on this occasion of Bank Directors, and unclaimed dividends Think again of Lord High Chancellors, and Masters of the Rolls, and unclaimed pittances of miserable suitors: and see by what omnipotence it is that the money employed in augmentation of masters' salaries is created out of nothing.

Behold in each master's office a gulf, by which, when a man's money is swallowed, either his right to it is concealed from him, or, if he know of it and claim it, more is squeezed from him than is paid. First men make the wrong, then they make their profit from the wrong: nor is that enough for them, but they must have praise for it.

Sham notice presents two main modifications: 1. When notice pretended to be given is not given, not being meant to be received; 2. When, received or not received, it is manifestly incapable of answering its pretended purpose. In the one case it is ineffective, in the other useless. By the English practice in the case of outlawry, in the class of causes called *civil* causes, an example may be seen of both these modifications, according as it is considered in its application to the one or the other of two descriptions of persons persons out of reach of the pretended notice (whether put into that state by latency, expatriation, or ex-provinciation;) and persons incapable of profiting by it, being incapacitated by indigence.

Process of outlawry* is a mode of proceeding by which a man is put into the condition of an outlaw. To be in that condition, is to forfeit all his goods and chattels, together with the profits of lands. goods and chattels upon the performance of the first ceremony—profits of lands after other ceremonies, all of course yielding their fees. Add to this, perpetual imprisonment, if he be caught; besides other plagues in plenty, not worth detailing after these.

Who are the persons whom the partnership has subjected to this fate? Two descriptions of persons: those who have not wherewithal to defend themselves from it, that is, to employ lawyers to defend them; and those who, for any cause (be they ever so poor or ever so rich,) happen to be so circumstanced as to be out of the way of receiving the notice. Not that, on this occasion any more than others, the condition of poor and rich is exactly upon a par. A difference there is, and it may easily be imagined in favour of which side. A rich man, unless he be uncommonly unfortunate, can be kept in it only for a time: a poor man continues in it for ever, and without remedy.

To put a man in it, is a power given to every other who is content to pay the price. Proceeding in a particular course, chalked out for this purpose, a man brings an action against you for anything that comes uppermost: no matter what it is, since it is not necessary that it should have the smallest foundation in fact: and if one carried on in this way is not sufficient to ruin you, he brings as many more as he pleases. The great majority of the people are unable to employ an attorney to defend them respectively in any one such suit; much more in any number of such suits, increasable without stint: consequence,—outlawry, as above described.

There are two principal offences, to which, as already intimated, this punishment is annexed. One is poverty; or rather (reference being had to the circumstances of the plaintiff) inferiority of affluence. The other is expatriation; being out of England: whether for a man's own business or pleasure, or in the public service, makes no difference. While a soldier is bleeding for his country at the antipodes, judges in England have a shop open, in which they are ready to sell his liberty, with the faculty of destroying his property, to any one who will come to them and pay the price for it

Previously to a man's being sentenced to this punishment, a notice, in some shape or other, must in every case be given to him. But it is not necessary that in any case he should have received it He never does receive it: it never is intended that he should it is always intended that he should not: it is always a sham notice. The man is in the East Indies the notice consists of a mess of jargon, muttered by an attorney's clerk, in some office or public house in London,† call-

* 1 Tidd (Edit. 1803,) 125.

† When a man is transformed into an outlaw, a *caput lupinum*, a wolf's head, as we learn from the highest authorities, takes place of the original head planted by nature upon his shoulders.[a] While John Wilkes was in Paris, an attorney's clerk performed this metamorphosis upon his head, by pronouncing the magical words at a public-house called the Three Tons, in Brook Street, Holborn. A discovery was made, that one of the words belonging to the formulary was wanting or misplaced. The effect of this discovery was, to replace upon the shoulders of the blasphemer his natural head, such as it may be seen in Hogarth's print of it.

A list of persons is periodically published un-

[a] This applied to outlawed felons. The passage in the Mirror relating to this subject, is exceedingly curious. If the felon refused to come in, it was lawful for any one to treat him as a wolf, and kill him; and for every head of an outlaw so killed, a reward was awarded of a demimark. Ch. IV. § 4. It would now, however, be as much murder to kill an outlaw, as to kill any other person. 1 Hal. P. C. Ch. xiii.—*Ed.*

ing upon the man to appear there or thereabouts in a few days.

The case in which a man cannot be outlawed for nothing, without risk to the person at whose instance this punishment is inflicted on him, will help to show (if it be necessary to show) that it is not for want of knowing how to remedy it, that those who profit by this enormity persevere in the commission of it.

On a criminal prosecution, it cannot be practised as above mentioned without risk. The necessity of a bill found by the grand jury is the bar to it. Not that the power given to that sort of court is the real obstacle: the real obstacle consists in the oath attached to the testimony, without which the bill could not be found: *i. e.* to the punishment attached to it in case of falsity. The same punishment would afford the same security, grand jury or no grand jury.

The observation is necessary; otherwise a lawyer would have his answer ready: *in civili* you cannot have the same security against groundless outlawry as you have *in criminali*, because *in criminali* you have a grand jury, and *in civili* you have none.

To put an end to this abuse, along with many others, what is wanted is, no jury, grand or petty, but personal appearance of the plaintiff *coram judice*, for the purpose of examination upon oath, in the first instance.

CHAPTER XIV.

NINTH DEVICE—PRINCIPLE OF NULLIFICATION.

THE instruments and operations to which the principle of nullification is in use to be applied, may be divided into two classes,—non-judicial, and judicial. Of the non-judicial class, *contracts* (including agreements and conveyances) present the most extensive as well as most familiar example. These belong not to the present purpose; but (so close is the analogy) what is here said with reference to judicial instruments and operations, would, without much exception or difference, be found applicable to those others.

Applied to a judicial operation or instrument, the effect and object of the principle of nullification is (according to the most comprehensive description that can be given of it) in the case of an *operation*, to cause that to be considered as *not* having been done, which *has* been done:—in the case of an *instrument*, or a clause or portion of an instrument, to cause that to be considered as *not* existing which *does* exist.*

Examples:—Order from the judge to the party to appear in person, at a certain time and place. He appears accordingly:† this appearance is null and void: for this obedience he suffers as if he had not obeyed. Suffers! Why? Because the pleasure of the judge was (as he ought to have understood, the order being to the contrary,) that he should *not* appear in person, at that or any other time and place; but should employ an attorney to appear instead of him, at other times and places.

Defendant proved guilty of a capital crime; found so by the jury: acquitted afterwards by a judge. Why? Because, in the description of the crime, a lawyer, whom the prosecutor was obliged to employ, had omitted to employ a particular word, which neither legislator nor judge had ever ordered to be employed, and which was not in the language. For the purpose of giving impunity to the criminal, the judge makes the rule, pretending to find it ready made.

On a more particular view, the effect of the nullification principle in respect of the ends of justice will be seen to be different, and indeed opposite, according as it is in favour of the plaintiff's or of the defendant's side of the cause that the operation in question has been performed, or the instrument in question exhibited.

1. In favour of the defendant's side; if the suit be a criminal one, the object of the suit (the application of punishment to the defendant, if he be guilty) is either prevented altogether, or retarded: so, if it be a non-criminal suit, the administration of satisfaction to the plaintiff: for example, the causing him to receive a sum of money that is his due.

2. In favour of the plaintiff's side; if the suit be criminal, the effect of the nullification is to cause the defendant to receive punishment, and that punishment undue: if the suit be non-criminal, then, on the score of

der the name of the East-India Directory. A monthly list, called Steele's List, shows such of the king's subjects as are serving their country at different stations, in the naval branch of his service. In the periodical book called the Court Calendar, may be seen the names of others of his majesty's subjects, serving in various foreign stations. All these, together with all the inhabitants of all the colonies, form a part of the whole number of persons whom, without the shadow of a cause, without inquiring into the cause, and under a determination not to inquire into the cause, the judges of all the courts are ready, on all appropriately fixed days, to sentence to this punishment, at the instance of anybody who will pay the fees.

Selden, as he tells us in his *Table Talk*, outlawed the king of Spain, for not making his appearance in Westminster Hall, in pursuance of a notice thus delivered.

* In this point of view, the principle of nullification may be considered as a modification or application of the principle of *fiction*. See the Chapter on that device (Chap. XVIII.)

† *Vide* 31 Reg. Gen. H. T. 2 Will. IV.—*Ed.*

satisfaction, to render to the plaintiff some service, and that service undue.

From causes which lie too wide of the present purpose, so it is that, — in comparison with the instances in which the operation of it is in favour of the defendant's side, especially *in criminali*, — those in which it is in favour of the plaintiff's side (in such sort as that the defendant shall, either on the score of satisfaction or on that of punishment, be subjected to a burthen which is not due) would be found extremely rare. In other words, the effect of it is much more frequently to paralyze the force of the law, than to give a wrong direction to it. This, therefore, is the effect which in general, and unless on special notice to the contrary, it will be proper to consider as attached to the application of this principle.

To which side soever of the cause the operation of the principle applies, the effect of it is susceptible of two other distinctions, which require to be observed :—

1. It applies either to the whole number of steps taken, or about to be taken, in the cause, or to some part only of that number. In the former case, the nullification may be said to be *complete ;** in the latter case, *partial.*†

Thus, in another and fairer and honester as well as pleasanter sort of game, the *royal game of the goose*, one sort of unlucky cast throws you back only a part of the way you have made ; another, the whole of it.

2. Again : Where the nullification is complete, in some instances it has the effect of operating as a bar,—on the plaintiff's side, to all ulterior demand, to all fresh suit on the same score, — on the defendant's side, to all ulterior defence ; in other instances, not. In the former case, it may be termed definitive or peremptory ; in the other case, dilatory or temporary, or rather non-peremptory.

Another distinction : The cause of nullification,‡ — the pretended irregularity in the operation, or the pretended vice or defect in the instrument, — may be made to operate backwards only, or forwards only, or both ways.

The principle of nullification is what Lord Bacon would have called a polychrest : a constellation of injustices.

1. If the article of substantive law which it serves to frustrate be in the form of statute law, it not only contributes to the uncertainty of the law, but contributes to undermine the authority of the legislator, substituting that of the judge in place of it. In the individual case in question, it repeals the law of the legislator *pro tanto ;* and it serves as an example and an encouragement to judges to repeat such acts of repeal in other instances.

2. Although the article of substantive law thus frustrated exist in no other form than that of a rule of jurisprudential law, — in other words, if it be no more than a sham law, made or imagined by a judge, without any determinate set of words to put it into, instead of an article of oral law, made by the legislator in a determinate set of words, — in this case, though no such advantage is made as in the former case in the way of usurpation, yet in the way of uncertainty the advantage is the same. The substantive law, which was of itself uncertain, as being in the form of jurisprudential law, is rendered still more so, by the shock thus given to the system of adjective law, on which its execution depends.

3. It possesses, and in a pre-eminent degree, the virtue of an *ex-post-facto* law. Whatever general rule of law is established in the way of jurisprudence, that is, by judges, acting as such, is in effect an *ex-post-facto* law. The mischief of an *ex-post-facto* law consists in its being unexpected. whence, the suffering produced by it is at once inevitable and unnecessary : unnecessary, since an article of statute law to the same effect would have produced all the good, without any of the suffering. But what can be so unexpected as that a malefactor should be acquitted, because a clerk has written a wrong word?

4. It punishes one man, for the fault, or the supposed fault, of another. It punishes the party injured, it deprives him of redress, because an attorney's clerk, or a clerk under the orders of the judge himself, has written a word, which is supposed to be wrong. Under the natural system, an error being discovered, if it were deemed worth correcting, it would be corrected, and the suit would go on as if there had been no error: but under the technical system, such correction would not serve the ends of judicature.

The more foreign the ground is to the merits, the more the decision contributes to the giving to the law the desired appearance of a lottery, in which a favourable decision is a prize, and the tickets, the prices paid by plaintiffs and defendants for their respective chances.

5. In all cases of a criminal nature, it serves for lodging the power of pardon in hands unknown to the legislator. The lower and more numerous the hands, so much the better; so long as the power of allowing or disallowing the pardon is reserved in the hands of the judge. The persons in which this power is

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* Synonyms, — thorough; entire; pure and simple; operating (in the language of school logic) *simpliciter.*

† Synonyms, — limited ; operating *secundum quid*, in the language of school logic; *quoad hoc* in the language of jurisprudence.

‡ Synonyms, — quirk, quibble.

vested, are all the persons to whose mistake, or supposed mistake, this consequence is annexed: every attorney or attorney's clerk, every official clerk or official clerk's clerk. If the consequence is settled, and the clerk unpunishable, the clerk is, in respect of this prerogative, more of a king than the king himself; for the king cannot pardon without the concurrence of at least two other persons,* and the clerk needs no concurrence, but what, by the supposition, he is sure of.

A decision which is not grounded on any alleged cause of nullification, is said to be grounded on the merits:† *è converso*, a decision which is grounded on an alleged cause of nullification,‡ is not grounded on the merits.

Under the technical system (but more especially under the English edition of it,) a judge says, with equal facility and indifference, my decision was grounded on the merits, or, my decision was not grounded on the merits. In some future age, such openness will appear hardly credible. In each case, a shorter phrase might serve:—My decision was according to justice; or, my decision was contrary to justice.

A decision not grounded on the merits, bears upon some ground foreign to the merits—upon some alleged cause of nullification, some quirk, some quibble.

When the decision is in favour of the quirk, it is then simply and decidedly a decision against the merits. Yet, when it is against the quirk, it is only *sub modo* that it can be said to be in favour of the merits.

The back of the judge is turned upon the merits, not only when he decides in favour of the quibble, but at an earlier period; viz. when he takes upon him to listen to an argument on the subject of the quibble. Then is it that one offence against justice is committed; and, if the decision is in favour of the quibble, that makes a second offence against justice.

Whether the decision be for or against the quibble,—point blank against, or to a certain degree in favour of, the merits,—mischief to the community (it will be seen) is produced, advantage to the man of law. When it is *for* the quibble, a portion of mischief (it will be seen) is produced, over and above what is produced in the other case.

But it would be an error were it supposed, that, by a decision pronounced against the quibble, any sacrifice is made of the ends of judicature, of the interests of the partnership. That the service habitually rendered to that interest may be at its maximum, it is necessary (it will be seen) that the instances in which the decision is *against* the quibble, and, so far, *for* the merits, should be frequent. Equality is as good a proportion as any other. It is where the numbers of decisions for and against the quibble are seen to be equal, that the uncertainty is at its maximum; and uncertainty is the mother of *argument*, that is, of *business*.

Suppose the question were, whether the length of your nose should operate as a reason for depriving you of a sum of money proved to be due to you: and suppose the decision in the affirmative. Would the injustice commence with the decision? No, surely: it would commence with the argument: or, to speak strictly, with the token (whatever it were) by which it had been manifested that arguments *pro* and *con* on that question would be heard.

The exemplification may appear ludicrous; but the purpose of it is a grave purpose. Among the quibbles, on the ground of which decisions have been given against the merits, enough might be found in which the distance from the merits was not less, and in which the mischief done by the contempt put upon the merits was even more considerable. If, in that case, the outrage to justice present itself, at first view, as more flagrant than in these, it is only because in that case the colour of the ground is new (for which purpose it was chosen;) in those others, old, and the eye familiarized with it.

Fancy not, that if a premium had been offered to him who should invent the most absurd ground of nullification, the most flagrant injustice that could be committed on this ground, anything more absurd or more flagrantly unjust could have been invented than those quirks (sometimes successful, sometimes unsuccessful) which are to be found in such abundance in the books.‖

* The keeper of the privy seal, and the keeper of the great seal. [The sovereign can now, by 6 Geo. IV. c. 25, grant a pardon under the sign-manual, with the concurrence of only one of the principal secretaries of state. *Vide supra*, Vol. II. p. 579.—*Ed.*]

† Gallicè, *portant sur le fond.*

‡ Gallicè, *portant sur la forme.* In the French expression there is less perspicuity, but, on that very account, more decency. The outrage to justice, though the same in spirit, is not openly avowed.

‖ In 1826, a man named Sheen was tried at the Old Bailey, for the murder of his illegitimate child. It was clearly proved, that he cut the child's head off: but as the names by which the child was known were not accurately set out in any of the counts of the indictment, the murderer was acquitted.—A very remarkable case occurred in Scotland in 1806. John Hannay was tried for the murder of Marion Robertson, daughter of John Robertson, late *wright* in Westcroft, &c. It turned out in evidence, that John Robertson was not a *wright*, but a *tailor*. On the objection being taken, the jury, at the request of the Crown, found the prisoner "not guilty of the murder specified in the indictment." The object of this special verdict was, to form a ground for trying the question, whether the prisoner could be brought to trial on a corrected in-

True it is, that, in the station of a judge, injustice can never be done, without a something in the character of a ground or reason; equally true it is, that, in that station, nothing can be imagined more irrational than what, in the character of a ground or reason, has been made, and may continue to be made, to serve.

Fancy not, that, if it had happened to the *nasal* reason to form the ground of a decision, reported in good law-French, the decision, with its ground, would have been defended with less pertinacity, or spoken of with less reverence, than any of those others which form so large a portion of the chaos called, in lawyer's language, *common law*

As to the uses of this device, the catalogue of them has already been in great part seen, in the catalogue of the mischiefs.

Use 1. Making business, viz *pro hâc vice*. This use (as already observed) is the more peculiar fruit of the process of temporary nullification, in contradistinction to peremptory but even where it is peremptory, the argument in that same cause is the fruit of the principle; and this whether the irrelevant objection be allowed or disallowed; since, on that ground at any rate, had it not been for the principle, there would have been no argument.

Use 2. Nursing uncertainty—the perennial source of made business, flowing from the land of quirks and quibbles,—in all future cases. But as to this use, see further, under the head of the Principle of Jargonization.

Use 3. Establishing and supporting arbitrary power. See further, Chap. XXIII *Double-fountain principle*.

Use 4. Blinding the legislator: rendering the law unintelligible to him. putting it out of his power to see what is going forward, to form to himself any clear conception, either of what ought to be done, or of what is done See again the jargonization principle

Use 5. Awe-striking, as well as blinding, the people: causing them to regard complaint as groundless, and hopeless, and injurious, and culpable: deterring them thus from complaint, howsoever intense their sufferings.—See again the jargonization principle.

Use 6. Repelling the eye of the legislator by disgust. See once more the jargonization principle.

Use 7. Securing a fund of popularity.

This use is confined to the criminal branch of the law: the effect produced by the principle, when thus applied, being the acquittal of malefactors.

Such has been the success of hypocrisy in this line, that the deluded people have learnt to regard with sentiments of love and reverence and gratitude, instead of indignation, the treachery of those ministers of justice, who, by the help of this capital engine of iniquity, have persevered in the habit of giving aid and impunity to all sorts of malefactors.

If an advantage, so much greater than at the outset could naturally have been expected, contributed little or nothing to the creation of the technical system, it contributes at any rate in no small degree to the preservation of it.

Under this delusion,—the more ill-grounded, and (whether ill or well-grounded) the more excessive the lots of punishment are, which stand attached to acts prohibited under the name of crimes,—the more eager are the people to see this surreptitious and anti-constitutional power of pardon, thus employed, in eating out the very heart of the substantive branch of the law.

Hence, a sort of auxiliary device and resource of the technical system consists in adding in all practicable ways to the atrocity of the penal system pouring out punishment, as from a cornucopiæ or a Pandora's box, without regard to proportion or demand. This may be done in either of two ways: either by applying to the legislator and getting fresh statutes, or without any such trouble, by jurisprudential construction, screwing up misdemeanours into felonies till at last there comes to be but one sort of offence, and that a capital one It is thus that, under the auspices of hypocrisy, ambition and cruelty play into one another's hands By double iniquity, a man renders himself double service. By breaking the law, he receives the blessings of the people for his humanity, when, by making it, he has received their veneration for his love of justice.

Advice to judges. When a case of compassion presents itself (and the more atrocious the penal system, the more frequently will cases of that stamp present themselves,) instead of recommending to mercy, get the defendant off by a quirk. The defendant, for example, has stolen thirty-nine guineas: recommend it to the jury to value them at as many shillings. Observe, now, how many points you will compass by this one stroke. You reap the seven advantages already mentioned; and, besides all that, you cherish in the bosom of the people the habit of regarding with affection and respect the vice which is one of the main engines of your system, and cherish at the same time the habit of blind obsequiousness in the bosom of your rivals, the juries.

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dictment: it was found that he could not. See 2 Hume's Criminal Law, 197.—A case is reported by Leach (545), in which a married couple escaped conviction for stealing from a lodging-house, because it was stated in the indictment, as hired by the husband, whereas, the negotiation, though commenced by him, was concluded by the wife.—*Ed.*

If,—you being on the ministerial side, as it is most natural for you to be,—the author of a real or supposed crime, particularly obnoxious to administration, comes under prosecution, and an attempt is made to save him by a quirk; you have a choice to make. On the one hand, you see the service you may do to your party by a due execution of the laws; on the other hand, the service you may render to your partnership by the violation of them. Your choice will depend upon existing circumstances: but it is a pleasant sort of a dilemma, not to be able to stir a step without reaping an advantage.

The popularity gained by this principle in criminal cases, will serve you for the support and defence of it in that other class of cases (non-criminal cases) in which the favour of the public does not extend to it. In these fat cases, the advantage reaped from the principle is much more substantial than in those other meagre ones. In criminal cases, at least in nineteen instances out of twenty, the defendant is mere skin and bone; the plaintiff, called prosecutor, little better. The effect of the flaw too is commonly peremptory, or it would not be worth noticing, or worth making. In *non-criminal*, called *civil* cases, costs come frequently out of the estate; and (be that as it may) the parties may be of any degree of opulence. Here, then, you make the effect of the flaw but temporary; and the quantity of business which the cause affords is thereby doubled.

The grosser and more abundant the pretences for nullification, the more easily may business be made, without the expense of treachery on the part of the professional assistants of the party who suffers by the flaw: and in this case, compared with the other, the encouragement to such treachery is much more inviting and more pure. Many a man who would not charge his conscience with the destruction of the innocent, or even, in a matter purely civil, with the final sacrifice of a client's righteous cause, will be restrained by no such scruple from the lending a hand to the manufacture of a little extra business, by a slip too natural to attract notice.

In England, as elsewhere, the body of the laws may be divided into two parts: the beneficial, and the pernicious. Nowhere will the existence of the distinction be disputed; no, not even among lawyers: since what little there is in it that tends to the reduction of delay, vexation, and expense, may, even in the estimate of an official panegyrist, make sure of a station on the left-hand side. No man that will not admit the reality of the division: no two men who would draw the line exactly in the same place.

In England, however, the distinction is more marked than perhaps in any other country: the cause may be found in the mixed nature of the constitution, and the stages through which it has passed in its ascent to its present elevation. Be the constitutional law of the country what it may, the tenor and fabric of the law must ever be favourable to the interests and wishes of the individuals who, for the time being, are in possession of power: favourable to them, proportionally adverse and unfavourable to all whose interests run not in the same channel with theirs. Hence, taking the whole fabric together, there will exist continually, on the two opposite sides, so many perpetual and perpetually opposite contentions and endeavours,—on the side of those in power, to strengthen the system,—on the side of those out of power, to weaken it. The system imagined by the Manichæans for the government of the physical and moral world, is thus exemplified, in fact, in the ordering of the concerns of the political world.

Excellent as the constitution is in its materials and capabilities; supported as no doubt it has every now and then been by truly heroic exertions of public virtue,—neither wisdom, nor virtue, nor the union of both, will go any considerable length in accounting for the details of it. The features in it on which we pride ourselves with so much reason, and on which we may felicitate ourselves with so much more reason, are to be considered rather as diagonals resulting from the conflicting forces of personal interest, than as perpendiculars erected by virtue on the basis of wisdom.

The struggles between parties have frequently been struggles for existence. When existence is at stake, all other objects are eclipsed by it: everything bends to the present emergency.

When the adjective branch of the system is weakened in any part, the weakness extends to the substantive branch *in toto*: when the foundation of a house decays, the danger extends to everything that is above. But, when immediate destruction is in prospect, no price can be too great that holds out a hope of present safety. When law is against men, men will be against law. If, by a flaw introduced into the texture of the system of procedure, a precious life which otherwise might have fallen may be saved, any future mischief that may by contingency creep in at the flaw makes no impression on the mind. The beam I introduce to support a falling house, may be pregnant with the dry rot; but if the house would fall without an immediate prop, and there is no other within reach, the beam goes up of course, all thought of the dry rot is put aside.

The sacrifice of future contingent good to greater present good, is reconcileable to the dictates of the purest wisdom. What the dry rot is to a house, the principle of nullifica-

tion — the principle according to which decisions are pronounced on grounds foreign to the merits — is to the system of adjective law, and the system of substantive law which rests upon it.

It is applicable to the purpose of saving from the power of the law any sort of person, be he who he may, so he be for the moment exposed to its penalties. the corrupt placeman who abuses the powers of government, or the patriot who opposes his resistance to the abuse.

When, in a penal case, on a ground foreign to the merits, the decision is against the merits, it destroys *pro tanto*, in the individual case in question, the power of the substantive law. It destroys the power of a bad — it destroys the power of a good, law Considering it in the light of a perpetually applicable and all-extensive principle, is it not, however, capable of meriting, upon the whole, the appellation of a beneficial one? In idea, yes but upon what supposition? Upon this; that, in the substance of the penal system taken together, there is more evil than good in other words, that it would be more for the advantage of the country to have no penal laws at all, than such as are actually in force Upon any other? Upon this other that, the good and the evil being in equal proportions, the application of the nullifying principle is more likely to fall upon the evil than the good On either of the above suppositions, but on no other, is the nullifying principle, this favourite and ever busy principle, anything better than an execrable nuisance But for either of these suppositions is there any the smallest ground?

The true remedy is, what? So obvious, the pen is almost ashamed to write it To rid the substantive system of the peccant matter, not to introduce into the adjective system a principle of debility, by which the efficacy of the good and bad is reduced together, and alike.

When Wilkes, the victim of the court, and the idol of the populace, was prosecuted for the two writings, one of which had been the cause of the resentment and the other furnished the means of gratifying it,—in the instance of this delinquent, as of every other, the licensed accessaries after the fact, consulting the oracle of chicane, betook themselves to the principle of nullification for the means of safety. Their researches presented to them, in one of the legal instruments, one of those imaginary flaws, on which iniquity under the mask of humanity has bestowed the power of rescuing delinquency from the pressure of the law. But the demon to whom, even in mischief, all certainty is odious, had provided an instrument by which, if applied in time, flaws of that kind may be closed: not amended, the flaw would have been a fatal one: but, to flaws of this description, power had been in the habit of applying a remedy. Addressed in proper form, the judge (Lord Mansfield) substituted the valid slang to the invalid slang.* Immediately Westminster Hall was in an uproar what could not be done by reason, was to be done by noise and calumny. The forgerer who inserts a word in a deed, alters it: the judge who amends a record, alters it. the cry was, *He has altered the record!* and what you were to understand was, that he had committed an act of forgery on it.

To the enabling the partnership to turn to the best account the principle of nullification, the form of jurisprudential law was indispensably necessary. Without the aid of that deceptitious form, something might indeed have been done by so convenient a principle, but nothing in comparison with what has been done.

As in the substantive branch, so in this adjective branch, the law, if it had not been in the form of jurisprudential, would have been in the form of statute law. In that case, whatsoever it had required to be done, in the course of the cause, by either party (suppose the plaintiff)—whatever operation it had required to be performed — of whatever tenor, purport, or effect, it had required an instrument, on this or that occasion, to be delivered,—it would have given a description of that operation, of that instrument, and, if on pain of nullity, intending that such should be the consequence of failure, it would have given warning to that effect

Of the legislator (except in so far as it might happen to him to be corrupted or deceived by the man of law,) the object would of course be to render such failures as rare as

* The Author has here misconceived what was really done by Lord Mansfield. The form of proceeding against Wilkes was by information, for publishing two libels. Just before the trial (which took place on the 21st February 1764,) the records being made up and sealed, the counsel for the crown thought it expedient to amend them, by striking out the word "purport," and substituting the word "tenor." As it was in vacation time, application was made to Lord Mansfield, at his house, and he at once granted a summons to show cause why the amendment should not be made. The defendant's attorney attended his lordship, and though he had no objection to urge against the amendment, he could not consent to it. The amendment was made accordingly, and no notice taken of it by any of the counsel at the trial. Not until the 20th April 1768, when Wilkes voluntarily appeared in court, was any objection made to this amendment, which was then characterized as being unconstitutional and illegal. The point was subsequently argued, when it appeared, from numerous precedents, to be a usual course of proceeding. No doubt of the legality of Lord Mansfield's act seems ever to have been entertained in Westminster Hall, but a great clamour was raised against him out of doors. 4 Burr. 2527.—*Ed.*

possible: to that end, he would as surely have pursued the course just mentioned: whatever on each occasion his pleasure were, he would have declared it. If it be your wish that your servant should go on an errand to a particular place, you tell him so, mentioning the place: you do not (unless you are perfectly assured of his knowing already) leave it to him to guess that you want him to go on an errand, and to what place.

Of the partnership (for the sake of the profit drawn in by means of the principle of nullification, by the reiteration of operations and instruments, together with the other less prominent advantages) the object was, of course, to make such failures as frequent as possible.

Their first and constant care accordingly was, that no such directions should ever be given. The foundation, a foundation not the less sure for being negative, having thus been laid for these failures, — causes of failure, and consequent grounds of nullification, were built in infinite numbers upon the foundation so laid. Day by day the party in the right was punished — punished with the loss of his due, because his lawyer had omitted to fulfil directions, which, lest they should be complied with, had been omitted to be declared to him, or so much as to be framed. The directions which should save the suitor from being deprived of his due by his own lawyer, where are they to be found? Upon the blade of the sword that Balaam wished for.

This was not yet enough. While A was punished for the disobedience of B to the unuttered and unutterable directions, care was taken to place them out of the danger of being guessed at. Absurdity and inconsistency, figures which cost as little to the English lawyer as prose did to Monsieur Jourdan, secured this point without difficulty.

In punishing one man for another's not having done so and so, it was not possible to avoid altogether the giving of some sort of description (how inadequate soever) of that, for the not doing of which, the punishment was inflicted. A description of this sort, though, on the occasion of the cause in hand, and in the character of a direction, too late to be of use, might yet, if committed to memory or writing, supply in some sort, as far as it went, the place of a direction, in some future contingent cause. Though not itself a law, a general law, it might, to him who should be diligent and fortunate enough to catch it and preserve it, answer in some sort the purpose of a law. A professional lawyer having nothing to do in the cause, would (for his own instruction, or on a commercial speculation, in the view of the profit to be made by selling the information to others) commit every now and then to paper, and eventually publish, in a suitable mass, a body of instruction of this sort thus collected. It is thus that the sort of discourse has gradually been accumulated, which, by an abuse of words peculiar to the English language, has, under the common denomination of *law*, been confounded with the genuine expression of the will of a legitimate legislator. Of this nature at least is the largest and least bad part of the materials that enter into the composition of it. A collection of imaginary laws, which, had they been real, would have been *ex-post-facto* laws.

Had these spurious laws been of a rational complexion, conformable to, and such as would naturally have been dictated by, a regard to the ends of justice — had they been such as, if framed and communicated in such manner as to afford a possibility of complying with them, would have been conducive to those ends — had they at the same time been regularly committed to writing, and made public, — little by little, in the course of a few centuries, the mass of sham and spurious law so formed might (to the effect of preventing such failures) have (though in a very imperfect and incongruous manner) supplied, to the extent of it, at each point of time, the place of genuine law. Little by little, the pitfalls so carefully left in the field of law would have been filled up, as in the siege of a fortified town the ditch has sometimes been filled up, by the bodies of the slaughtered. The ideal laws, the *quasi* laws, thus formed, being each of them conformable to the ends of justice, would have been consistent with one another: the place of promulgation might in some sort have been supplied by analogy: from two such already made laws put together, a suitor might have learned upon occasion to foresee a future one: in like manner, though unhappily not with equal certainty, as from two angles of any triangle the mathematician knows how to deduce the third.

This possibility was to be avoided: and the avoidance of it was not difficult. The more absurd a decision is, the more impossible it would have been to divine it: and the more irreconcilably repugnant to each other two decisions are, the more impossible it is to deduce from them a third. Accordingly, the wit of man never has devised, nor, under the stimulus of the highest premium, would be capable of devising, absurdities and inconsistencies grosser than are to be found in what are called the *books*, in such disastrous abundance.

How could a cover for injustice be ever wanting, when it had been made known by every day's practice that a syllable wrong written, or pretended to be wrong written, by a lawyer's clerk, was enough to make the client lose his due!

Would you see a short proof of two propositions at once: that the nullification prin-

ciple is a mere instrument of iniquity; and that, by those who are in the constant use of it, it is known to be so? Behold it in this one circumstance. In a variety of instances, a flaw being suspected — a flaw that, if not amended in time, might (it is supposed) subject the instrument to nullification, — application is made, and permission granted for the amendment of it. The permission, when thus granted, is it made use of? Not it indeed. Why should it? The defect being an imaginary one, amendment is of no use The flaw being a sham, the amendment may be so too: as, on another stage, a sham sore leg is cured by a sham remedy Defect, amendment, argument, deliberation — everything is a sham, but the iniquity and the pillage

Uncured, the flaw would have made business: cured, it makes business likewise. Cure or no cure, what matters it, so it produce equal business?

CHAPTER XV

TENTH DEVICE — MENDACITY-LICENCE.

§ 1. *Mendacity-licence, what.*

THE licence given to mendacity being one of the most efficient articles in the list of jurisprudential devices, it is particularly necessary to be clear and distinct in the explanation of it.

Under the fee-gathering system, falsehood, wilful falsehood, was, by the judge, and the rest of the partnership, found at a very early period to be on many occasions a necessary, and on all occasions a useful, instrument, in their hands, to aid them in their pursuit of the ends of judicature It accordingly became a capital and constant object with them to neglect no means or opportunity of applying it to this its use.

In whatsoever instances falsehood, being known and wilful, appears to have been habitually uttered either by the judge himself, or by others with his allowance or under his compulsion, to the advancement of the ends of judicature, as opposed to the ends of justice, — what is so uttered and done, may be said to be done under the mendacity-licence

The mendacity-licence has been in some instances acted under — in some instances assumed: *acted under*, where the falsehood uttered has been uttered by one of the parties; that is (under the exclusion put upon the parties) by his professional assistants, acting as such: *assumed*, where the person by whom it has been uttered has been the judge himself, or any of his official instruments and subordinates.

The case where it has been assumed, is the case of *fiction* — legal fiction: it will be spoken to under that head.

In the case where the licence has been acted under, it has been acted under either by choice, or by compulsion — compulsion imposed by the judge. In the former case, the licence is a simple licence, created by permission: in the other case, to the simple permission has been superadded a command: a virtual one at least, punishment applied to produce the effect of a command.

In the present chapter, our concern is with the falsehoods which are simply permitted.

When, in regard to a practice of any kind, which on most occasions or to most persons stands prohibited, the intention is, that on certain particular occasions or by some particular persons it shall be practised if they please, — there is no other mode than the taking off, in those particular instances, the punishment, by which, in the other instances, the prohibition is created, or enforced: unless, over and above such forbearance or exception, a declaration were issued, expressly permitting and authorizing the practice in the cases to which the permission was meant to extend itself, an act which, in the case here in question, would be as indecorous, not to say perilous, as it would be needless.

For securing truth, veracity, correctness, and completeness, in testimony (when to produce these effects has really been the wish and endeavour of men in the character of legislators or judges,) the expedient employed has been *punishment* in some shape or other, attaching upon each violation of that important duty

Punishment, in whatsoever way, attached to the breach of this duty, being a known, and obvious, and obviously and confessedly necessary, means of providing for the observance of it, where the intention has been that it should be observed, — wheresoever this necessary means has been forborne to be employed, a presumption not far short of certainty has been afforded that the forbearance has been intentional, having for its object to promote the utterance of the falsehood, by operating as a licence. When it appears that, for a course of ages, personal advantage has been continually reaped from this forbearance by those by whom it has been practised, this presumption is converted into a certainty, or what is little short of it

By mendacity on the part of an extraneous witness, nothing was to be gained by the man of law. On the other hand, by the detection and supposed prevention of mendacity in that quarter, something was to be gained, viz. the reputation of discernment, and of a laudable zeal for justice. Accordingly, by virtue of a general rule, extraneous witnesses were to be subjected to examination — made to give answers to interrogatories — and, by way of a security for the truth of such answers, the sanction of an oath was called in, and punishment annexed to the breach of it. By the

intervention of an oath promising veracity, mendacity committed in breach of that promise was thus converted into perjury — testimonial perjury; and, to the offence thus denominated, a lot of punishment, such as was deemed competent, was annexed.

The case of the parties was in this respect widely different. By mendacity in this quarter, a great deal was to be gained. Care accordingly was taken that the check applied to such practice in the other case should not extend to this. By receiving mendacious statements as grounds for inquiry, inquiries in abundance would thus be instituted — inquiries which, had the mendacious statements been prevented, or the falsehood of them detected at the outset, would not have had existence. Groundless demands on one hand, groundless defences on the another, were thus invited and admitted without stint.*

In the present case, however, for rendering the licence complete and effectual, the mere suspension or abolition of factitious punishment, applied professedly for that purpose, and under the name of punishment, would not have been sufficient. Had the natural system of procedure, and in particular that feature of it which consists in the meeting of the parties at the outset in the presence of the judge, been adhered to, the natural punishment attaching, in the shape of present shame, upon convicted or suspected mendacity, would in no inconsiderable degree have operated with the effect, and supplied the place, of all factitious punishment. The clearing the fee-gathering or technical system of so powerful an obstacle to its success as that initial meeting, was therefore a necessary preliminary to the establishment of the mendacity-licence, over and above its other uses.

From the earliest ages of political society, wilful falsehood, on the part of an individual speaking in the character of a witness for the information of a judge, had met with powerful checks. The utterance of the testimony being accompanied with the ceremony of an oath, the falsehood took the name of perjury, and was punished by the gods: having this mark set upon it, it came to be regarded with horror at least, if not always pursued by punishment, among men. If a statement thus stained, and sooner or later seen to be stained, by falsehood, being exhibited by the plaintiff, were seen to be in danger of experiencing this treatment,—a plaintiff who to his own knowledge had no merits, and whose prospects of success depended on the weariness, or poverty, or absence of the defendant, the mendacity of hired or dependent witnesses, or the imbecility or improbity of the judge, might shrink from the attempt; and so, *vice versâ*, in the case of a dishonest defendant. To encourage enterprise on the one side, perseverance on either, what was to be done? A sham distinction was to be made. To exhibit false testimony, the ceremony of an oath having been employed to insure the verity of it, would indeed be perjury. But what a plaintiff says, what a defendant says, is not testimony, but *allegation*. Not being testimony, the sanction of an oath will not with propriety attach upon it: the sanction of an oath not attaching upon it, be it ever so false, it is not *perjury*. But, not being perjury, it is not anything that has a name. No longer the crime of a man — of an impious and wicked man, — it is little more than the failing, the venial failing, of a child. Refusing to everything that comes either from the plaintiff or from the defendant the name of testimony, and by that means, in case of falsity, the name and tremendous consequences of perjury — withdrawing it, in a word, by that means, altogether out of the reach of punishment, we grant a licence, we annex rewards to mendacity, to what otherwise would be perjury, in so far as it can contribute to the continuance or the number of those contentions by which it thrives.

Divested of that security for veracity, were the discourse of a plaintiff or a defendant recognised as divested of all title to credit, and (as such) unfit to be acted upon in any way, and by anybody, the invention would not answer its purpose. But here comes in another distinction to our aid. Credit is not due to allegation for the purpose of giving termination to the cause: credit, the fullest and most unreserved and unquestionable credit, is due to it, and shall be given to it by us, for the purpose of giving continuance and commencement to a cause. Were we to see, and to be known to see, that what the plaintiff, at the very outset of his demand, says in support of it, is void of truth, there could be no pretence for calling upon the defendant to make answer to it. At so premature a period, therefore, let it be our care to know nothing about the matter; to rest in convenient and impartial equipoise; to take it for true and not true: for not true, to the purpose of giving, in favour of the plaintiff, a termination to the cause; for true, to the purpose of calling upon the defendant for an answer to it: which in the same manner shall be both true and not true; and so, by the blessing of Providence, giving continuance to the cause.

Comparing allegation with testimony, it is curious enough to observe the difference between appearance and reality — between what is said to take place, and what actually does

* Plaidoyers de Linguet, vii. 347. Memoire pour de Gouy. "Il faut se rappeler avec quel mépris. . . . les tribunaux rejetoient ces articulations vagues, dénuées de probabilité, de circonstances, et qu'on ne hasarde si librement que parce que les loix n'y attachent d'autre peine que le défaut de succès."

take place. According to the language, and perhaps the conception of the man of law, nothing is done by the law without proof; mere allegation without proof goes for nothing. In reality, allegation without proof has more effect, is much surer of its effect, than proof itself — than proof of the nature of testimony, than proof by deposition, for example. Of what is ranked under the names of proof, deposition, testimony, the effect depends altogether upon its being believed disbelieved, it has not any, upon the conduct of the judge, or the fate of the adversary Of what is delivered in character of allegation, mere allegation, the effect is exactly the same whether it be believed or no

Where the suitor and his professional assistants behold in the employment of such licence a means (especially if the only means) of pursuing their respective ends,—if, in their respective bosoms, the force of the improbity-restraining interests be not sufficient to restrain them from the pursuit of the ends in question by such means, their availing themselves of the licence is a result that follows of course.

Where (on whatever prospect of advantage) a man proposes to himself to prefer against another a demand, of the groundlessness of which in point of fact he himself is conscious, if, at the same time, according to the formularies in use on that occasion, it is necessary that on that occasion he should utter any assertions (general or special) which, the demand being groundless, fail in some respect or other of quadrating with the truth, in such case, falsehood in some shape or other is necessary, both to him and to his lawyer, in the pursuit of their respective ends for, without the falsehood, the suit, by the supposition, could not be carried on the client would therefore stand debarred from the advantage, whatever it be, which he looks for from the suit; and the man of law, from the profit attached to the sale of his assistance

On this occasion it is not necessary to be particular in the delineation of the various shapes in which advantage from demands known to be altogether groundless may present itself, and be reaped. If the object demanded possess of itself a value, possession of that object will constitute the advantage. If the object demanded be even altogether destitute of value, still, under the technical system, it follows not by any means that the suit should not be provided with any substantial and intelligible advantage Is the defendant in a state of comparative indigence? he may be ruined. Is he opulent? be he as opulent as Crœsus, he may at any rate be tormented.

So, if the professed object be the real object of the suit, and the value of it considerable to any amount, means are not wanting by which, without the shadow of a title, it may be possessed. If the defendant be at once rich and resolute, it may happen that nothing less than perjury may present an adequate prospect beforehand: but, if his condition be that of relative indigence (that is, if it surpass not the condition of nine-tenths of the people,) perjury may be a mere waste of wickedness and danger the mere expenses of defence, natural and factitious together, (especially with the help of a timid frame of mind,) may be sufficient to ensure success.*

§ 2 *Mendacity-licence, in what cases granted.*

In certain cases, in regard to certain instruments and discourses, it suited the interests of the partnership that the liberty granted by the mendacity-licence should have place, that mendacity should go unpunished; in certain other cases, not When it suited their interests that it should be more frequent, they encouraged it, when it suited their interests that it should be less frequent, they discouraged it

The effect of the licence may be considered as produced in either of two ways. — 1. The allowance general — the prohibition and punishment particular, and operating in the way of exception to the general rule, or 2. The prohibition and punishment general, and the allowance particular, operating in the way of exception to that general rule It may be considered as constituting the exception, or it may be considered as constituting the rule

Mendacity, to all who have not a special interest in the promoting of that vice, is a thing so odious, — and, to every eye but a lawyer's, so intimately connected with in-

* Of this licence to mendacity, and, through mendacity, to oppression — to the most flagitious of all oppressions, that which is inflicted by the hand of law, — it is almost superfluous to say that it is no secret to those by whom and to whose profit it is suffered to continue. It has neither been always unfelt, nor always unopposed, by the legislature.

In the particular case of debt, an act was passed some time in the last century, requiring the plaintiff, as a condition previous to his being allowed to employ provisional arrestation as a means of securing the justiciability of the defendant, to aver upon oath his persuasion of the justice of his demand.

Wretchedly imperfect as was the check thus opposed to licensed oppression, it was felt by those by whom the profit of the oppression was shared, as a most cruel injury. At a distance of many years, the recollection of it (I shall not easily forget it,) drew once in my presence, from the breast of a veteran practitioner, a sigh, the sincerity of which could not admit of dispute. Ay, those were times indeed! The first merchant in London might then have been carried off from the 'Change, and consigned to a prison or a spunging-house, by any man, who had neither the smallest claim upon him, nor ever so much as conceived himself to have one.

justice, so hostile to justice,—that, in regard to every sort of discourse bearing relation to justice, the obvious course seems to be, to regard the prohibition of mendacity as constituting the general rule, the allowance as an exception—a rare, unheeded, unintended, and even unwelcome and lamented, exception. Yet, in comparison with the cases in which prohibition and punishment bear upon it, so great is the extent of the cases in which neither punishment nor prohibition, nor anything but encouragement (sometimes by simple permission added to the natural advantage, sometimes even by positive compulsion) bears upon it;—in a word, the exception (if it be one) is so extensive; that a man may well be at a loss on which side to place the rule.

On this occasion, as on every other, the problem was (as we have seen) how to produce most profit, with least infringement upon ease.

Exaction of heavy fees (heavy, with relation to the general pecuniary ability in those early times, when money as well as money's worth was so scarce,) had the double effect of increasing profit and diminishing labour at the same time: increasing profit, in proportion to the number of those who, being able to pay the price, take upon themselves the expensive character of suitors; diminishing labour, in proportion to the multitude of the vulgar herd, the bulk of the people, who, unable to pay the price, gave up their chance for justice.

The quantum of profit, which on each occasion it might be worth while to accept from each suitor in the shape of fees, being thus settled—the price of the commodity being thus fixed,—the greater the number of those who put in for their chance for it, the better.

The first idea seems to have been, that, the more universal the allowance to mendacity was, the better. The first arrangement accordingly appears to have been that of an universal mendacity-licence to all mankind: no distinction as yet in that respect between parties and extraneous witnesses. The proof is, that afterwards,—when, in the case of an extraneous witness, mendacity came to be punished,—punished it then was, as still it continues to be, no otherwise than through the medium of the ceremony of an oath: no oath, no perjury—no perjury, no punishment for mendacity:—and, in the time of Edward I.* at any rate, and probably for centuries later, no such ceremony as that now in use under the name of an oath was employed—employed in the common-law courts, on any such occasion as that of receiving the *vivâ voce* testimony of an extraneous witness. At the same time, no want of mention of perjury; but the perjury then in question was the perjury of the juror, of the judge, of this or that other official person—of anybody but the witness.

This in the common-law courts. Meantime, the ecclesiastical courts were in vigour: and they, taking their law from papal Rome, (in which the profit, of which writing is so fruitful, had always been made the most of,) went on administering testimonial oaths, and punishing the breach of them under the name of *perjury*.

From this practice, compared with the common-law practice, the idea of a sort of composition or middle course seems to have been deduced: a happy temperament, increasing the number of *bonâ fide* demands and defences, without diminishing the number of *malâ fide* ones.

If we administer an oath to the parties, and thus, in case of mendacity on their part, punish them as for perjury, the truth will come out at the first meeting, and there will be an end of the cause: no lying excuses, no perpetual renovation of delays and fees by alternate absentations.† Let us, therefore, confine the oath, with its eventual punishment and present discouragement of mendacity, to extraneous witnesses. These need not, shall not, come upon the stage, till the fifth act: leaving the four first acts for the torment and pillage of the parties, whose averments, being open to the objection of *interest*, and being not upon oath, shall no longer, in the character of testimony, be listened to. Giving this new security for veracity, and thence for justice, we shall increase the honest part of our custom, without prejudice to the dishonest part; we shall increase the number of our *bonâ fide* customers, whose expectation of success being founded in truth, they will, in the security thus given for truth, behold an increased probability in their favour. Continuing to allow to the averments (true or false) on the plaintiff's side, the effect of giving commencement to the suit, in confidence of the inability of the defendant to go on with it,—and, on the defendant's side, that of giving continuance to it, for the purpose of staving off the evil day, or in confidence of the plaintiff's inability to go on with it,—we shall experience no diminution, no equivalent diminution at least, in the number of our *malâ fide* customers.‡

* Mirror, Ch. iv. § 19.—*Ed.*

† *Vide infra*, p. 269.

‡ Of an arrangement which, for the purpose of securing the commencement and continuance of a suit, admits the testimony of a man without any security for his veracity, while, for the purpose of grounding the decision which is to give termination to the same suit, it refuses to receive the testimony of the same person under any security or in any shape, the inconsistency and ini-

Thus stood the matter in the common-law courts. Meantime, the equity courts, a new class of courts peculiar to England, hit upon a further refinement, a yet more extended application of the oath: a further increase to the number of *bonâ fide* litigants on the plaintiff's side, and still without any equivalent diminution in the number of *malâ fide* litigants on either side.

The practice of writing had, by this time, received considerable extension writing, the fruitful mother of fees, had become familiar to the man of law.

Let us give to the *bonâ fide* plaintiff (said they) the advantage of extracting from his adversary, under the sanction of an oath, his unwilling testimony — on condition that the examination shall not be performed *vivâ voce* in our presence (in which case, the cause, being ended almost as soon as begun, would afford no fees,) but in writing, and that on both sides: reserving to the *malâ fide* plaintiff, whose object is to oppress his less opulent adversary by the weight of vexation and expense, the faculty of telling a story, which, as often as he has no sufficient truth to ground it upon, may be groundless, but which, on the supposition of its being true, might afford a just cause for the commencement of the suit. Let the plaintiff, by his *bill*, tell his story (the longer the better,) and put his questions (the more of them the better,) in writing, and not upon oath: the defendant, by his *answer*, gives his responses, and, in giving them, tells his story (the longer the better) also in writing, but under the sanction of an oath.

All this while, it is only from one of the parties that there will be any chance of truth: as between those two, the truth may be half told, but it will be no more than half told. So much the better: if it be the misfortune of the defendant to stand in need of the testimony of the plaintiff, this gives the benefit of a cross cause, in which the parties exchange characters: the defendant of to-day, the plaintiff of to-morrow: another bill, another answer, another cause.

Had the examination been performed *vivâ voce*, by the one party on the other, in the presence of the judge, each being as much present as the other — both causes, original cause and cross cause, would have been dispatched at once both of them would have been as good as lost to us.

Lawyer. — Mighty fine all this, in good truth! But what is it you have been about all this while? You have been confounding two quite different things, *assertion* and *proof*, pleading and evidence and on this confusion rests your argument *Evidence* is worth nothing without oath accordingly it is never received but upon oath. But *pleading* is not *evidence*. what need therefore of its being upon oath?

Non-Lawyer — Pardon me: nothing has been confounded that the nature of things has separated Proof, that sort of proof which consists of testimony, what is it but assertion? and *assertion*, if it be pertinent, and sufficiently particular as to time, place, and so forth (the assertor speaking of the fact as being the subject of his belief, or having come within his own knowledge,) — assertion, come from whence it will, what is there in it that should prevent it from being received as evidence?

No, sir it is not by the nature of things, but by your partnership, and for the purposes above stated, that the distinction has been made Call it *evidence* in one case, call it *pleading* in another, it is still neither more nor less than assertion in both cases. Whence then sprung the distinction? From the views which led the partnership to grant or continue the mendacity-licence in one case, to withhold it in the other. Where the licence was to be granted, assertion became *pleading:* where the licence was to be withholden, assertion was *evidence.*

Lawyer — And so, sir, you have persuaded yourself, or wish to persuade others, that what you are pleased to call the mendacity-licence extends to every assertion that belongs to the head of *pleading*, — to every assertion that does not belong to the head of evidence? Know, sir, then, that in a number of cases, in equity, as well as at common law — in short, wherever it has been thought proper (which is as much as to say wherever it is proper) — the sanction of an oath has

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quity is as flagrant as the motive is obvious. In one case, going on with the suit, after it has been commenced by the averment of the plaintiff, will cost the defendant, say £50. To the purpose of subjecting the defendant to this burden, the bare assertion of the plaintiff, without oath, without fear of punishment for perjury, in terms the most vague that can be devised, and without so much as his signature to fix it upon him, is not only admitted, but made conclusive: no evidence on the other side by which this effect can be stopped. In another case, or in the same case, the matter in dispute not amounting to £5, — to the purpose of giving termination to the suit, by proof of the matter of fact in question, the assertion of the same person under oath, under fear of punishment for perjury, in the most pointed and explicit terms, under the security afforded by cross-examination, is not admitted on any terms: neither amidst other evidence on the same side, nor subject to opposition liable to be given to it by evidence on the other side. Inconsistency enough to arrest the boldest hand, were the device to be grafted alone, upon a system directed to the ends of justice. But, in comparison with the other enormities with which the system swarms, this particular one is so inconsiderable as to have been generally passed by without notice. Gullets exercised with the swallowing of camels, do not stop to strain at gnats.

been required to be attached, and is constantly attached, to assertions made by a party: made by a plaintiff as such, and coming on in the course of the pleadings, and not of evidence. There is the affidavit annexed to the bill of discovery, there is——

Non-Lawyer.—Yes, sir, there they are indeed: there they are in the books, you need not trouble yourself. But do you think the credit of your partnership will be much served by these exceptions, these thinly scattered exceptions? Verily, verily, they do nothing better for you than (to use your own expression) the fixing you with notice. By what reasons will you justify yourselves in withholding the licence in these few cases? By none, though you were to look for them till doomsday, but such as condemn you for granting it in the rest: such whereby, in every case in which you have granted it, your conduct stands condemned.

It is not, then, but that the necessity there is of the same security for truth in the one case as in the other, is sufficiently understood among you, and has been over and over again brought to view. What you do, then, for the encouragement of falsehood, of that falsehood which is so profitable to you, you do with your eyes open: and whatsoever forgiveness you may ever hope for, it will not be on the ground of your not knowing what you do, that you can expect to obtain it.

In a word,—call it pleading, call it what you will,—in the whole course of the cause, from the writ to the execution, there is not one assertion made, there is not a scrap of paper or parchment scratched upon, to which the effect of evidence is not regularly attached. Take the writ: it is on the ground of the assertion contained in it (or on no ground at all,) that the defendant is compelled to *appear*, as you call it, that is, to employ an attorney: and so on, till the cause has run its course. Take the declaration:—it is on the ground of the assertions, true and false, contained in it, that the defendant is compelled either to put in his *plea*, and so on, through the several operations prescribed to be performed on his side of the cause, or, in failure of any of them, to lose his cause,—that is, to be put in as bad a condition as he could have been put in by any the most conclusive mass of evidence.

And now, sir, say, if it be your pleasure, say, if it can be of any use to you, that pleading is not evidence.

If, when thus applied, the word *evidence* be altogether insupportable to learned ears, imitate the admiring critic, who, speaking of Pope's Pastorals, confessed they were not pastorals, but said they were something better: say that it is not *evidence*, but something more conclusive.

Carelessly as the account of the sins of the partnership is kept by the public mind; still, as the account swells, this or that device must every now and then be practised, for the purpose of rubbing them out, or covering them.

Flaming indignation, for example, kindled by a *sham plea;* and a miserable attorney, made into a scape-goat, immolated in great ceremony. A sham plea! as if, in the whole chaos of pleas there were a single plea that, under the mendacity-licence, in the mouth of any one who thought fit to employ it as such, might not equally be a sham one.

The plea, too, thus singled out for infamy, what is it? It is one of the least guilty ones: a lot of gibberish, by which the intended effect, *delay*, is produced, at the expense of a few words, and the profit upon those few words. Were it a hundred times the length, such as the arch-sacrificator has drawn a hundred times over with his own sacred hands,—a hundred times as long, and equally void of truth,—it would not be called a *sham* one.

If, in any instance, there be anything worse in a plea called a sham plea, than in a plea not put upon the sham list, it is this: viz. that (the sham plea so called being capable of being interposed between the declaration and the sham plea not so called, while those of the latter stamp cannot be thus added *ad libitum*) the lesser plague, though by itself the lesser, is so much superadded to the greater one. This supposition, is it often, is it ever verified? Inquire who list, that have curiosity and patience.

Of this grimace, what is the practical lesson—the *learn we hence*, that John Bull is to lay up in his mind? A preachment on the text, by which any abuse at pleasure is metamorphosed into a blessing; *Corruptio optimi fit pessima.* The system perfection, as far as anything human admits perfection; the system perfect, but man frail, and some men are attorneys. The rules admirable, but irregularities, violations of these rules now and then committed: everything good ascribed to the rules, everything bad to the violations

To keep up the delusion of the people, and maintain in their bosoms the habit of ascribing to the arbiters of their fate that love of justice, the existence of which, in such a situation, is not in human nature,—it was necessary that, from time to time, the appearance of punishing iniquity should be kept up; and that here and there a delinquent, though a partner in the firm, should be sacrificed in ceremony on the altar of offended justice. But to take the victim from that class of lawyers from whom the judges themselves are taken, would stamp a mark of suspicion, at least, upon the judicial character itself. Matters are accordingly so ordered, that whatever mal-practice, recognised as such, takes place, shall be the act of the attorney; and whatever profit is to be derived

from mendacity and iniquity, shall drop pure into the lap of the advocate, without danger or punishment, even in the shape of shame. The attorney is thus made to act the part of scape-goat, for the benefit of the advocate, and through him, of the judge.

What is the plain truth? That the system is rotten at the core: that the system is the cause of almost every iniquity practised, almost every suffering sustained: that whatever is done amiss by any of the partners in the firm, is to be ascribed, not to the individual, but to the partnership itself: that, when the attorney is wicked, it is for the same reason that his censor, or any one else, is wicked, — because the system makes him so. and that, as to the rules, the mischiefs of violation are as nothing, compared with the mischiefs of observance.

If there were any use in quarrelling with water for running downwards, or with sparks for flying upwards, against which of the two classes should men direct their reproaches on this score? Against the class which acts under this system? or against the class that sits above it and upholds it? Against the class which knows not what it is, to find itself within the bar of either house? or the class which divides its time between the woolsack and the bench? Against the class against which the eye of constant suspicion points itself? or against a class to whose words all ears are attention, all hands obsequious?

To estimate the true temperature, if it were worth while, of the indignation excited by a sham plea, inquire whether the judge by whom you see it manifested, is not of the number of those who know their way to parliament. If yes, observe, that, to bar it out, with all its fellows, there needs nothing but an oath; that familiar, too familiar, instrument, by which so many of its fellows have been barred out already. Think of this: then draw your inference.

§ 3. *Uses of the mendacity-licence to Judge and Co. without the help of writing.*

In the use made of the mendacity-licence, two distinguishable applications may be noted: one, independent of the art of writing, the other, grounded on the practice of that art, and proportioned to the abuse of it. Not but that, in the cases where, even without the help of that art, the licence might, with reference to the partnership, have had its use, that use has, from the abuse made of the art, received prodigious increase.

The use that is not absolutely and completely dependent on the practice of writing, is that which consists in the encouragement and consequent birth given to *malâ fide* litigation — litigation which, on the part of the *malâ fide* litigant, is accompanied with the consciousness of the injustice of his cause.

In litigation, the *mala fides* may have place either on the side of the plaintiff, or on the side of the defendant.

Wherever, to subject an adversary to the vexation and expense of a course of litigation, nothing more is requisite than a bare assertion, unaccompanied with any security for the truth of it, — any man, at the mere expense of a lie, has it in his power to subject any other at pleasure to whatsoever vexation and expense it may be in his power to introduce into that distressful state, and that without so much as a shadow of right, as easily and safely as upon the clearest title.

The plaintiff, it is true, cannot engage the defendant in that course, without first plunging into it himself, but the quantum of vexation and expense attached to it on one side, compared with what is attached to it on the other, is susceptible of all manner of proportion: and a man will not engage in it in the character of plaintiff, but in those cases in which, comparing the probable amount of his own vexation and expense with that of the proposed defendant, he sees in it a prospect of clear advantage to himself upon the whole: and to the possible number of these cases there is no limit.

Require of him an assertion, of one sort or another, according as the particular facts on which he grounds his demand are or are not represented by him as having fallen under his own immediate cognizance, exacting from him, at the same time, for the verity, or at least for the veracity, of such his assertions, such security as in other cases (for example, in the case of an extraneous witness) is regarded as sufficient, you thus nip in the bud all *malâ fide* demands: the comparatively few excepted, in which, for the chance of the coveted profit of successful mendacity, a man will be content to subject himself to the risk.

In like manner if, at the like small expense, any man at whose charge a burdensome service of any kind (payment of a debt for example) is demanded, has it in his power to oppose a temporary bar at any rate, with or without the probability of a perpetual bar, to the burden sought to be imposed upon him (to the burden, for example, of paying such debt,) the licence so given to dishonesty is (for the time for which it holds good) complete and universal: as truly so as any other licence can be rendered so by law.

Exact, on the contrary, from the defendant's side, an assertion correspondent to that just spoken of in regard to the plaintiff's side, together with the like security for veracity, —you make, in the number of *malâ fide* defences, a reduction proportionable to that made in the number of *malâ fide* demands in the other case.

All this is at the same time so perfectly incontestable and so extremely obvious, that it

may be pronounced morally impossible that those judges, who, at an early period of jurisprudential history, exempted parties from the obligation imposed, in respect of veracity, upon extraneous witnesses, could have acted with any other view than that of giving the encouragement, the immense and too efficient encouragement, which has been received and acted upon by profitable injustice.

There is no practice so mischievous, to the flagitiousness of which, by habit, mankind in general, and especially those who profit by it, have not been rendered insensible. What they do not see (because, by turning aside from it, they take care not to see it) is the mischievousness of the practice: what they do see is the practice itself; that custom, which constitutes the only immediate standard of right and wrong in the eyes of the generality of mankind.

Without the use, and antecedently to the general practice, of the art of writing, an advantage might, for the purposes of injustice, be made of the mendacity-licence, on both sides of the cause.

On the plaintiff's side (for instance,) where his own abode was in the neighbourhood of the court, while the defendant's abode was at a great and inconvenient distance.

On the defendant's side, the advantage had beyond comparison a much greater, indeed an infinite latitude. Under the licence, the utmost that a *malâ fide* plaintiff could do in the way of injustice and oppression, was to subject him, in the article of journeys and demurrage, to a proportionable burden, in the shape of vexation and expense: whereas, in the character of defendant, a man who had by injustice possessed himself of property to any amount, might, with the benefit of the mendacity-licence, and with the assistance of the judges by whom it was granted, maintain himself in possession of such property for any length of time.

Accordingly, in the practice designated by the name of *fourcher par essoign* — decision staved off by two defendants coming each day with a sham excuse in his mouth, and taking care never to appear both on the same day, —we see a contrivance suited in its grossness to the grossness of the age; but by which, even without any assistance from the abuse of writing, judges had established themselves in the habit of keeping an open shop for the sale of any man's property to any other man who would pay their price for it.

Essoign was the name given to an *excuse* for not appearing. Sham excuses, known to be such, were regularly admitted by the judges. To any man who, in reading Glanville, Hingham *magna*, and Hingham *parva*, but especially the two Hinghams, has the courage to open his eyes, this will be clearly visible. In the character of joint-defendants, suppose the usurper of your land and a man of straw, whom, in the character of former proprietor, he called in to warranty. Two of these sham excuse-makers, joining together, made an engine, called, in the technology of that day, *fork (fourche.)* by the help of which a man who had got possession of your land was admitted to stave you off for any length of time. *Fourcher par essoign* was the name given to the operation. When A appeared, B kept out of the way: when B appeared, A did him the same good office. If thus much could be done by a fork with two prongs, judge what might have been done with a fork of two or three dozen, or two or three score of prongs, such as they have now in equity.

Is it possible to imagine, that, if the judges themselves had not been in the plot, they could have suffered themselves to be deceived, and justice paralyzed, by so gross an artifice?

This was when jurisprudence was raw and young: so that, when once the parties were met together in the presence of the judge, the cause was at an end, pretences not having been invented for delaying any longer to do justice.

When, by one such artifice or another, generation after generation had been squeezed and kept in torture, so that the grievance was grown past all bearing, the legislature would now and then interpose, and say that such things should be done no longer:* whereupon things went on nearly as they did before; the worst that could happen to the contriver of iniquity, being the trouble of putting her into new clothes.

Drive nature off (says the poet) with a pitchfork, she will run back upon you. Justice, under the management of these judges, was not thus obstinate. It required an act of Parliament† to say that there should be no more such *fourching*.‡

To understand the structure of a watch,

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* *Vide supra*, the case of manufactured outlawries, p. 254.

† See Note to the title "Warranty," in Butler's edition of Co. Lit.—*Ed.*

‡ In reading of the remedies applied from time to time by Parliament, in those early days, to the abuses of judicature, remedies never curing, oftentimes aggravating, the disease, it is seldom possible, at this time of day, to discern, or even to conjecture, how far the men of law acted in the character of open oppugners, how far in that of authors or supporters, of the so-called remedy. In the application of it, iniquity under the name of jurisprudence having been swelled into a science, it was impossible that, among the efficient members of the government, the non-lawyers should have been able to stir a step, to pen a clause, without calling in, in the person of a colleague or subordinate, the assistance of the lawyers. The lawyer (according as the understanding of the non-lawyers he had to deal with admitted, and his own dexterity enabled him) would of course do what

each particular wheel must be separately viewed, and its office separately considered. To obtain a clear and satisfactory conception of the system of technical procedure, it was accordingly necessary that each separate device should be separately brought to view, and the advantage, to the production of which it was of itself and by itself competent, separately displayed.

Between the mendacity-licence, and the abuse of writing in the shape of ready written pleading, the combination was most intimate Closer than mechanical combination, it required a sort of chemical process to dissolve it, and present the elements in a separate state.

Thus much as to what could be done, and has been done, by the mendacity-licence alone. The great improvement given to the virtue of this element by the addition of the other, will be seen in the following chapter.

CHAPTER XVI

ELEVENTH DEVICE — READY WRITTEN PLEADINGS

§ 1. *Idea of a system of pleading adapted to the ends of justice.*

SHOULD justice ever become an object, a system of pleading might be devised, which, creating no delay, and giving no mendacity-licence, should at the same time give real information to the parties, and bind in chains the despotism of the judge.

He who has a right to any subject of property,— immoveable or moveable, sum of money to be paid him by some one else, service of any other sort to be rendered by a determinate individual, — is he in whose favour some one in the list of *events* or *states of things* having, with reference to that right, the effect of *collative* (or say *investitive*) events or states of things, has taken place: no article in the list of those to which, with reference to that same right, the law has given the effect of *ablative* (or say *divestitive*) events or state of things, having subsequently taken place in his case.

The nature of the subject of property, or of the right, so demanded (ideas never having been clear, language on this head is not determinate,) determines the nature of the service which is the immediate subject of demand the service which the plaintiff prays may be rendered to him by the judge.

General description of the proper contents for the *instrument of demand*. correspondent to the declaration at common law, the bill in equity · —

1 Specification of the service demanded at the hands of the judge, including, of course, where property is in question, a specification of the subject-matter of the property.

2 Indication of some one collative event

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depended upon him towards diminishing the efficacy of the medicine, or converting it into a poison. In this state of the human understanding on both sides, it is evident that, in the long run, taking the whole of the course together, it was impossible for the non-lawyer, the real friend and patron of the people in the character of suitors, to avoid being jockeyed by their sham friend and implacable enemy, the lawyer.

In one case indeed, and (as already mentioned) but one, a sincere co-operating hand may have been lent, even by the lawyer, to the correction of abuse: and that is, where, but for correction, the abuse threatened to swell to such a pitch as to produce destruction; the dissolution of society, or the destruction of the lawyers themselves: the dissolution of society altogether, by general denial of justice originating in the rapacity of the lawyers, supposing their wickedness not discovered; or the destruction of the lawyers themselves, supposing it seen through and discovered.

In the course of Cook's intercourse with the friendly savages, such were the charms of the Circes he found among them, and such the force of attraction exerted by them on the hearts of his crew, that, by the general eagerness to collect the precious metal that constituted the price of their favours, the very constitution of the ship was put in jeopardy.

It is among the evils of the technical system, among the misfortunes attending the relation between the law partnership on the one part, and the people (in the character of clients and suitors) on the other, that, to produce a petty profit to the judge, vast loss and still greater mischief in other shapes must on each individual occasion be done to the suitors. The fees squeezed by lawyers out of the purses of insolvent debtors and their sinking creditors, must every now and then have been like the nails drawn by Cook's sailors out of the sides of a ship, which a few more of such draughts would have sunk.

Treated like what it really has been — has been all over the civilized world, a perpetual conspiracy of lawyers against the people, the history of jurisprudence might, besides the amusement, be made no less instructive than the history of other conspiracies. For the jurisprudence of Rome, something has already been done in this way by Pilati One of these days, should the popular eloquence and grammatical talent of Blackstone be ever united in the same pen with the sagacity and probity of a father Paul, this entertainment may be given to the world. Deserting the beaten track of conscious hypocrisy or blind servility, the adventurer in this department of literature may here strike out a new path to fame.

In pointing out the artifices of priestcraft, what multitudes have already exercised themselves! The artifices of lawyercraft have been not less numerous, not less successful, not less wicked; yet scarce has any hand yet lifted up so much as a corner of the veil that covers them!

Near 300 years has religion had her Luther. No Luther of jurisprudence is yet come; — no penetrating eye and dauntless heart have as yet searched into the cells and conclave of jurisprudence.

(or more, if by accident there should be more than one,) on which the plaintiff grounds his title to that service.*

Reference to the article or articles (say for shortness the article) of the body of law, on which the demand is grounded; viz. in which the right or title to a service of the sort in question is given to him in whose favour a collative event of the description in question has taken place. *Assertion of the matter of law.*

Affirmation (on oath, or what is equivalent) of his belief of the happening of an individual event, coming under the description of the sort of collative event above indicated. *Assertion of the matter of fact.*

3. Reference to the article of law, by which, in relation to the same service, the quality of ablative events is given to a list of events therein contained.

Affirmation, that no individual event, coming under the description of any one of the events in that list, has, to his belief, taken place in this instance.

This (with the occasional addition of so much incidental matter as we have seen) is what comes out of course, at the judicial meeting spoken of under the head of the *exclusion put upon the parties.* Such is the stock of information required, of course, by the judge, to warrant him in rendering the service prayed for: such is the information which will of course be given by the plaintiff himself, by every plaintiff, in so far as his intellectual qualifications serve him for the purpose: such is the information which, in case of any deficiency in these qualifications, it will belong to his professional assistant, if any such be present, to draw from him — or, if not, to the judge.

According to the importance of the cause, in itself, or in the estimation of either of the parties (he paying, provisionally at least, the extra charges, should the importance of it be deemed to have no other ground than the particular state of his own particular affections,) *minutes* will therefore be taken, or not taken, of this part (as of other parts, if any) of the evidence: but at any rate a printed form, with proper blanks, will be filled up and signed by the plaintiff, to serve, *pro tanto*, the various purposes, private and public, of a record.

Lawyer. — Mighty well; but all this, does it not suppose two things? — a correspondent mass of what you call substantive law, on which this course of procedure is to be grounded, and to which it seeks to give execution and effect; and that mass of substantive law in the state, not of common, but of statute law?

Non-Lawyer. — Doubtless it does.

Lawyer. — And so, according to you, there can be no such thing as *good pleading*, without a complete body of laws in the form of statute law: that is, without the extirpation of the good old common law, the pride of ages, the Englishman's best treasure!

Non-Lawyer. — Say rather, if you please, the English lawyer's: but, as to that point, be pleased, if you have any curiosity, to restrain it till you come to the device spoken of under the head of *magnification of jurisprudence.*

Lawyer. — And so you look upon it as possible, do you, sir, to compose a complete body of statute law, extending over all causes, as well as over all persons?

Non-Lawyer. — Indeed do I, sir; and, for these fifty years or more, the more I have thought of the task, the greater does the facility of it appear to me. Not a cause is ever decided, or so much as begun, but all this, though never done, is supposed to be done. Which, according to you, is productive of most labour and most difficulties? — to form an article of real law once for all; or, by an endless series of suppositions never realized, to make it over and over again in imagination, — to make so many sham substitutes to it? If the difficulty be insuperable to a select draughtsman, appointed by the legislature, subject to correction from all mankind, under the authority of his employers — one who may have been occupying a whole life in thinking of it, — how comes it to be so easy for every attorney, special pleader, or attorney's or special pleader's clerk, to be continually imagining such laws as fast as called for?

Among the objects which it may be necessary for the judge to have under review, to enable him to compass the ends of justice, may be noted three; the description of which it will in all cases be useful, in some absolutely necessary, to have in a fixed form, given to them by means of the act of writing; viz. the demands on both sides; the titles, or grounds of demand, on both sides; and the evidence: —

1. On the part of the plaintiff, a description of the demand in this permanent form is in general necessary for the use of the judge; to the end that, in the event of its being acceded to by him, the decision, the judgment, pronounced by him, and the execution of that judgment, may be sure to be correspondent to it.

2. The same reason applies to any demand that may happen, in the course of the cause,

* Where punishment or satisfaction at the charge of the defendant is the service demanded, the list of collative events will be the list of *criminative circumstances* attached to the definition of the offence; ablative, or what are equivalent to ablative events, will be the list of *justificative*, and (if any) that of *exemptive*, circumstances.

to be brought forward on the part of the defendant: since, in case of any such counter-demand, he takes upon himself, *pro tanto*, and in respect of it, the character of plaintiff.*

3. On the part of the plaintiff, again, a designation of the title, or ground of demand, in this same permanent form, if not at all times necessary to the judge, would be more or less useful to him; to enable him (in so far as reflection for any considerable length of time may be necessary) to reflect upon it, without danger of mis-recollection, at his leisure.

This in the case of him who acts as judge in the first instance But, in case of dissatisfaction on either side, and appeal accordingly to another court (especially if the propriety of the conduct of the judge below is to be among the subjects of inquiry,) these fixed designations will be little less than necessary The demand actually acceded to by the judge, is it of the number of those that, according to law, are, if supported by appropriate titles, capable of being acceded to? The title on which the accession given to the demand was grounded, is it of the number of those to which the law has given the faculty of serving as a support to that sort of demand?—To enable the judge above to give a surely-grounded answer to these several questions, it seems little less than necessary that of each of them there should be a description, reduced to that permanent form which excludes all dispute about the words, and enables all persons concerned to refresh, at any time, whatsoever conceptions they may respectively have formed of it.

4. That on both sides of the cause the evidence should be invested with the same permanent character, will always be at least conducive, if not absolutely necessary, to the ends of justice; for two distinguishable purposes: — 1. That, in case of mendacity, the alleged matter of delinquency, the subject or ground of prosecution, and eventually of punishment, may be ascertained beyond dispute, 2. That eventually, in case of dissatisfaction, as before, it may be seen, upon occasion, how far the decision professedly grounded on the evidence, was really warranted by it.

Such are some of the principal of the purposes with reference to which the exercise of the art of writing promises to be in all cases useful, in some cases little (if at all) less than necessary to justice, in the course and for the purpose of the suit.

But, howsoever necessary it may be at some stage or other of the cause, its employment to the exclusion of the meeting *coram judice* where practicable, at the outset of the cause, will not be found necessary, or so much as conducive, to justice.

With reference to both points, viz. the *demand* (i. e. the particular nature and description of the *service* alleged to be due,) and the *title* (i e the ground of the demand in point of law and fact, as above explained,†) misconceptions and consequent mis-statements on the part of the plaintiff (unblameable as well as blameable) are apt very frequently to arise

In so far as the true nature and propriety of his demand depends upon his own personal cognizance of the facts in question, such incorrectnesses might, in case of due attention, or at least in case of consummate and perfect intelligence, on his part, be avoided. But, in so far as it depends upon the personal cognizance, and thence on the testimony, of an extraneous witness, the most consummate wisdom on the part of the suitor would not suffice to render the exclusion of them in any degree secure Still less would be the chance of their being avoided, where the source of the necessary evidence is the reluctant bosom of the adverse party in the cause

Delivered in the face of the adverse party, as well as in the presence of the judge, a misstatement of that sort may receive its correction the next instant mis-statements in any number may receive their correction at the same minute delay, vexation, and expense, avoided altogether. nothing of which a dishonest adversary can take advantage, so as to render the fulfilment of a plaintiff's demand either distant or precarious.

Let the discussion be carried on in writing —even suppose the defendant honest—a single mis-statement of this sort cannot receive its correction till the length of time alloted for the defendant to put in his plea is run out — a length to which there are no certain limits. But technical law (especially English law,) if it does not find a man dishonest, is almost sure to make him so, if he has anything to gain by dishonesty. under the tuition of his professional advisers, he accordingly lies by, and suffers the mis-statement to pass uncorrected: consequence to the unfortunate author, or rather utterer, of the mistake, loss of the suit — of that individual suit, at any rate liberty or not, as it may happen, to bring on and go through with another, if so it be that he feels himself rich and bold enough.

What is necessary to justice is, that communications of this sort should respectively be made: what is not necessary is, that they should be committed to writing before they are made.

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* Thus in English procedure, in the case of *distress*, on one hand, and *avowry* on the other, distrainer and avower are recognised as acting, each of them, in the character of plaintiff. See Comyn's Dig. Art. *Pleader*.

† *Supra*, Chap. VI. *Exclusion of Parties*.

§ 2. *Pleadings in use, their modifications.*

Pleadings (understand ready written, delivered in the form of writing in the first instance,) is the term employed to designate any masses of discourse delivered in that form, and purporting to contain allegations made by the parties on the occasion and in the course of the cause.

In English technical procedure, they are distinguished, according to the courts under the judicature of which they are delivered, into common-law pleadings, and equity pleadings.

In each court again they are distinguishable into general pleadings and special pleadings.

I. At common law. In a cause of the class called civil causes (*i. e.* not considered as criminal causes,) the first instrument is delivered on the plaintiff's side, and is called a declaration.

In this instrument, the nature of the *demand* (*i. e.* of the service demanded at the hands of the judge) is supposed to be stated; and, as supposed or pretended (with what truth will presently be seen,) with a degree of certainty sufficient for the information of the defendant and the judge: and moreover, the title, on which the demand is founded, is or is not supposed to be stated with like certainty: supposed or not supposed to be thus stated, in here and there an instance it may perhaps be found to be so.*

In return for this, comes from the defendant's side, if anything, an instrument called the *plea*. Laying aside *demurrer*, by which the demand is disputed so far only as concerns the ground it rests on in point of law, —and setting aside also *pleas in abatement*, commonly having no other object than mere delay, and never having anything to do with the demand,—the other sort of pleas, pleas in bar to the action, are either general or special. A plea is called *general*, when the effect given to it is the putting an end to the line of altercation† in this mode: it states a point, which it calls upon the plaintiff to join in submitting to the decision of a jury: and admits not in general of any instrument on the part of the plaintiff, other than the signification of his consent to do so. To do this, is to bring on what is called the general issue: to plead a plea having this effect, is called, for shortness, pleading the general issue.‡

What, in all cases, it purports and is supposed to do, is, to express in general terms a denial of the justice of the plaintiff's claim; at any rate in respect of fact — in respect of the whole, or some necessary part, of the mass of facts on which his demand is grounded; and eventually also in respect of law. What in many instances it really does (though without professing to do, and perhaps without being generally considered as doing,) is the giving him a right, at the trial, to oppose the demand by the proof of counter-facts: counter-facts, not only such as tend in disproof of the facts relied on by the plaintiff, but other facts of such a nature that the law has given to them the effect of establishing in the behalf of the defendant a counter-title, having the effect of destroying the force of the plaintiff's title, even should the facts which constitute it be established.

A special plea, — though in one respect true or false as it happens, meant or not meant to be true as it happens, — is in another respect constantly true: and, so far as it is true, the information conveyed by it is material and useful.

The matter that might be true or false, as likewise meant to be true or meant to be false, as it happened, was the matter of fact asserted by the plea.

Of the information conveyed by it, that which was constantly true, was, in every case, neither more nor less than this: viz. that the matter of fact therein asserted was the matter of fact which the party, if he attempted to prove anything, intended to attempt to prove. It might happen, that, knowing it to be false and incapable of being proved, he did not, on delivering it, intend to attempt proving that or anything else: delay being the only purpose of his delivering it. But, if he intended to attempt proving anything, that and nothing else is what he (that is, his lawyer) must have intended to

* Examples: — Debt on contract, bond, demand, recognizance, or judgment.

† Comyn (Edit. 1802,) Pleader, p. 387.

‡ General issues given by Blackstone, but given only as examples, are — not guilty, non assumpsit, nil debet, non est factum, nul tort (in Gilbert on Evidence, *nul tiel tort.*) His account would have been more instructive, had he completed the list of these general pleas, stating all along by their side the species of action to which they are respectively applicable. In Gilbert's book on Evidence, three other pleas present themselves in the character of candidates at least for admission into the list: viz. 1. Non assumpsit intra sex annos; 2. Solvit ad diem; 3. Nullum fecit vastum: to which may perhaps be added, nul disseisin, put in opposition to nul tiel tort. — Not guilty, Gilbert applies to three civil suits, — viz. trespass, trover, and ejectment: besides criminal suits.

A general plea is in every instance characterizable by a few words, which serve for the denomination of it. Pleas there are in abundance, which, though *special*, are characterizable still more strictly, viz. each of them by a single word: some of them much more frequent in their application, and in that respect more general, than several of those general ones. The only distinction therefore seems to be, the effect given or not given to the two sorts of pleas respectively, as above.

attempt to prove. Why? Because, by the established, and in this instance proper, practice, that and that alone is what at the trial he would be allowed to prove.

As to the general plea, that which brings on the general issue, it conveys no information at all: it conveys in no instance any more information of the ground or title on which the defendant means to rest his defence, than in most instances the declaration does of the ground or title on which the plaintiff means to rest his demand.

Thus stands the matter in regard to written pleadings. General pleading conveys no information, but there is an end to it: if any information is conveyed by pleading, it is by special pleading, but there is no end to it.

Compare this with the result of the meeting of the parties in the presence of the judge. Whatever information can be requisite, either to the parties or to the judge, may be obtained by it, and obtained at once.

II. In equity procedure, the first instrument delivered, and which of course is delivered by the plaintiff, is called the bill. It corresponds to the declaration at common law.

What the declaration pretends, or is pretended, to do, the bill really does: it states both demand and title. The declaration conveys its no-instruction in a discourse, the length of which, though too great by the whole amount, is, in comparison with that of a bill, for the most part moderate. To the length of a bill there are no bounds.

What it calls for, is, an answer. What it produces (not to speak of demurrers, as above) is most frequently an answer—not very unfrequently a plea. the answer, upon oath; the plea, not upon oath.

The plea is, in every instance, of the nature of the special plea above described in regard to pleadings at common law.

In equity, as at common law, pleadings used at one time to be drawn into length by altercation. In both instances, but more particularly in equity, the length of the chain has of late years been more or less contracted, by the opposing pressure of public indignation.

As to the range of the mendacity-licence under the two systems, it is already understood. In common-law pleadings, it has no exception: in equity pleadings, the instrument called the answer constitutes the only one.

§ 3. *Uses of this device, in conjunction with its auxiliary devices, to Judge and Co.*

In practice, the profit produced to the partnership by the system of pleading, conducted as we see it, is a very complex mass: including, in its composition the accumulated benefits produced by the four principal articles in the already enumerated list:—1. Blind fixation of times for operations; 2. Long intervals between sitting and sitting; 3. Principle of nullification; 4. Mendacity-licence: without reckoning the master-device, exclusion of parties from the judge's presence, and other devices, the benefit of which, how considerable soever in itself, is, in the character of an auxiliary to the device here in question, less considerable, or less conspicuous.

That the nature and utility of so rich a compound may be the more clearly understood, let us endeavour to bring to light the separate virtue of each element taken by itself: what each has contributed to the common ends.

Taking this element for the basis, let us first observe its virtues when pure; and then, conceiving the several others as if necessarily added one after another (not that in fact they were so,) observe what additions it stands indebted for to the separate virtues of the several other elements so intimately and happily combined with it.

1. Had it stood by itself, the sources of the mischiefs produced by it to suitors, and thence of the advantages to the man of law, would have been confined to these,—viz. 1. Employment of writing in cases where it was improper, as being either useless, or preponderantly expensive, 2. Accumulation of surplusage.

2 From the blind fixation of times for judicial operations—from this device alone, added to that of unnecessary and excessive scribbling, might have been derived a further advantage, besides the advantages already spoken of as drawn from this same device. The suit being brought to a premature and fruitless end by the breach of this or that blind appointment, the use of the pleadings delivered in the course of that suit might have been deemed to have terminated along with it: consequence, if another suit, then a fresh series of pleadings; useful or useless, with or without surplusage, quantity of writing doubled.

3. Another addition is made to the virtues of the compound, by the application of the principle of nullification. In regard to instruments, the principle of nullification renders much the same sort of service, as is rendered by the blind fixation of times, in regard to operations. In both instances, the object was to make a pretence for causing to be done over again, business that had been done already. For this profitable reiteration, the non-performance of this or that operation at a given time formed one pretence; the supposed incongruity of this or that instrument formed another pretence.

4. Let us next observe the additional advantage derived from the excessive length of interval between sitting and sitting. The preceding device furnishing *means*—this furnishes *motives*.

Suppose the sittings from day to day, and offices as well as courts open alike at all times, the operation omitted one day might be performed the next: the instrument pronounced incompetent one day, might be amended or replaced the next.

In this mode the interest of Judge and Co. would indeed have been served well enough; but, both parties being materially vexed and pillaged, neither of them very materially served, Judge and Co. would have found them both complaining, neither joining with them to deliver the other into their hands. Means for plaguing the adversary would not have been wanting; but motives would have been inadequate.

Interpose the length of interval, institute terms and circuits, manufacture inevitable delay,—in proportion to the length of it the account of encouragement swells: the value of the delay rises in the joint ratio of the weight of the burthen from which a man is respited (or perhaps liberated,) and the length of the respite: to the dishonest debtor, to the dishonest usurper of another man's right, to the malefactor in every stage of guilt, the commodity offered becomes more and more valuable, in proportion to the magnitude of the debt due, the value of the right usurped, and (in so far as any proportion between delinquency and punishment is maintained) the mischievousness of the crime.

Without this device, the partnership would have stood alone, with the whole world against them: with all their power, they might have found an united people too many for them. Availing themselves of this device, and availing themselves of it to the extent we see and feel, they made a division among their adversaries—they made a coalition with one half of them: in every dishonest debtor, in every usurper of another's right, in every malefactor, in every evil doer, they behold an eager customer, a purchaser, an accomplice.

5. The mendacity-licence may close, as it served to crown, the list. It contributed to the common end in two perfectly distinct ways:—

1. To the dishonest defendant it was of use, by affording an additional source of delay. The fund of true allegation has narrow limits: the fund of false allegation is inextinguishable. Let the length of time gained by an allegation on the defendant's side be ever so great, say six months; without the benefit of the mendacity-licence, the advantage thus obtainable would be but inconsiderable. In multitudes of the causes that now take place, the demand is of a debt, and the debt justly due. But (the debt being by the supposition due,) on the part of the defendant, the case admits not of any allegation that shall be at the same time pertinent and true. Here is delay enough, if it could find customers, but nobody is in a condition to buy it: the oath, with its eventual punishment, the oath and the scrutiny, form a bar, which (a few rash adventurers excepted) excludes all *malâ fide* customers. Remove the bar, and you have as many customers, as you can find or make dishonest debtors.

From the defendant's side, let us turn to the plaintiff's. One of two classes of dishonest plaintiffs owes its existence to this device.

There stands one man, who, having a right (say to a sum of money due,) and being of course conscious of that right, is led by anger, or some project of advantage, to convert that right into an instrument of oppression. Men of this description have no need of the mendacity-licence. The vexation and expense produced by the other devices furnish him with the means.

But men thus circumstanced are in comparison but few. Establish the mendacity-licence, remove the bar set up by the obligation to speak truth, their number is without bounds.

The demon, by I forget what father of the church, was styled the ape of the Almighty. Conceive him in the character of the unrighteous judge (that is, under the fee-gathering and technical system, of any judge,) with the mendacity-licence in one hand, and the other open to receive the fees, addressing himself to rogues of all classes by two different invitations:—

"*Come unto me, all ye that are heavy laden:*" down with your money, out with your lies, and I will give you rest,—rest, peradventure for ever: rest for many and many a day, at any rate. Such is his address to dishonest debtors.

Come unto me, all ye who, seeing adversaries in your way, see them unable to defend themselves: come ye unto me; ye have no need of right, so ye bring lies and money: your money is my reward, your lies are my pretence. I will deliver your adversaries into your hand: numbering (adds the commentator) among your adversaries, all whose enemy you are, whether they are or are not your enemies. Such is his address to all such who may be engaged to tread in the paths of iniquity and oppression in the character of plaintiffs—plaintiffs, without being creditors.

§ 4. *Pretended use of this device,—certainty.*

In the regular form of technical procedure, written pleadings are constantly required.

We have seen the information, which, under natural procedure, is given; given by the judicial meeting, given of course, and without professing it. Of this body of information, a small part only can by technical procedure be so much as professed to be given; and whatsoever professions of this kind are made, are false.

With regard to the nature of the service demanded, and the ground of the demand, it would be too much to say that no true information is ever given in any of the instruments comprised under the name of pleadings. Falsehood thus universal would not have been necessary, nor so much as in a superior degree subservient, to the purpose. What was sufficient was, that, along with the matter which, had it stood alone, would as far as it went have been instructive, so large a dose of falsehood was everywhere mixed, as was sufficient to destroy all confidence, all capacity of instruction, in such part of the mass as was true.

Certain Jews, travelling towards a seaport, met with a Christian, and asked him the way to it. He pointed along the shore, to a path which he knew would soon be covered by the tide: they struck into it, and were drowned. To the christianity of Lord Coke, by whom the stratagem is reported, it affords matter of exultation. "Thus perished," says he, "these infidel Jews."*

This stratagem may be received, if not as the model, at any rate as an emblem, of the policy pursued in the adjustment of the principles of pleading. Misconception is worse than no conception. false information is worse than none. Had the communicative Christian held his peace, the infidels might have escaped. When, from a source from which he had expected information, a man finds none, the effect of his disappointment is only to put him upon the look-out for another. false information, when acted upon, cuts a man off from true, and makes error sure

The first object, therefore, was to produce misconception — misconception, and certain error in consequence. Unfortunately, the advantage derivable from this policy has its bounds. Information recognised to be false, becomes tantamount to ruin. The first gang of the infidels were drowned; but had a second been within sight, the stratagem would not have succeeded upon the second.

In pleadings, *certainty* is a qualification exacted with the utmost rigour. Certainty, a non-lawyer would say to himself, includes *truth*. No such thing. By *certainty*, though they have never said as much, they mean *precision* *precision*, and nothing more. Precision is a quality which it is just as easy to give to falsehood as to truth: accordingly, so it be but precise, what is notoriously false is just as good as if it were true.

Precision and assuredness being two qualities which, consistently with truth, it is scarcely in the power of the plaintiff to give to the allegation by which, in the first instance, he states the nature and ground of his application to the judge, — the rational and obvious course is, to permit it in the first instance to be worded with that degree of generality and indecision, which cannot but accompany the conception entertained of it by the plaintiff in the interior of his mind.†

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* The facts, as reported in the 2d Inst. 506-8, are shortly these:—Edward the First, in consideration of a fifteenth granted to him by the Parliament, consented to the passing of the 18 Ed. I., which forbade any Jew to take usury upon any lands, rents, or other things. The consequence was, that more than 15,000 Jews left the kingdom. The richest of them embarked with their treasures in a large ship, and when they had got beyond Queenborough, the master and some of the sailors agreed to destroy their passengers by a stratagem. They cast anchor in a place, where the ship at the ebb was left on the dry sands. The master then enticed the Jews to walk with him, for their recreation, and when he perceived the tide coming in, he stole away from them, and got back to the ship in safety. The tide overtook the Jews, and as all help was refused them, they were drowned. The master and his confederates were indicted for murder, convicted, and hanged. At the end of the case, Coke says, "And hereby it appeareth that Divine ultion did follow these cruel Jews, wicked and wretched men; for the debts of cruelty are seldom unpaid." The case is also referred to in 3 Inst. 50.—*Ed.*

† At the hands of another individual, and, in his default, at the hands of the judge, a man may have a right to a service — to a service of any degree of importance, — and yet, in the first instance, antecedently to an explanation (to an explanation which cannot take place without a meeting of the parties in the presence of the judge,) not a single circumstance may be capable of being averred with precision, consistently with truth: — not the quality and quantity of the service, the time at which it became due, the place at which it should have been rendered, the title on which the right to it is grounded (including the numerous list of collative events, one or other of which must be affirmed, and of ablative events, all of which must be negatived, with all their several circumstances of time, place, and individual things and persons concerned:) no, nor so much as, among two or more persons, the individual by whom, or at the charge of whom, the service (payment of money, suppose) should have been rendered. All depends upon information, which, by the assistance of the judge, may or may not be obtainable, but which, without that assistance (that is to say, at the commencement of the suit,) is plainly unobtainable.

In any of these cases (cases occurring in every day's practice,) what can be more barbarous than, on pain of loss of cause, under a penalty severe to any amount, unjust in every case, thus to insist upon precision, when, consistently with truth, precision is impossible?

Suppose the parties, — one plaintiff, and one defendant, — met together in the presence of the judge, everything of this sort will either be cleared up — cleared up at once, or put in the best trail for being so.

Suppose, besides the plaintiff, two individuals, of whom it is as yet uncertain on which the burthen ought to rest: let both of them be present at the meeting, this point, it will frequently happen, may be cleared up on the spot, and in

This course was too simple for the founders of English jurisprudence. Certainty (meaning, as before, precision) — certainty, it had occurred to them, was a very desirable property; as on all other occasions, so, in particular, on the occasion of all allegations and communications made for the purposes of justice. Certainty, therefore — nothing short of certainty, was what on this occasion they were determined to have. But the allegation you insist upon cannot at the same time be thus certain, and be true. Well then, if that be the case, we won't insist upon its being true. In our law, in our morality, diffidence is unpardonable: as to falsehood, far from shocking us, it is on all occasions our delight. Fear nothing, plaintiff; falsehood shall be no prejudice to you, so it be advanced with confidence.

To men who could decide thus, all idea of utility must have been altogether out of sight: adherence to practice, adherence, and that of the blindest kind, was taken for the only rule. For every purpose of information, false information must in this case have been worse than none: the effect of it, if it had any, could only be to mislead. Yet this falsehood they were determined not only to receive from the plaintiff, but to force him to give.

Of the information required to be given, and given accordingly, in pleadings, what cannot be said is, that it is in every instance false: what may be said is, that it is in so many instances allowed to be false, that, upon the whole, it is of at least as little use as if it were always so.

Not content with requiring, at the hands of a plaintiff, allegations which, supposing it in his power to render them correct, might afford to the defendant information capable of being of service to him for the guidance of his defence, — might, in a word (in so far as it were true and correct,) be useful and instructive; — they have, on various occasions, insisted on a variety of allegations, partly false, partly irrelevant, partly absurd and unmeaning, and which, if true, could not be of any use. Why insist upon them? For what reason? Because the insertion of them had been customary. Violation of truth is a thing not worth avoiding: departure from custom, from precedent, would be intolerable.

If the judicial power had seconded the views of the legislative, the state of legislation on this ground would not have been thus deplorable. A time there was, in the reign of one of the Edwards, when the legislature, by an act which is still in force, conveyed to the respective courts (or rather to the chancellor) a subordinate power of legislation in this behalf. But power, legal power, is one thing; knowledge, intelligence, which is intellectual power (not to speak of inclination,) is a very different thing. What the legislator did convey to them, was legal power: what he knew not how to convey to them, was inclination: what he could not convey to them, was adequate intelligence: he had it not to give; they, if he had, were not in a condition to receive it. Had their stock of intelligence been ever so abundant, what should have been their inducement to employ it? The labour would have been their own; the benefit would have been reaped by their fellow-subjects: a part by suitors; the other part, and the most valuable (because reaped without expense,) by those whose good fortune it would be, by means of the information thus afforded them, to escape the misfortune of becoming suitors. Instead of pursuing the course prescribed to them, they took a course which was at once more commodious and more profitable. They left it to the plaintiff to word his own demand; and when worded by him, and worded at his peril, he learnt by the gain or loss of his cause, whether the wording of it was or was not to their taste. For themselves, they never thought anything about the matter: it was for him to declare, and at the peril of loss, and perhaps ruin, what those conceptions were, which, so far from having been declared and made known, had never been so much as formed.

The same proposition was capable of being expressed in a multitude of different ways, and perhaps with equal propriety in any one of the whole number. When the suitor came to give words to his claim, what was the inquiry of the judge? Not whether the wording employed by the plaintiff was capable of

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consequence one of them be left free. He has had to make this one, perhaps unpleasant visit; at this price he is free. What is this, compared to an English equity, or even common-law suit? What a flea-bite is to a fracture.

Under the technical system, the right and the wrong defendant being as yet absolutely undistinguishable, the plaintiff finds himself compelled to fix upon one of them in the dark. At the end of the suit, when the evidence comes to be heard, the one thus fixed upon turns out to be the wrong one. Here, then, instead of the money (supposing it money) justly due to him, the result is, the obligation of paying three, four, or five score pounds more than a great majority of the people would be respectively able to pay, were they to leave themselves houseless, naked, and penniless. In this condition, the plaintiff has to seek his remedy against another defendant, who, if for this time he happens to be the right one, may have gone out of reach, or become insolvent; or the evidence by which, if taken in time, the obligation might have been proved upon him, may be unobtainable. But suppose the plaintiff at this time successful: will he obtain re-imbursement of the costs produced by his innocent and inevitable mistake? Not he indeed.

answering the purpose, but whether they were the exact words which he himself (the judge) would have employed. If there was a hair's-breadth difference, so much the worse for the plaintiff: his cause was gone.

Was there any possible means of safety for an unfortunate, or perhaps obnoxious, suitor? Oftentimes it has appeared to me that there was none. The claim was alike capable of being preferred in either of two ways: the plaintiff pitched upon the first, the judge upon the second: had the plaintiff employed the second, the judge would have stamped his exclusive approbation upon the first.

To the non-professional reader, a few specimens of what lawyers call certainty may be neither useless nor unacceptable:—

A specific thing (if you want to get it of a man, or he wants to get it of you,) belongs to the class of moveables, or to the class of immoveables.

The first instrument by which any information is pretended to be conveyed, is the *declaration*—the first instrument delivered in the plaintiff's name. Under natural procedure, at the first judicial meeting (be it a moveable thing, or a thing immoveable, that is demanded,) what the thing is that is demanded, and on what ground it is demanded, would (amongst so many other articles of information that might eventually be of use) come out of course, with every degree of certainty that was at once requisite and practicable.

How is it under technical procedure? If it is a horse your adversary wants of you, the action is called an action of *trover*, and the declaration a declaration in *trover*. To state, and with truth, what it was that was wanted of you, viz. that it was a horse, could not well be avoided: but as to the ground of the demand, the statement under this head must always indeed be precise, but (except in a case which scarce ever happens) it must as certainly be false. It must be not only false, but impertinent. Had it been necessary for him to say how the animal became his, this, in case of his demands being unjust, might have been of use to you. This, accordingly, is what he is excused from saying: what he is obliged to say is, how it came to be *yours*: that is, in your possession for the time (though, if his demand be well grounded, you have no permanent right to it.) You *found* the horse: this is what he would always be forced to say, even were he to know that you bought it, or that he lent it to you.

Where a thing immoveable is the subject of the demand, it is still worse. Not only the statement of the title is never given, but, though a description of the subject of the demand is always given, it is never true. If it is one acre that a man wants of you, his lawyer mentions twenty acres or two hundred—any number that he pleases. As to the title, the place of instruction is here again supplied by falsehood and impertinencies. A foolish story is told about somebody called Doe, that was turned out by somebody called Roe—an imaginary man by another,—as anybody may see in Blackstone.*

Thereupon, to work the lawyers go, upon the ground of this superficially silly, fundamentally wicked, story: justice the pretence, pillage the object and result, mendacity the means.

Are you really at a loss to know what it is the man wants of you? The information pretended to be given by your adversary being all a sham,—if you want any real information, it is for you, the defendant, to apply for it. Your lawyer makes a *motion* for it. so much more business: a cause within a cause. Here we see the use of the false information: to make a man pay so much the more if he would have true.

Where *ignorance* or *doubt* is the real state of the mind, assertion of *knowledge* is mendacity. Who is there that does not see this? What lawyer can avoid seeing it? Every degree of *persuasion*, short of that which is expressed by the word *knowledge*, is proscribed in pleading: it would be want of certainty. Mendacity, therefore, on the part of every suitor whose degree of persuasion falls short of the highest, is called for and compelled. Moral vice is made into a legal duty: and a duty for the breach of which there is no pardon.

Wherever a man speaks in the disjunctive, a sort of doubt is confessed: which is a sort of ignorance. Accordingly, the disjunctive conjunction *or* is proscribed in pleading. The word *and* is exacted instead of it. Why? Because *and* is always *certain*, though it be always false.

Half a dozen, or thereabouts, is the number of different *titles*, upon one or other of which, or perhaps sometimes two or more at a time, a demand of money due is most frequently apt to be grounded: work and labour done, goods sold and delivered, money lent without security, money lent on note of hand, and so forth. You sold the defendant a horse for £20, and he gave you his note of hand for it. It is matter of doubt to you, which fact you may be best able to prove: the sale of the horse, or his signature of the note. At the suggestion of truth and common sense, would you say that the man owes you £20,—viz. either upon the score of the sale, or upon the score of the note? You would lose your money. What they make you do is, to demand two debts of £20 each: one due upon the sale, the other upon the note.

* B. iii. Chap. 11.

In the case just put, these two demands might serve. But the practice is, where one debt is due, to claim half a dozen or more, as above; each to the same amount; each with a separate *count* (that is the word) to claim it. The more counts the more writing: the more writing, the more fees.

Whatever be the demand, in general a declaration contains divers counts: stories, of which one may perhaps be true, most commonly all but one false.

Thereupon, at the trial, the jury being agreed, and ready to give their verdict for you the plaintiff, — doubts upon doubts, on which of all these counts to take it: the jury, who know nothing about counts, waiting in gaping admiration to know what decision, which is not theirs, shall be given to the world for theirs. Take your verdict on a wrong count, you lose it: saving always the privilege of taking your chance (at the twelvemonth's end) for another such verdict, which may again be on a wrong count: and so *toties quoties*.

Under natural procedure, at the first judicial meeting, — in a court of conscience for example (for parliament, whensoever it shall be its pleasure, knows where *conscience* is to be found,) — all this would have been settled at once, and upon the best evidence.

Such being the case with the most common sorts of demand that could be found,— suits individually counted, in perhaps nineteen out of twenty, — to pursue the inquiry through the list of the less common ones, would be as useless as it would be endless. Such the information destined for the suitors: such the pretended, and not intended, use to the suitors; such the real and intended use, to the judges and their partners.

All this lies open to every eye that can endure to look upon it: all this, though in Blackstone's colouring, is pourtrayed even by Blackstone. Such is the ground on which he builds the claim of his firm to the veneration and gratitude of mankind!

All this for ever before our eyes, pleadings coming in question, judges talk of certainty. To all this certainty, know they, or know they not, the non-necessity of truth? If yes, what dishonesty! if no, what ignorance!

Pretended study, — to prevent surprises: that, at the trial, both parties may come prepared. Real study, — to produce surprises: that, sometimes by the production of the surprise, sometimes by the apprehension of it, business may be made.

By the judicial meeting, surprise would really be prevented: everything that was ever called surprise. Who, except by shutting his eyes, or turning them aside, can avoid seeing it?

Lawyer.—The pleadings giving, according to you, no information, or worse than none, how is it that surprises are not perpetual? How is it that parties ever come prepared?

Non-Lawyer.—I did not say that no information is ever to be got from your pleadings; such consistency, I have observed already, would be of no use to you, but the contrary. What I mean to say is, that in general it is not from *that* source that the information a man stands in need of for the support of a just cause, is obtained. Whence, then, is it obtained? From the previous transactions between the parties. The case is comparatively rare, in which, before the suit begins, the defendant is not pretty well informed what it is the plaintiff wants of him, and on what grounds it is that he demands it: so, on the other hand, the plaintiff, on what grounds (if on any) the defendant means to dispute it.

But, where information is by either party really wanted, generally speaking, he has this alternative: either he applies for it by motion (a cause within a cause,) getting it, or not getting it: or he does without it as well as he can.*

Lawyer.—You will admit, at any rate, that information is afforded, as often as the pleading goes to the length of special pleading.

Non-Lawyer.—Agreed. You on your part will have the goodness to admit four things: 1. That the information so given, being given under the mendacity-licence, need never have a syllable of truth in it; 2. That the more there is of it, the more business; 3. That, where there does happen to be any truth in it, the effect of it is liable to be destroyed by nullities, against which no human prudence is sufficient to secure it; 4. And that, at the end of twelve, or fifteen, or twenty, months, it is not in the power of your special pleading, be the chain of it ever so long, to give half the information (meaning true and useful information) that, at the first judicial meeting, would be given in as many minutes.

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* So utterly unfit is the initial document called the *declaration*, in the opinion of judges themselves, for any such purpose as that of informing the defendant what claim it is that is made upon him, — that a practice has grown up of compelling the plaintiff to give in, together with the declaration, another document, called a bill of particulars, which shall *really* specify, what the declaration *pretends* to specify, the nature of the demand. According to the judges, then, who have introduced this practice, the declaration is waste paper: utterly useless with reference to the purpose for which it is pretended to be meant; productive only of a mass of expense to the defendant. The bill of particulars really giving the information, all the information that is wanted, — the question, why the declaration is not abolished, is a question for those who are capable of penetrating the mysteries of the judicial conscience.—*Editor.*

CHAPTER XVII.

TWELFTH DEVICE — PRINCIPLE OF JARGON, OR JARGONIZATION.

The object and use of language (meaning ordinary language,) is to convey information: information which, in some way or other, shall be of use: for which purpose (except in here and there a case, too extraordinary to present on this occasion a claim to notice,) it must be true.

The object and use of lawyers' language is twofold: partly to prevent information from being conveyed to certain descriptions of persons; partly to cause such information to be conveyed to them as shall be false, or at any rate fallacious: to secure habitual ignorance, or produce occasional misconception.

Misconception, as will be seen, is on those occasions a sort of improvement upon ignorance: all the purposes of ignorance are served by it, but in a more exquisite degree. Particular misconception is the occasional result of general and habitual ignorance. Its tendency is to rivet the chains with which the public mind has been loaded by ignorance.

All those peculiarities whereby the language made or employed by lawyers is conducive to this effect, may be comprehended under the general name of jargon: law-jargon.

Various are the shapes in which jargon is capable of making its appearance —1. Foreign language, dead or living, 2. Obsolete language; 3. Technical language undefined, 4 Nonsense; 5. Fiction; 6. Ordinary language perverted. None but what may be made subservient to the general end. one or another, this or that one of them, is to be employed, as occasion serves: but, that the use of them is not altogether indifferent, will be seen as we advance.

Each has its use: each was to be made the most of, as occasion served. Each has its use; some more than others, as will be seen. Anything will serve, so it be repugnant in any way to the ends of language.

A lot of jargon may consist either of propositions, one or more, or of a single term. In less compass than that of a proposition, neither truth nor falsehood, wisdom nor folly, sense nor nonsense, can be conveyed. But there are single terms (such is their force and virtue) that are sufficient, any one of them of itself, to infuse the qualities of darkness or nonsense into this or that proposition, or into almost any proposition of which they make a part. Such are the terms *felony*, *larceny*, *corruption of blood*, *attaint*, *common bail* (meaning no bail at all;) *vi et armis*, force and arms (applied to forgery, &c.)

Law being the subject, whatever tends to keep men in ignorance, is of use to lawyers: but the beneficial effects of the ignorance assume a somewhat different complexion, according to the description of the person in whom the endowment is considered as being liable to reside: — 1. The people at large in the quality of suitors; 2. The legislator; or 3. Men of law themselves.

I. On the part of the people at large, it makes business, in three ways: —

1. From ignorance of the law *in criminali*, comes delinquency; from delinquency, prosecution.

2. *In non-criminali*, if a man, being ignorant, is conscious of his being so, and knows not how to act with safety, he applies to lawyers. Hence comes an appropriate branch of made business, the trade of the law-adviser or opinionist: the opinion trade. If, being ignorant, he fancies himself sufficiently knowing, not being aware of the traps that have been laid for him, so much the better. He then leaves something undone, which he ought to have done, or does something which he ought not to have done and litigation, with loss, or danger of loss of right, or of falling under some burthensome obligation, is the consequence. Business in the way of assistance, previous business in the way of advice.

3. From ignorance in respect of the adjective branch of the law, the law of procedure (*in criminali*, and more especially *in non criminali*,) comes the necessity of having recourse to the lawyers, in unlimited numbers, in the character of assistants, or (what is much better) of substitutes. Business in the way of assistance, with ditto in the way of advice, step after step, at as many steps as possible.

Making business is not enough, without securing against diminution the quantity of business, that is, the mass of profit, habitually made.

In proportion as business is made, the people suffer in proportion as the worms multiply and fatten, the patient faints. Did the people know that the sufferings they experience at the hands of the judge and his confederates are in so large a proportion factitious, they would be apt to cry out; their outcries would be troublesome, and might lead to relief.

Against this danger, the use of jargon is considerable. It impresses them with awe: it forms a species of the sublime. *Omne ignotum pro magnifico est.* Viewed through this medium, every object assumes such shapes and colours as could be wished. Factitious vexation, expense, and delay, become natural and inevitable: nonsense becomes science, fraud and extortion, purity: their tormentors and plunderers become their kind protectors and best friends.

It is not by its *quality* alone, that jargon lends its service to the advancement of the

common cause; by the very *quantity* of it, it renders at least equal service. Judicial formulary, conveyance, whatever be the nature of the instrument, care has been taken that each particle of sense shall be drowned in a deluge of words. By the quantity of profit, the particular purpose of the individual lawyer, on each individual occasion, is served;* by the contribution made to the immensity and incomprehensibility of the chaos of which it forms a part, the interests of the whole partnership receive a lasting benefit.

It is in the demesne of jurisprudential law, that the service rendered by jargon, in virtue of its quantity, is rendered in the most transcendant degree. Where statutory law would create certainty by a word, jurisprudential, with its argumentations, gives uncertainty in a volume.

But even in the composition of statute law, the treacherous assistance of the professional lawyer has, by a disastrous necessity, been forced upon the legislator. Words being heaped together at so much a dozen, the consequence is alike necessary and obvious. In this case, too, lest the virtues of tautology and surplusage should not be sufficient, the aid of disorder, and a religious exclusion of those helps to elucidation with which no other species of composition is unprovided, have been called in and carefully preserved. The details of this policy would diverge too far from the present purpose.†

II. On the part of the legislator, the service rendered by jargon to the partnership admits of some diversifications: though all resolvable into this, viz. either adding to the quantity of business (*i. e.* to the mass of profit extractible from the mass of business,) or protecting it against diminution from that commanding source.

The interest of the legislator, in as far as it has been brought into coincidence with his duty, is, on this as on all other grounds, the same as that of the people: the ends of the legislator are no other than the ends of justice. Having the power in his hands, he will of course (unless in so far as he can be corrupted, or drawn from his duty, or led into mistakes in the exercise of it) take effectual care that the mass of made-business, and thence the mass of lawyers' profit, be as small as possible.

Towards preventing him from exerting his power in this way, the services of jargon are in the highest degree important: —

1. By the heaps of filth, moral and intellectual, of which it is composed, it becomes a perpetual source of disgust, and serves as a perpetual repellent to the eye of scrutiny. "As to that cell there, sir, you must not think of looking into it: you will catch something bad: the smell will be too much for you." Jailor's *quarte* and *tierce* in fencing against Howard. Jails have had their Howard: jurisprudence waits for one.

2. It converts the whole field of legislation into a thicket, impenetrable to the legislator's eye: when he does work, he works blindfold: he works at random, at the hazard of creating more mischief than he cures. As often as this happens, then comes the lawyer's triumph: "You would be meddling; see now the consequence!"

That sort and degree of knowledge which the subject (dealt with as it has been) admits of, is now an object of monopoly in the hands of the partnership. The stock of endowments such as the legislator must possess to do his duty, stands distributed upon a plan the most commodious imaginable. On the part of the man of law, — what there is of knowledge, power to be had for asking, were it but convenient for him to ask for it; inclination, acting in a direction directly opposite to that in which it must act, to prompt a man to apply the knowledge and power to any other than a bad purpose. On the part of the legislator, — power, and, for the most part, inclination: but of knowledge, appropriate and necessary knowledge, so deplorable a deficiency, as divests the other endowments of all force and virtue.

But the mass and efficiency of jargon is continually upon the increase. In the way of reform, and previous necessary information, whatever may be the degree of difficulty one day, exists with increase the next. Every day, the more urgent the demand, — the more hopeless the supply.

The partnership look on and triumph. Soon, if not already, their language will be in this tone unanimous: — Yes, so long as it was possible, a change might have been useful; but, whatever it may have been, it is now impossible: human faculties are not equal to it.

From different temperaments come different tones. Those (if such there be) who still fear the possibility, will deny the use: the use may be admitted as a point not worth disputing, by those who look to the impossibility with an eye of confidence.

Admit the impossibility, they will allow

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* Marriage-settlement: — property to be settled, twenty-eight thousand pounds; costs of settlement, two thousand seven hundred pounds. I have this from a conveyancer of the first eminence, himself concerned in it.

† The style of the British statutes is a disgrace to the nation in the eyes of Europe. Opening a book of these laws in one hand, open a book of French, of Austrian, of Prussian statute law in the other: without understanding a syllable of any one of the languages, a man may see enough to satisfy him, that, in the structure of the three last, the ends of language are aimed at; in that of the other, ends opposite to the ends of language. (*Vide Nomography*, in Vol. III. p. 231.)

you the expediency without scruple. The praise of candour is got by the admission, and nothing lost by it. The plea of impossibility has already become plausible; a little while, and it will become real.

III. In their intercourse one with another, jargon has again its use. It serves them as a bond of union: it serves them, at every word, to remind them of that common interest, by which they are made friends to one another, enemies to the rest of mankind.

Co-operation is thus secured—concert rendered unnecessary. Concert would be conspiracy: co-operation without concert produces all the advantage without any of the danger.

If jargon nurses ignorance among those who employ it, as well as among those at whose expense it is used, so much the better. The knowledge which is of use to the man of law, is not positive knowledge, but comparative: nor even of that the reality, but the appearance: of the reality just so much, and no more, as is necessary to keep up the appearance. When the suitor, a non-lawyer, makes a mistake about law, the mischief falls upon his own head. When a lawyer makes a mistake, the mischief falls upon the suitor, or the client: care has been taken that it shall do so.* Under these circumstances, superior knowledge in superintending stations being out of the question, nothing is so convenient as genuine ignorance: unintentional mistakes cost less to make than intentional ones.

Between the veterans and the tyros, the harmony of interests is not in this point perhaps altogether perfect; but such minutiæ belong not to this place.

Nursing ignorance, jargon serves at the same time for a screen to it. It does more over a head of ignorance it puts a mask, exhibiting a face of science. It is the dissertation upon Sanchoniathan, presented to the Vicar of Wakefield.

This is among the circumstances, that, under the technical system, concur in rendering quirks so pleasant and convenient to the thorough-bred judge. He feels a degree of awkwardness where a decision is to be given upon the merits. If there be any statute law in the case, the letter of the law is a sort of check to him. Statute or no statute, the common sense of mankind operates at any rate as a check, and that a troublesome one. On this ground, decision, too, if it is to be on the right side, is apt now and then to require faculties, which, whatever they may have been at first, have been enfeebled by habitual diet-drinks from the fountain of jurisprudence. If a man is wrong, he exposes himself: if he is right, he gains little praise, compared with what might be got by jargon or hypocrisy: every simpleton is ready to say—What is there in all that? 'Tis just what I should have done myself. Seated in a chair, in the character of a justice of the peace, with common language in his mouth, a common coat upon his back, and no hair upon his head but his own, Solomon himself would not gain the praise of wisdom. Seated on a woolsack, Bartholon would pass muster, while talking about entering appearances, or filing common bail, clothed in purple and fine linen, artificial hair and ermine

Every sham science, of which there are so many, makes to itself a jargon, to serve for a cover to its nothingness, and, if wicked, to its wickedness alchemy, palmistry, magic, judicial astrology, technical jurisprudence. To unlicensed depredators, their own technical language, the cant or flash language, is of use, not only as a cover, but as a bond of union. Lawyers' cant, besides serving them as a cover and as a bond of union, serves them as an instrument, an iron crow or a pick-lock key, for collecting plunder in cases in which otherwise it could not be collected: for applying the principle of nullification, in many a case in which it could not otherwise have been applied

The best of all good old times, was when the fate of Englishmen was disposed of in French, and in a something that was called Latin. For having been once in use, language, however, is not much the worse, so it be of use no longer. The antiquated notation of time suffices of itself to throw a veil of mystery over the system of procedure. Martin and Hilary, saints forgotten by devotees, are still of use to lawyers How many a man has been ruined, because his lawyer made a mistake, designed or undesigned, in reckoning by the almanack! First of January, second of January, and so forth,—where is the science there? Not a child of four years old that does not understand it. Octaves, quindecims, and morrows of All Souls, St Martin, St Hilary, the Purification, Easter day, the Ascension, and the Holy Trinity; Essoign day, day of Exception, Retorna Brevium day, day of Appearance—alias *Quarto die post*—alias *Dies amoris;* there you have a science. Terms, Michaelmas, Hilary, Easter, and Trinity, each of them about thirty days, no one of them more than one day; there you have not only a science, but a mystery: do as the devils do, believe and tremble.

Jargon pregnant with misconception, is better than jargon preservative of simple ignorance. The sense of subjection, the humiliation, the self-distrust, the despair, on the part of the non-lawyer, the client, the suitor, is more complete.

Jargon which takes a word that is in every man's mouth, and uses it in a sense in which no man ever used it, is better than a jargon

* *Supra*, Chap. XIV. *Nullification.*

made out of foreign, antiquated, technical, or other hard words. Every man knows what *common* means: most men even know what it means when opposed to *special*, and applied to a jury. Apply it now to bail, and take order about bail, you know how.—*Creditor*. My debtor is going off: he must be held to bail.—*Lawyer*. That he is already.—*Creditor*. Who are they?—*Lawyer*. Common bail; John Doe, and Richard Roe.—Applied to bail, *common* signifies *none*. (You will not forget to charge for these buckram bail, as if they were real ones.) Besides the profit, there is a degree of fun in this. You pick men's pockets, while you laugh at them for their patience. Kick them, or spit in their faces, you cannot; because it is a rule with you never to see their faces: but this comes next to it.

The more pointed and solemn the assurance given, the better; so it be but violated.

There was genius in writing word to a man, Appear before me on such a day,—and then punishing him for appearing accordingly, instead of employing an attorney. There was still more genius in saying, Appear *in person*, and then punishing him as before. He had learnt that when a lawyer says, *appear*, what he means by it is extortion or deceit: but seeing such words added as *personal*, or *in person*, he thought he might trust them for once; that it was their intention for once to be sincere. He took it for a flag of truce: but, so savage is the hostility of this coalition, there is no trusting to its flags of truce.

Advice to lawyers:—When non-lawyers plague you (as now and then they will) about reforms, and something must be done to quiet them, they can never refuse you a hand in the business; and it will be your part to take care that what is done shall be to little or no purpose. When you have done what can be done towards spoiling the plan, you make your mock at it: you throw ridicule on that reform, and through that on all reforms, and so you have your revenge. Thus Blackstone triumphed, when, upon the translation of the lawyer's dog-Latin scriptures into a sort of English, the darkness was but the more visible.

Another and a capital use rendered by jargon to the partnership, is the extensive possession it secures to the professional branch, of the emoluments; the comparative leisure, the power, and the honours, attached to the commanding orders of the official branch,—attached to judicial offices.

Proportioned to the advantage thus gained to the natural and irreconcilable enemies of the community, is the mischief done to the interest of the community itself. Justice is administered by no other hands than those which, by interest and interest-born prejudice, have been trained up in a predilection for injustice.

A twenty or thirty years service among the priestesses of Venus, a qualification *sine qua non* for admission into the college of vestals!

What is the proper nursery for judges to fill the highest and most important of judicial offices? Common sense (instructed by universal practice in all other lines of service) answers,—Service in an inferior office in the same line.

What is the proper school for a judge who fills an inferior office? A course of attendance at the feet of a Gamaliel actually in office.

CHAPTER XVIII.

THIRTEENTH DEVICE—FICTION.

WHAT you have been doing by the fiction,—could you, or could you not, have done it without the fiction? If not, your fiction is a wicked lie: if yes, a foolish one.

Such is the dilemma. Lawyer! escape from it if you can.

But no: the distinction is but in appearance; folly none in either case, except in so far as all wickedness is folly: mischievous in every case the *effect;* in every case wicked, if it had any, the *purpose*.

Fiction of use to justice? Exactly as swindling is to trade.

The fictions with which the substantive branch of the law has been fouled, belong not to the design of the present work.

The fictions by which, in so much greater abundance, the adjective branch is polluted, may be distinguished in the first instance into two great classes: the falsehoods which the judges are in the habit of uttering, by themselves, or by the officers under their direction; and the falsehoods which they cause to be uttered by the suitors.

1. Take for the first case, as one of the most striking ones, that of common recoveries; * though it belongs to the substantive branch with as much propriety at least as to the adjective.

The judges formed a plan for making business, by enabling the proprietors of entailed estates to cheat their heirs. The king, as is said, through policy, or perhaps through negligence, gave them their own way. A sham action was brought against the proprietor: the proprietor, by direction of the judges, named a creature of theirs, the crier of their court, a man worth nothing, as the man of whom he had bought the land, and who stood bound to prove the title to it a good one, or, on failure, to give him another estate of equal value. The father lost the land; that is, got the power of doing with it what he pleased:

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* 2 Blackstone, 357. Fines and recoveries (as has been before observed) have been abolished by 3 & 4 Will. IV. c. 74.—*Ed.*

but no injury was done to the children, because the father, and through him, they, his children, got the crier's land instead of it. This the judges, receiving their fees, never failed to testify: it is entered upon the record. A record is the very tabernacle of truth: let it say what it will, no man is permitted to dispute the truth of it, or of any part of it.

Sham equivalent, as above, to heirs; sham security to defendants; sham security to plaintiffs; sham notices to both, and more especially to defendants; sham pretences to one another for cheating one another of business. To give the list and the explanation of all those shams, with the consequences drawn from them, would be to heap volume upon volume. It is of such matter that the system of procedure, as displayed in the books of practice, is composed.

Such is the matter of a record: everything is sham that finds its way into that receptacle, as everything is foul that finds its way out of Fleet-ditch into the Thames.

The spice or two of truth, buried here and there amidst those heaps of falsehood, serve but to make the compost the richer, and the better adapted to the purposes of misconception and deception, in a word, to the service of the ends of judicature. They serve to favour the operation of the *double-fountain* principle: which see.

2. Take next the case of sham bail, and sham pledges of prosecution.

In the infancy of the technical system of English procedure, the performance, on the part of the plaintiff, of an operation called by the name of *finding security*, was established in the character of a condition precedent to the subjecting a man, in the character of defendant, to make answer in any way to a judicial demand. The security was real, but eventual only, and not deposititious a pair of friends binding themselves (though by promise only, and not, as in case of pawning goods, by actual deposit,) to pay a sum of money, preliquidated or not preliquidated, certain or uncertain, in case the plaintiff should lose his cause. *Pledges of prosecution* was the name given to these friends.*

No such pledges are in any case found; a certificate of their being found is in every case given: and the certificate is among the countless host of lies, notorious lies, without which English judges know not how to administer what in their language goes by the name of justice.

So in the case of sham bail, on the part of the defendant. The defendant pays an attorney, who pays an officer of the court for making, in one of the books of the court, an entry, importing that on such a day two persons found themselves to stand as sureties for the defendant; undertaking, in the event of his losing his cause, and being ordered to comply with the plaintiff's pecuniary demand, either to pay the money for the defendant, or to render his body up to prison. No such engagement has been taken by anybody. — The persons spoken of as having taken it, are not real persons, but imaginary persons; a pair of names always the same, John Doe and Richard Roe.†

The impossibility that this vile lie should be of use to anybody but the inventors and utterers of it, and their confederates, is too manifest to be rendered more so by anything that can be said of it

In the original institution of this security the "pledges of prosecution," as little regard was paid to the ends of justice, as in the subsequent evasion of it

Had any regard been paid to the ends of justice, the judge, were it only for the purpose of ascertaining what security the nature of the case required, and what it was in the plaintiff's power to give, would have examined him *vivâ voce*. not to speak of the many other indispensable purposes to which the same operation would have been subservient Instead of that, this part of the duty was turned over to a subordinate officer, of which there was but one for a whole county, the sheriff. This officer, either he was personally responsible for the eventual justiciability

* Blackstone, III. Append. xiii.

† This operation English lawyers, heaping fiction upon fiction, call *appearance:* a word which in their vocabulary has at least half a score different meanings: but that which it has in the language of common sense is not of the number Whatever be the number of them, they all agree in this, viz that they signify some operation which, in every instance, is completely useless to the purposes of justice, oppressive to suitors, useful to none but the fraternity of lawyers.

A written order is delivered to a man, commanding him to appear on a certain day in a certain court of justice, under a certain penalty On the day mentioned, he appears in the court mentioned, and stays there the whole time of its sittings; this does not save him from the penalty An English judge (such is the force of usage in hardening men in iniquity) scruples not to sanction this instrument of deception by his signature.

Think you to make an English lawyer comprehend how it should be possible that appearance, when the scene of it is in an English court of justice, should mean appearance? The adjunct *personal* will be apt to present itself as capable of conveying the intimation. Appearance simply — appearance of the defendant in court means indeed, it may be said, appearance of somebody else in another place: but personal appearance, — personal appearance of the defendant in court, — cannot surely be understood as meaning anything else but the appearance of that person in that place. Vain expectation! personal is added and the meaning of the word appearance is still in the conception of the man of law, exactly what it was before.

and solvency of those pledges, or he was not. Responsible for them, for twice as many persons as there were actions brought in a year within a whole county, he would have been continually exposed to almost certain ruin. Not responsible for them, two secure instruments of injustice were lodged in his hands: for the acts of this subordinate officer were not, like those of his superiors, the judges, exposed to the scrutiny of the public eye. One was, to consult his own ease and safety, by reporting the impossibility of finding two such pledges. The other was, to make the like report for the benefit of his friends; including all such persons as, for the convenience of getting rid of troublesome demands of all sorts, might find their account in purchasing that distinction at his own price.

Not such, however, were the considerations which dictated the evasion which ensued. Of the due application of this security (had it been susceptible of any useful application in such hands,) the effect would have been the depriving the justice-shop, the *officina justitiæ*,* of a number of good customers. For, to a man's being a good customer to the lawyers of all sorts, so long as the suit lasted (which was as long as they could contrive to make it last,) it was not necessary that the demand should have any merits to support it, or the demandant the value of a farthing left in his purse, to pay, in the name of satisfaction, to an injured defendant at the end of it. On the part of the judge, any such inquiry (it may be said) would have been impracticable. Nothing more easy to say; nor anything more true: because, from the first of their opening, it had been the care of those great shops to put down all the little ones. Without hearing all suitors in the first instance, justice, it is true, could not be done to any of them: and trúe indeed it was, that for three or four sets of judges, sitting in Westminster Hall, to hear as many persons in the character of suitors as all England could supply, has from first to last been physically impossible. But what was possible, and not only possible but easy, was, from the whole of that extent of country (and from ten times that extent, had there been as much,) to receive fees; giving, in return for those fees, scraps of written lawyer's slang in due form of law.

The plea of impossibility offers itself at every step, in justification of injustice in all its forms. The plea is as true, as so many other pleas are false: but the impossibility is, in each instance, the work, not of nature, but of the judge.

No man (says the man of law, in one of his maxims) ought to take advantage of his own wrong. What! no man? no lawyer — no judge, take advantage of his own wrong? when, under the system of procedure which has had the judges for its authors, it is thus out of their own wrong, and nothing else, that an apology, or anything in the form of apology, is, or can ever be cooked up? What! no man? Yes; no man: subject of course to the exception, which, when anything wrong is forbidden by us, is constantly to be understood; viz. an exception in favour of ourselves, and such other persons to whom it is our pleasure to impart our licence.

True it is that under this system of yours it is impossible, without exception impossible, ever to do justice. Nothing was ever more true. But the impossibility, whence comes it? From yourselves. First you make the impossibility, and then you plead it. And wherefore was it made, but that it might be pleaded?

3. Business-stealing, or jurisdiction-stealing falsehoods.

King's Bench stole business from Common Pleas: Common Pleas stole it back again from King's Bench. Falsehood, avowed falsehood was their common instrument. B. R. let off one lie; C. B. answered it by another.† The battle is in all the books.‡

Quoth client to attorney, Such a one has forged a bond upon me. Quoth attorney to client, Don't dispute it; forge a release. *Vero o ben trovato:* this advice is also in the books. If true, it shows that it was not for nothing that so good a scholar had been to the great school, the school kept by the king himself at Westminister. *Regis ad exemplum:* such was the pattern followed by him. *Ingenuas didicisse fideliter artes, Emollit mores.* . . . .

Vide the case of the story-telling club in Joe Miller. Per *Archer*, cabbage as big as St. Paul's: per *Merryman*, boiler as big as St. Paul's church-yard. *President* — Cui bono? *Merryman* — to boil brother Archer's cabbage.

Thief to catch thief, fraud to combat fraud, lie to answer lie. Every criminal uses the

* Blackstone's Comm.

† This was caused by the 13 Car. II. st. 2, c. 2, which required that the true cause of action should be stated in the body of the writ, before a defendant could be arrested, upon affidavit that the cause of action amounted to £10 or upwards. As the bill of Middlesex was only framed for actions of trespass, upon which a defendant could not be arrested for a breach of a civil contract, the King's Bench was ousted of its jurisdiction. In order to get out of this difficulty, the judges invented the *ac etiam* clause, by which the defendant was to be brought in to answer the plaintiff of a plea of trespass, *and also* to a bill of debt. A few years after, Lord Chief-Justice North, in order to get some of this business into the Common Pleas, also added an *ac etiam* clause to the writ of *capias*, in order to give his court jurisdiction.—*Ed.*

‡ Blackstone's Comm.; Sellon's Crompton; North's Life of Lord-Keeper Guildford, &c. &c.

weapon he is most practised in the use of: the bull uses his horns, the tiger his claws, the rattle-snake his fangs, the technical lawyer his lies. Unlicensed thieves use pick-lock keys: licensed thieves use fictions.

Unwilling to be left behind, Exchequer stole with both hands at once, stole from both its neighbours. In design, they were all three much upon a par: but as to success, whatever may have been the cause, the thefts of the Exchequer have been little more than gleaning.

Among the falsehoods which judges caused to be uttered by the suitors, a division may again be made, into those which they contented themselves with encouraging, and those which they compelled the suitors to utter. In the one case, the powers of reward alone were employed in the generation of the lie: in the other case, the irresistible force of punishment is called in to secure it

A sample of the simply permitted lies has been already seen, in the instance of the written pleadings in general, and more especially of special pleading at common law, and the initiative pleadings called bills in equity. The habitual utterance of these falsehoods is exactly commensurate and co-extensive with the range of the *mendacity-licence* above mentioned.

These exercises of professional genius and morality, if they do not in common parlance come under the head of *fictions*, come not the less under the head of falsehoods, falsehoods hatched in the same heads, and in pursuit of the same ends, the ends of judicature.

Of the falsehoods which are forced into the lips of the suitors, or rather (since in that way little would be to be got) into the paws of their professional assistants, a specimen may be seen in those falsehoods (some examples of which were given in a preceding chapter*) the utterance of which is rendered necessary on pretence of *certainty*. The specimen is a rich one: falsehood upon falsehood: for the reason (as we have seen) is as rich in hypocrisy, as the practice itself is in falsehood.

When a thing happened in one or other of two ways, and you cannot tell in which, you must not say so; that would be *uncertain*: your indictment or your declaration would be void for uncertainty. You must say it happened in both. On these terms, and on these only, you are right in law: not the less so when the fact is impossible. And so if there be half a dozen or a dozen such alternatives: which there are, and more, in every day's practice.

The practice is, to tell as many different stories, as there are ways in one or other of which it is supposed the fact may have happened: it is spoken of as having happened in each of those ways: each story is called a count. Thus, if there are two such counts, there is one of them perhaps true, one certainly false: if half a dozen counts, one perhaps true, five false.

A man was murdered, by being knocked on the head and thrown overboard: whether dead or not when thrown overboard, is uncertain. Two counts: one, that the man was knocked on the head, and died of the blow: the other, that the man, the same man, was, at the same time and place, throw overboard, and died of the drowning. Here was the same man killed twice over: and this for the better information of the supposed murderer, that he might the more clearly understand the charges he had to defend himself against. Had the fact been truly stated, the murderer would have been acquitted. This case occurred not much more than twenty years ago. ' The indictment stood the scrutiny of the twelve judges †

So again *in non-criminals*. To take the sort of case of all others the most commonly exemplified. A man owes you £20 and no more; you are or are not certain as to the precise description of the debt, or the evidence by which you shall be able to prove it. Your attorney, with his special pleader under the bar, with or without the advice of a barrister to boot, gets a declaration drawn with half a dozen counts in it, less or more: say half a dozen. Here, then, you are made to demand six separate sums of £20 each, stating them as different, and saying of each that it is due to you · total £120

What shall we think of that man, but above all of that judge, who, seeing this, or not seeing it, proclaims the necessity of certainty; and is indefatigable in his eulogiums on the law, for the rigour with which it exacts the presence of that best ornament in all legal instruments?

Uses of these forced falsehoods:—

1. Half a dozen or a dozen or a score of stories told instead of one. so much the more made business.

2. Chance of mis-statement, real or supposed whence application for nullification; certainty of a motion and an argument; even chance of a fresh suit: at any rate, more made business.

3. Verdict taken in a court alleged not to be the proper one: application in consequence: more made business as before.

4. The business having thus been rendered incomprehensible to a jury, what is given as their verdict is none of theirs, but settled some how or other among the men of law: neither is the judge himself responsible for it. On one or other of all these counts, the

* Chap. XVI. *Written Pleadings*; § 4.

† Leach's Crown Cases, [p. 569, case of Hindmarsh, 1792.—*Ed.*]

plaintiff takes the verdict at his peril: that is, the plaintiff's lawyers take it, at the peril of their client: if they take it wrong, so much the worse for the client, but so much the better for the lawyers. The lawyers make the verdict, the jury stare. Jury trial for ever! — sacred palladium of English liberty!

5. Confirmation of arbitrary power in the hands of the judge: the jury serving as a stalking horse. Incapable of judging for themselves, conscious of their own incapacity, juries become helpless, and do as they are bid. How should they do otherwise? They know not what is done; they know not how to help themselves. If the court likes the verdict, it stands; if not, it is got rid of. The verdict, if an unjust one, cannot, on the score of its injustice, be got rid of without reasons. But in this way, just or unjust (reasons being out of the question,) it may be got rid of with equal ease.

6. The state of the law rendered more and more incognoscible.

By wrapping up the real dispositions of the law in a covering of nonsense, the knowledge of it is rendered impossible to the bulk of the people — to the bulk of those whose fate depends upon it. What meets their eyes is gross and palpable nonsense: a man dead and alive at the same time; a dead man and a live man the same person: thirty or forty days making altogether but one day: a man constantly present in a place where he never set his foot: the same man judge and party, and justice all the better for it. In jargon such as this, no man in whose brain the natural provision of common sense has not been eaten out by false science, can avoid beholding so much vile and scandalous nonsense: but if, by the help of that portion of common sense which each man's fortune has imparted to him, it were possible to him to divine what disastrous sense may be at the bottom of this nonsense, the nonsense would miss its mark.

7. Legislator and people confirmed in the habit of bowing down to falsehood and absurdity, and recognising them as being, what lawyers are continually proclaiming them to be, necessary instruments in the hands of justice. If without them justice never *is* administered, what conclusion more natural, than that it never *can be?*

8. Corrupting the morals of the people. Wheresoever the use of fiction prevails, and in proportion as it prevails, every law-book is an institute of vice; every court of judicature is a school of vice.

Put into the hands of your son the Commentaries of Blackstone? Send him to attend the courts at Westminster? For learning jurisprudence, yes: but for cherishing in his bosom the principles of veracity, of sincerity, of true honour? Stay till you have made your daughter get by heart the words of Piron and Lord Rochester.

9. Corrupting the intellectual faculties of the people. To what a state of debility and depravation must the understanding of that man have been brought down, who can really persuade himself that a lawyer's fiction is anything better than a lie of the very worst sort! that the whole mass taken together, or any one particle of it, was ever of any the smallest use to justice!

Fiction may be applied to a good purpose, as well as to a bad one: in giving support to a useful rule or institution, as well as to a pernicious one. The virtues of an useful institution will not be destroyed by any lie or lies that may have accompanied the establishment of it: but can they receive any increase? The virtues of a useful medicine will not be destroyed by pronouncing an incantation over it before it is taken: but will they be increased?

Behold here one of the artifices of lawyers. They refuse to administer justice to you unless you join with them in their fictions; and then their cry is, see how necessary fiction is to justice! Necessary indeed; but too necessary: but how came it so? and who made it so?*

As well might the father of a family make it a rule never to let his children have their breakfast, till they had uttered, each of them, a certain number of lies, curses, and profane oaths; and then exclaim, You see, my dear children, how necessary lying, cursing, and swearing, are to human sustenance!

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* A man to whom you lent a horse, — does he refuse to return it? Not the smallest chance will they give you for getting the animal back again, unless you say he *found* it. This is what you are forced to do when you bring an action of *trover:* by which, by the bye, you will not get your horse after all, if the defendant chooses to keep it, paying the price which the jury have happened to set upon it.

A man to whom you let your house for a year, — does he at the expiration of the time refuse to quit it? Not a chance will they give you for obtaining possession again of your house, unless you trump up a foolish story about two persons, real or imaginary, one of whom turned the other out of it. This is what you are forced to do, in bringing an action of *ejectment.*

On the other side of the Tweed, where no such lies are told, do not they contrive somehow or other to put a man in possession of his horse, or of his house? An English court of conscience, would it do its business any better than it does, were it to refuse to make a man repay the thirty shillings he had borrowed of you, unless you would declare that, instead of your lending him the money, he had found it.

CHAPTER XIX.

FOURTEENTH DEVICE—ENTANGLEMENT OF JURISDICTIONS.

§ 1. *Division of jurisdiction, how far subservient to the ends of justice.*

Jurisdiction being considered as divisible, the possible modes of division may be comprised under two denominations; geographical division, and logical, or say metaphysical. the latter comprehending every mode not included under the former.

The extent of the state in question being to a certain degree considerable, division on the geographical principle is prescribed (as has been seen) immediately by the regard due to the collateral ends of justice, viz. saving of the delay, vexation, and expense, attendant on journeys and demurrage.

The division being already carried to as great a length as is prescribed by the mere consideration of the regard due to those ends of justice, — add the supposition of a certain degree of populousness in the districts marked out in conformity to those ends, the disposable time of the one tribunal (if there be but one) may be to such a degree drawn upon, as to be inadequate to the demands thus made upon it. Suppose this to be the case, thence arises an absolute and irrecusable demand for one or other of two operations a further division upon the geographical principle, a division of the first instituted district into more districts than one (say into two districts,) or the institution of more courts than one (say two) in the same district.

Each of these arrangements has its peculiar advantage Divide the district into two, each with its separate court, you reduce in proportion the quantum of delay, vexation, and expense, incident to journeys and demurrage, but then you have no emulation. Leaving the district undivided, put two courts into it, each with precisely the same jurisdiction as the other, you get the advantage of emulation. Supposing all other circumstances equal, or, in case of inequality, competent allowance made for it; the number of suits brought in the course of the year in the one court, compared with the number brought within the same space of time in the other court, will, if made public, constitute a sort of index, exhibiting the respective heights at which the reputation of the two judges, or sets of judges, for the time being, stand in the scale of public estimation.

Of these two advantages, the former is much the more certain in its nature. It depends on causes purely physical; causes much steadier in their operation than any psychological ones. It is subject to no accidents: between two places the distance is not apt to change: no expedient can lessen that distance. Of this advantage, however, no notice has been ever taken; at least by English lawyers. How should it? Recognise this circumstance in the character of an advantage, you recognise at once the worthlessness of the system which labours to such an excess under the opposite inconvenience.

The other advantage, being in its nature the more vague and unsusceptible of calculation, is on that very score the better qualified for recommending itself, under a system, with the endurance of which a general habit of thinking with precision is incompatible. To the polemic, to the rhetorician, in whose sight victory is as precious as truth is worthless, no argument is so acceptable as one which he can make as much or as little of as he pleases.

In legislation, first the advantages and disadvantages of an arrangement are sought out and weighed, then, if the advantages are deemed to preponderate, the arrangement receives the touch of the sceptre. In jurisprudence, first the arrangement is observed to be established; this observation made, then comes the problem — Required to find out the advantages of it.

Original short-sightedness had divided the business, upon the logical principle of division, among three courts: mutual rapacity had by degrees broke down here and there the fences, mutual lassitude and impotence have left things in this state The former arrangement, though made by the legislator, was made so long ago that it could not but have been a wise one the latter, though made in the teeth of the former, being a work of lawyers, was still wiser Required to prove it so No other argument being to be found, the principle of emulation offered itself, and was received with open arms.

That the influence of this principle, so far as it extends, is salutary, seems out of dispute but as to the subjecting the amount of it to any sort of calculation, the impossibility has already been brought to view.

The effect of the emulation depends upon the notoriety of the proportions: but as to the giving to the public the possibility of being acquainted with them, no such thing was ever done. Publication of tables exhibiting the degree of success in hospitals, is in every day's practice. Medical men, being destitute of power, have nothing to serve as a ground for business, but reputation · nor anything to serve as a ground for reputation, but desert; or at least statements which, taking them for true, afford presumptions of desert.

If, in both or in either of two courts, the interest created by the love of ease happens to be ever so little stronger than the interest created by love of reputation, the principle of emulation is without effect.

Judge Titius may conduct himself less badly

than judge Sempronius, and yet conduct himself in a line of frequent repugnancy to the ends of justice. A system of registration so contrived as to show continually, — in the instance of every judge, of every suit carried on under the direction of every such judge, and of every step taken in the course of every such suit, — the degree of regard paid to the several ends of justice; — such a system would afford a still more steady and uniformly-operating security for good behaviour, than can be afforded by the mere operation of putting two courts with the same jurisdiction into one district, for the chance of the benefit to which, in their instance, it may happen to the principle of emulation to give birth. The superiority has long been constant and decided: the two judges, or one of them, if they live long enough, sink into the vale of years: what then becomes of the emulation, which, fifty or sixty years earlier, both being at Eton or Westminster, would have rendered each so eager to take the other's place?

Be it allowed, however, that in certain situations it may be, if not upon the whole advantageous, at least not in any very high degree disadvantageous, that in one and the same judicial district (that district not being a very extensive one) there should be two courts, with power over the same sorts of causes (viz. under inconsiderable exceptions, all sorts of causes;) operating according to the same system of procedure; collecting evidence in the same mode and in the same shape; exerting in every case sufficient powers, and therefore in every case the same powers, the one as the other, for effectuating the forthcomingness as well of things as of persons, as well in the character of the matter of satisfaction, and (where necessary) of punishment, as in the character of sources of evidence. Each being possessed of the several powers adequate to those several purposes, each consequently ought to be possessed of the same powers: the powers of each being subjected to the most effectual system of checks capable of being employed consistently with the adequate execution of these several powers in subservience to the several ends of justice, the powers of each ought to be subjected to the same checks.

Such are the terms on which the existence of two courts in the same district may be, according to the extent of the district, either advantageous upon the whole, or not decidedly and in any very high degree disadvantageous: the advantages from emulation, viz. in respect of superior security against misdecision, being set against the disadvantages in respect of increase of delay, vexation, and expense, by journeys and demurrage.

Change the terms in any respect, you will find no cases in which the effects of such multiplicity can be other than disadvantageous.

Give to one court cognizance of causes of one description, to another court cognizance of causes of another description,* each to the

* It might appear at first sight, that, on the supposition of a quantity of business greater than can be dispatched in the disposable time of a single court, and, therefore, of an adequate demand presented for two courts, it would be desirable to make a separation of the whole mass of causes into *simple* and *complex* causes — allotting the simple causes to the one court, the complex ones to the other.

That a distinction ought to be made between these two classes of causes, is proved by other reasons.

A great majority of the whole number of suits do not require more than a few minutes each, to hear and terminate: this is matter of experience. Yet here and there a cause shall arise, which, to do justice to it, may require more than as many days of uninterrupted attendance. Were no division established between simple and complex causes, here might be a hundred sets of suitors, with their respective witnesses, all kept in a state of torment by one single cause. Like a broken-down carriage in a procession, it might happen to a long cause to produce irreparable damage, stopping, for days or weeks, dozens or scores of causes, to each of which, upon an average, as many minutes might suffice.

It would, however, be in some respects better (two courts in one district, together with separation of complex from simple causes, being supposed to be resolved on,) that one of the two courts should not be confined to simple, the other to complex causes, but each court occupied with causes of both descriptions, dividing its time between them. 1. On this plan you have the benefit of emulation; on the other, not. 2. Confine the simple causes to one court, the complex causes to the other, the latter seems in danger of getting a bad name: the delay inseparably attached to the nature of the cause, may come to be charged, as matter of blame, to the personal account of the judge.

It is better, as between simple causes and complex ones, to allot to them different portions of the same day, than different days.

1. Latter part of every day for appointed causes, fore part of the day for chance causes, is easier to remember, than such and such days for the one, such and such other days for the other. Coming on a wrong day, a man finds the door of justice shut against him.

2. On the principle of distinction of days, there are entire days on which cases (for some such there are) that cannot wait one hour without danger of irreparable mischief,[a] find justice inaccessible. Of this mischief, the principle of distinction of hours stands clear.

3. In the case of a superfluity of time on the one part, and a superfluity of business on the other, it will be easier to borrow of the morning for the afternoon, or of the afternoon for the morning, than to borrow of one day for another.

A suit of a simple nature has been commenced within the fore part of the day; with the help of another half hour, borrowed from the afternoon,

[a] Ship on the point of sailing; female in the hands of a ravisher on board of it. Other cases might be instanced in abundance.

exclusion of the other: in the first place you lose the benefit of emulation; in the next place you produce, without any use, the danger of collision. On the part of the plaintiff, uncertainty to which of the two courts he ought to apply, on the occasion of this or that individual cause: on the part of the defendant, uncertainty whether to submit, or not to submit, to the cognizance endeavoured by the plaintiff to be given to the one or the other court, on the occasion of that individual cause. on the part of each court, uncertainty whether it ought to take cognizance of this or that sort of cause

With the purest intentions on the part of those by whom the line of demarcation is drawn, and with intentions equally pure on the part of those whose duty it is to conform to that line, the application of the metaphysical principle of division has ever been a difficult one, and one which is constantly liable to give birth to those doubts and contestations, the prevention of which is aimed at by it; — with the purest intention in both quarters — much more with sinister and corrupt intentions in either quarter, or in both—much more, again, if the two functions shall everywhere have been (as under the fee-gathering system) united in the same hand, that hand employed in carving out jurisdiction, for itself to fatten upon It will be matter of difficulty, in the maturest and strongest state of the public mind, — much more must it have been in those ages of barbarity and ignorance in which those lines of demarcation have been scratched in so many directions, with so much emolument to the draughtsman, and so much delay, vexation, and expense, to the suitors, of succeeding times

In regard, moreover, to modes of collecting evidence, and of securing forthcomingness,— one of the two courts being provided with a set of powers and checks, adapted, in the best manner that can be devised, to those respective purposes, — if, in the provision made in any respect in the instance of the second court, there be any variation, that variation (since by the supposition it cannot be for the better) will either in itself be upon a par with the arrangement that corresponds to it in the case of the first court, or it will be for the worse. The best that can happen to it is to be upon a par: but in this case,—though of itself, by the supposition, either would have been as good as the other,—yet, there being also, by the supposition, diversity without use, the effects of that diversity cannot but, to the extent of it, be purely disadvantageous. In its purest possible state of simplicity, the law, in every part of it, draws upon all men for a portion of labour and intelligence more than all men have to bestow upon it here is an inevitable imperfection, with the inevitable inconveniences that are its consequences add to this inevitable degree of complexity (that is, of non-notoriety, and thence of uncertainty) a single degree that is not inevitable, every word thus added is a nuisance

§ 2 *Distinction between law and equity, how far should it be included in the list of devices?*

In speaking of the entanglement of jurisdictions, and in particular of the entanglement created by the sham distinction between *law* and *equity*, I mentioned it as an article in the list of *devices* it may be expected that it shall be shown by what title it occupies the place given to it in the list.

It will be found that the device is not in the creation, but in the preservation of it. Of itself, it can scarcely make out a sufficient title to the name In its original creation, it was not mischievous, but beneficial.

Among the contrivances as yet brought to view under the name of devices, not one but what, in proportion as, in effect as well as design, it was subservient to the sinister ends of judicature, was repugnant, purely repugnant, to every end of justice Equity judicature, though in design directed with as much fidelity as the other to the same ends, and though in effect contributory in a very high degree to some of those ends (viz. the collateral ends of delay, vexation, and expense, considered as the necessary avenues to profit,) was in effect contributory also in a very high degree to the direct ends of justice: to the prevention of misdecision, and of failure of justice

But, though itself not in strictness entitled to be numbered among the devices purely hostile to the ends of justice, yet so intimate has been its combination with them, so close the alliance, that, in any survey taken of them, the omission of so capital a feature would have left a most material deficiency.

In England, so unexampled was the imperfection of the original scheme of judicature, so many of the exigencies of society had it left without provision altogether, that an addition, from some quarter or other, was matter of absolute necessity. These necessary additions, with an almost inconceivable stupidity, the original set of judges refused to make. By another set of judges, bred up in a different,—a foreign, and in a great degree even a

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it may be dispatched: in the first suit appointed for the afternoon, the parties, or one of them, are not quite ready, or, though ready, can with less inconvenience wait the half hour, than the parties in the simple cause can wait the whole day, or perhaps two days.

Suppose no complex business at all appointed for the afternoon: chance business may be received in lieu of it, instead of waiting a day, as it must otherwise have done.

hostile, school,—under the authority, or by the sufferance, of the same sovereign, these additions came by degrees to be made. But the new hands by which these indispensable additions were made, would not work but upon their own terms. The terms imposed upon suitors by the judges of the old school, profitable as they were to the imposers, grievous proportionably to the suitors (rendered such by the set of devices, as above explained,) were not yet grievous enough, were not yet profitable enough, for the judges of the new and foreign school. The home-bred judges shook off by degrees the obstacle opposed to their designs by the presence of the parties, and at last contrived to avoid seeing them till the very last instant, when it is impossible to help it, and when no good can come from it: from first to last, Rome-bred judges never would suffer the parties to come into their presence at all. Home-bred judges, when writing was scarce and dear, insisted upon its being employed, in considerable quantity, to no purpose, or to worse than none: Rome-bred judges refused to meddle with a cause, without a vast and boundless mass of writing employed in the first instance.

The evil done by the judges of the original English school, in respect of the exigencies left without provision,—the evil thus done by them, in so far as doing nothing can be called doing, was immense. The good done by the judges of the Roman school, in respect of the provision made by them for the same exigencies,—the good thus done by them, though done so badly, as well as upon such bad terms, was proportionably extensive. The good thus done, consisted in the aid thus lent to the direct ends of justice.

The evil done by the new workmen in the execution of the new work, consisted in the enhancement of the evils of delay, vexation, and expense: evil done, not for its own sake —of that gratuitous wickedness they must stand acquitted,—but, as in the case of the old workmen, for the sake of the profit extracted out of the expense.

We have seen the engines employed by the old school, in the manufacture of that mass of profit-yielding evil which it fell to their share to organize. In the fabrication of the augmented mass manufactured by the new set of hands, engines the same in the main were employed, but with here and there a variation in the proportions.

All this while, be it never for a moment out of sight, that,—how well soever, when compared with the common-law branch of the technical system, equity, with its peculiar branch of that system, may be entitled to the appellation of a remedy,—compared with the natural system, it is so much sheer abuse. Whatever imperfections equity has corrected, in so bad a way, and upon such exorbitant terms, the natural mode, if suffered to have gone on undisturbed, would have prevented from ever coming into existence: and would, whenever called in, supply the defect, in the best manner, as well as upon the best terms.

How numerous are the instances of necessary rights, for which common law gives no remedy on any terms, nor equity, without keeping the parties for months or years in hot water! but for which a justice of peace, operating in the mode in which he is in the habit of operating as far as the law will suffer him, would give a more effectual and less precarious remedy, in the course of as many hours or minutes.

Think of that remedy, by which (though still a remedy) natural and necessary inconveniences never cease to receive a twenty fold, a hundred-fold, or a thousand-fold increase! And this in an age priding itself on its civilization, and in a nation never tired of boasting of its laws.

So long, therefore, as—while a better, an infinitely better, remedy might be had for all the defects of common law—this entanglement of jurisdictions, a remedy so imperfect, and producing so many collateral evils, is allowed to subsist,—so long, although the purpose for which it was created was a highly beneficial one, the preservation of it has an indisputable title to a place in the list of devices.

No man regarding the subject with a view to the ends of justice and the welfare of society, can seriously believe that the existence of two repugnant masses of substantive law—that the existence of two repugnant masses of adjective law, two systems of procedure grounded on repugnant principles,—is really conducive to those ends. If this be so, then to the score of device, of artifice, of fraud, of hypocrisy, must be referred whatsoever composed complacency, much more whatsoever active and busy applause and admiration, we see bestowed upon English jurisprudence, for the felicity it enjoys in the monoply of this peculiar excellence.

§ 3. *Equity jurisdiction, its origin and extent.*

Taken by itself, or anywhere else than in company with the word *court*, *equity* is *abracadabra:* a word without a meaning.

To give a meaning to it, you must connect it with the word *court*, and say, *court of equity.**

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* England had once its court of star-chamber: France its court of the marble table. Explain the business of a court of equity by a definition of equity? As well might you explain the business of the star-chamber by the definition of a star, or the business of the *cour de la table de marbre* by the definition of marble.

As often as, in his argument, a lord chancel-

What, then, is a court of equity? Any court in which the course of procedure is in a certain form: the characteristic of that form being the sort of instrument called a *bill in equity*: any court in which the instrument, the written instrument, in which the plaintiff states his demand (that is, the judicial service which he calls upon the judge to render to him) bears that name.

To bear that name, it must contain, besides occasional parts, three essential parts: the *charging* part, containing a statement of the alleged facts; — the *interrogating* part, containing questions adapted to the purpose of extracting from the defendant a sort of confessorial testimony, admitting the matter of fact alleged, or so much of it as shall be sufficient to warrant the judge in acceding to the prayer; — and the prayer itself, in which a statement is given of the service looked for at the hands of the judge.

The defendant, if he means to combat the obligation of rendering this service, is under an obligation of yielding the testimony thus demanded of him.* the instrument in which it is contained is called an *answer*, the defendant's *answer*, to the plaintiff's *bill*.

At the time this answer is delivered in at an office, the truth of it is declared, in general terms, by a *vivâ voce* declaration, accompanied with the ceremony of an oath.

Of this ceremony, the effect is to deprive a man, *pro re natâ*, of the benefit of the mendacity-licence, granted (as already explained) to all parties on the occasion of the *pleadings* delivered in by their respective attorneys, on the occasion of a suit in a court of common law. To the plaintiff, in respect of his bill, the licence is reserved; and he is even compelled to make use of it. to the defendant it is not reserved.

What, then, is equity? Answer Whatever has ever been done by a court of equity.

A court of equity is a sort of court peculiar to English jurisprudence, and the institution of which took place at a period of time comparatively recent, relation being had to the other courts, called courts of common law.

The powers assumed by this sort of court have applied themselves to the substantive branch of the field of law, as well as to the adjective branch, the law of procedure.

1. To the substantive branch. accordingly you have *legal* estates, and you have *equitable* estates. The same estate which by the common-law courts, if applied to, would be given to one man, the equity courts give to another. The same estate, which, upon your applying for it to a common-law court, the court will give to you, — an equity court, upon an application made by your adversary, will give to your adversary. In case of a conflict, or seeming conflict, of this sort, the equity court is the strongest nor is the common-law court dissatisfied, it has had its fees.

The subject which gives most occasion to this difference, is the interpretation put upon conveyances (wills as well as deeds included) the interpretation put upon these instruments, or rather, the disposition made of men's property, on pretence of interpretation. Common law gives the property to one man, equity to another. when a man's intention, or pretended intention, has been ascertained, equity will sometimes give effect to it, in a case in which common law would refuse to give effect to it.

2. To the adjective branch. In this field, the principal operations of equity may be ranked under two heads — 1. Rendering, for the purpose of giving effect to acknowledged rights, a variety of services, which the common-law courts, through stupidity or inability, had omitted to do; 2. Stopping what was in a course of being done, or overthrowing what had been done, by the common-law courts, upon a variety of occasions.

Between stupidity and inability, the distinction is no other than between cause and effect Before the equity courts grew up and trenched upon them, the common-law courts did, or might have done, whatever they pleased There was therefore no inability, but such as was voluntary. Doing abundance of things which they omitted to do, they might not only have done (which indeed was less than nothing to them) more good, but, what was everything to them, have got more money Therefore, so far as inability extended, it had stupidity for its cause.

From whatever cause, however, — the list of the things which they could not, that is to say, would not, do, was a pretty long one.

What they could do, and did do, amounted to this they could punish a man — hang him — cut his hands or legs off: they could take a thing, a moveable thing, bodily, from one man, and put it into the hands of another: from a house or a field they could turn a man, head and shoulders, and put him into jail if he came in again. they could take, and at one time used to take (for example, on pretence of your having been outlawed, when it was no such thing) your estate, and divide it amongst themselves: they could take the property of a dozen men (jurymen) together, and destroy or dissipate it: it was what they did as often as a new trial was granted: till about the middle of the seventeenth century, they would not grant one upon any other terms.

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lor or a lord chief baron pronounces the word *equity*, — substitute, if it be more agreeable, the word *star*, or the word *marble*: it will make no sort of difference.

* Except the comparatively rare cases of a plea, and a demurrer, not worth explaining for this purpose.

What they could not do, was—everything else.

Not one thing whatsoever that a man ought to do, could they make him do. A man had agreed with you to sell you an estate, and you had paid him the money: could they make him put you in possession of the estate, or put you in possession of it themselves? Not they indeed. What they could do, was to punish him, or make a show of punishing him, for not having done it: give you, or make a show of giving you, money, instead of the estate: to raise the money, take his goods, if he had not sense to put them out of the way—take them, sell them, and give you what they fetched: take his goods, or instead of his goods, if he had lands, and had not sense to dispose of them, take half of them, and but half, when double would not suffice.

In regard to the future, and in the way of restraint, they could stop another set of judges, a subordinate court, from doing what they chose should not be done; but they knew not how to deal with individuals: they could stop encroachments upon their judicature, but they could not stop waste. When a house was pulled down, they could punish a man for having pulled it down; when a grove or an avenue was cut down, they could punish him for having cut it down: but as to the preventing or stopping him, it was out of their line. Mischief must first be done, before they would stir a finger to prevent it. When the steed was stolen, then, and not till then, were they ready and willing to shut the stable door. It required equity (when equity reared its head) to stop waste.

Thus, in the way of *restraint* alone, and that very imperfectly, could they operate upon the future; in the way of *compulsion*, they knew not how to deal with it.

There was a particular circumstance, to which they were in a considerable degree, if not altogether, indebted for their impotence: and that was, their connexion with a jury.

How a set of men in many respects so arbitrary, came to find themselves hampered with this salutary clog, is among the many historical points involved in darkness: but so it was. By King's Bench, by Common Pleas, by Exchequer, scarce anything was to be done, but either *for* or *with* a jury,

But there are abundance of things that could not be done, and never have been done, nor ever can be done, by a jury: and amongst these are many things so necessary, so strictly necessary, that without them the existence of society, in a state of civilization ever so little above the state of barbarism, ever so little approaching to the present, is a matter physically impossible:—Every function requiring occasional and occasionally repeated superintendence—every function requiring a constant eye to the future, and a ready hand to follow it—everything that was to be done in a cause which, in any one of a multitude of respects, was to a certain degree complex.

Except the anomalous and next to unexampled case where jurymen have been treated like cardinals in a conclave,—whatever is done by a jury, well or ill, must be done in a single sitting: shut up again after they have been turned loose, they are no jury—their claim to confidence is gone. By possibility, a jury may sit together (because they have sitten together) twenty-four hours; but if they have sat together half the time, unless they take their verdict blindly from the judge, he choosing to give it to them, cross and pile would present a better chance for justice.

Habituated to act with a jury, these sages knew not how to act without one: no pipe, no dance; no jury, no justice. With a jury, or, in the meantime, for a jury, was everything to be done: what could not be done with a jury, was either not worth doing, or could not be done. Superstition bears her shackles everywhere: poetry has been cramped by unities: by unities, justice too has been cramped. At the play-house, what could not be squeezed into five hours was not to be represented: in Westminster Hall, what could not be squeezed into twenty-four hours was not to be done.

Of the three common-law courts (the common-law half of each Exchequer judge included,) there was but one, the King's Bench, that had any notion of bidding any man (except the sheriff) do anything: and if, having received the order (in law-jargon called a mandamus,) a man chose to make a lying excuse, there ended the suit. In a fresh suit, if you could prove the lie upon him, then came work for a jury, and then he might be made to pay so much money as the jury taxed him at: but as to making him obey the order, it was not to be thought of.

From their incapacity of compelling a man to do his duty, coupled with their incapacity of doing anything that could not be done in twenty-four hours, resulted their incapacity for the discharge of a number of functions, on the discharge of which the continuance of society depends.

1. Scarce an act of power, whether over person or property, could they make a man exercise—scarce a *trust*, as the phrase is, could they make him *execute*, for the benefit of another. From this they were disqualified, not only by the two causes above brought to view, but by a third likewise.

Most trusts, and in particular all domestic trusts, require continued superintendence:—interposition, not constant indeed, but eventual and occasional, at a moment's warning. Cruelty, negligence, dissipation, imbecility, have not their long vacation. But the *custodes morum*, the judges, had, and resolved to

have, *their* long vacation; not one week of it would they part with: the wife might be plagued to death, the child corrupted, the property consumed and wasted,—it was no concern of theirs.

2. If an account of any considerable length wanted settling, they had no tolerable means of settling it. An account with a thousand items in it, five hundred on one side, as many on the other, contains the matter of a thousand suits: were there ten thousand, they would have had no objection to dispose of them, if presented one by one; but, if presented in a mass, they know not what to make of it.

3. If a thing were in dispute between two parties, the one not in possession of the thing could settle it, by bringing an action against the other: but if a third had also a claim, they knew not what to do about it.

4. Destruction of property (houses, trees, and so forth,) they had no notion so much as of stopping, much less preventing, so long as the destroyer had a right to the use of it. *Damages*, meaning satisfaction in money, they were ready to give, as soon as he had absconded.

5. If a complex mass of property called for distribution, they knew not how to go about it. For every death that took place (not to speak of insolvency,) if the deceased was worth anything, there was a complex mass of property vacant, and requiring to be disposed of; but death was of the number of those contingencies that had escaped their providence.

6. If an executor had promised to pay a legacy left by his testator, they could take measures, as above, for making him pay it. but if, choosing rather to keep the money, he had the wit not to make any such promise, they knew not what to do with him, he might do as he would with it, for anything they could do to get it from him.

In some of these instances, they could not act at all: in others, if they did act, it was so awkwardly and so badly, they had better not have meddled with it. In comparison of their mode, equity, with all its delays, was found a relief.

Here, then, was a gold mine—a mine rich in *business*: open to any hand that had strength to seize it, and the wit to work it.

The clergy, a set of adventurers who were always on the alert,—the clergy, dividing themselves into two parties, entered and took possession of so many different parts of it: one party with one pretence (that is, with one set of words) in their mouths, the other with another.

Some talked of holy mother church, and souls, and pious uses. For the good of a man's soul, whatever he had died possessed of, be it what it would, so it were worth having, they were ready to charge themselves with it for pious uses: and of all uses, none were so pious as their own.

The bishops, having for their proper and only ostensible function, the showing men heaven, and keeping them on the right road to it, soon perceived that there was no earthly power which, in such pious hands, might not be made subservient to that pious end. At an early period (not to speak of the goods of intestates, including all the moveable property in the country,) in the line of judicature, they soon got possession of causes relative to testaments, and causes relative to marriage,* with a few et cæteras not worth mentioning here. Being however the delegates of a spiritual authority, rivalizing with the temporal authority of the king, they found their career checked, and limits tolerably precise (the time of day considered) set to it.

The good of souls was their object: the good of souls was their motto: and what is above, with the administering a little fatherly or motherly correction, by the bye, for paw-paw tricks, was all they were allowed to do for it. In testamentary and matrimonial causes, what was done by them, badly as it was done, would scarcely in those times have been done less badly by any other hands.

To another set, a single word, *equity*, answered every purpose. What little knowledge the times afforded, was in a manner engrossed by ecclesiastics. the king's right-hand man, his virtual first minister, under the name of chancellor, was of that profession. Whatever in the way of judicature was ready to be done, he was ready for doing it. always understood, so long as money was to be got by doing it. This great officer chose for his motto the word equity. whatsoever a bishop did, was for the good of men's souls. whatsoever a lord chancellor did, was for equity.

It has been among the artifices of men in power, to fasten upon some abstract term, to beget upon it some ideal shadowy being, from the influence of which on the imaginations of mankind they could derive respect, and into the darkness of which they could occasionally escape from envy and from censure. Ecclesiastics, the sons of the church, were liable like other men to be fools—like other men to be knaves—like other men to be liars: but the church, their holy mother, ever one, ever the same, ceased not for a moment to be all-wise, all trustworthy, infallible. Like other men, men of law, sometimes through imbecility, sometimes through cunning, have ever and anon (not to say most commonly) clothed their conceptions in the language of absurdity: but, that the law herself, or itself, through all vicissitudes, has never ceased to be the perfection of reason, is placed out of

* Reg. Brev.

doubt by the concurrent testimony of Coke and Blackstone. A judge with the title of chancellor upon his head, and the word *equity* between his lips, will be no less exposed than a judge with the title of judge upon his head, and the words law, common law, between his lips, to be turned aside by imbecility or cunning into the paths of iniquity and injustice: but that equity is a personage still more perfect than that law which is the perfection of reason, is clear not only by the assumption of all equitymen, but by the confession, more or less explicit, of common lawyers themselves.*

The range of the judicature exercised for the good of men's souls, found the limits that have just been mentioned: what limits, it will naturally be asked, had equity?

In principle, none at all: what are the occasions on which a judge ought to act otherwise than according to equity?

In practice, — ask for the boundary line of equity? As well might it be asked what line had Ignoramus been describing upon the floor, when he said of himself, *Buzzo et torno sicut musca sine caput.*

Ask any institutional writer: ask a lord

* *Equity* is, in its original signification, exactly synonymous to its conjugate *equality*. In a certain description of cases, though that comparatively a narrow one, the dictates of utility require that, in the allotment and distribution made by law of benefits and burthens, to or amongst individuals standing in certain relations to each other, the proportion of equality should be observed. In so far as this state of things has place, it is right and proper, because it is most for the advantage of the community upon the whole, that such an allotment and distribution of the objects in question should be made by the substantive branch of the law. In so far as the allotment so made by the substantive branch of the law has been adjusted to this principle, justice requires that such allotment and distribution should be conformed to and carried into effect by the adjective branch of the law; in other words, by the system of procedure.

To the extent of this description of cases, whatever arrangement is conformable as above to *equality*, or say to *equity*, is conformable to justice, and, as such, fit to be carried into effect. Out of this circle of cases, an arrangement which should govern itself by the principle of equality, which should make a point of allotting and dividing the object in equal proportions amongst the several co-claimants or co-repugnants, would not be conformable to justice.

Between the cases in which the adoption of the principle of equality or equity is employed in the administration of justice, and the cases in which it is not, nor can be, employed, consistently with the dictates of utility and justice, — there is not in the nature of things any such marked distinction, as that justice should be of a better sort in the one set of cases than in the other. Yet, somehow or other, to the word *equity*, the relation of which to its original synonyme *equality* has insensibly been almost forgotten, a sort of eulogistic sense seems somehow or other to have attached itself, exceeding in the degree and measure of eulogy and approbation, whatever has attached itself to the words *law* and *justice*. By *equity*, men have accordingly come to understand a double-refined sort of law, distinct from and superior to the common sort, to that sort to which the common and original appellative *law* continues to be attached. Between *law* and *equity* there seems to be a gradation of rank: and whensoever they meet, that it belongs to law to yield the *pas* seems altogether out of dispute. How it stands between *justice* and equity does not seem quite so clear. Does it ever happen to their pretensions to meet together in the teeth? The answer may be *yes* or *no*, whichever happens to be most convenient. But if it be yes, so that the two goddesses do not agree, so much the worse for justice. Take her at the best, there is in her temper a crabbedness that people in general are not fond of: equity is decidedly regarded as the most amiable.

As to the superior favour attached to the word *equity*, it seems referable altogether to the circumstance of posteriority; though to that on more accounts than one.

1. Along with the involuntary good, so much mischief, nor that altogether involuntary, had been seen to be done by men in power with the words *law* and *justice* in their mouths, that the words had been rendered to a certain degree odious; and men had been upon the look-out for some sort of system, by which the good might be administered, if not without any admixture of the evil, at least with a less proportion of it.

2. The formidableness of the words *law* and *justice* had been constituted in a principal degree by its application to penal cases; and more especially to those in which the punishment was most severe: and of every such terrific application the word *equity* stood clear.

Here was prejudice against prejudice. The people, in proportion as they were oppressed by law, were fond of equity: in proportion as they were oppressed by judges, that is, by lawyers, they were fond of juries. Equity, according to the shortest and most comprehensive conception that could be given of it, was a sort of law in which everything was done without juries. What was to be done? Scylla was on one side — Charybdis on the other. Under juries, men found themselves ruined for want of a remedy. Under equity, they found themselves oppressed, and plundered still more grievously than under juries, by virtue of this new invented remedy. The alternative was like that of the wretched patient under ancient medicine: to lose his life's blood for want of a styptic, or be broiled by a red-hot iron applied to him instead of one.

They little think that to magnify trial by jury is to condemn equity. But lawyers, to whom inconsistencies of all kinds are daily bread, have contrived to make them easy under these as well as so many other inconsistencies. For lawyers, fond as they are of juries, are still fonder of equity. Trial by jury is trial by lawyers; but trial by equity is trial by lawyers too, and with still more work for lawyers to do than in the other case. Moreover, in process of time, and by an improvement made in equity itself, business was found, if not *in* equity, *by* equity, for juries: and along with it more business for more lawyers. Juries alone could give no remedy — equity alone, had no tolerable means for coming at the truth.

chancellor himself: ask both in one:*—as readily will he undertake to trace out the line described by Ignoramus in his irregularities, as the boundary line of his own jurisdiction, with all its regularity; though not less regular than equitable. To spiritual courts, testamentary causes, matrimonial causes, sins. to admiralty courts, maritime causes. To these jurisdictions, already something of a boundary line in those few words. But to equity courts, what causes? Answer: Equity causes. "What is to accommodate? Why, to accommodate: as if I were to accommodate you, or you to accommodate me. in a word, to accommodate."

Of your knowing (if it were to be known) what equity is, and whereabouts the line that bounds its jurisdiction runs, the practical use,—supposing you unfortunate enough to have need of something to be done for you by a court of equity,—would be that of your knowing whether it would or would not be done. In such a case, take for your direction the only answer (the only honest one at least) that can be given. Among the scanty and confused accounts that accident has brought to light of what has been done by judges in consequence of a bill in equity, rummage and see, if you can, whether anything like what you want to have done has ever been done, on grounds like those on which you would call for its being done. If yes, and the view taken of the matter by the judge happens to be the same as yours, then perhaps it may be done if no, then probably it will not be done.

By *you*, gentle reader, whoever you are (if you be not a lawyer,) I mean your lawyers: for as to yourself, if it were in your power, from any data within your reach, to form any such conception about the matter as would be of any use to you, they, and those whose estate they have, would have been labouring for so many centuries with very inadequate success.

How could it be expected that there should be any line of demarcation between the cases where a court of equity does, and where it does not, interfere? since the limits of its jurisdiction, like that of all other jurisdictions under English law, was left to be settled by a scramble. The history of the scramble would require a volume; a short sketch of it however may be given here: it is highly instructive.

With the single exception of the spiritual power—a power which, disdaining all limits, was comprisable under no rules,—in the new settlement that took place after the Norman conquest, the geographical principle of division, if not exclusively established, appears to have been nearly so, in the great outlines. In each county, a sheriff's court, competent to every sort of suit: attached to the person of the king, a supreme court, competent to every sort of suit, and moreover exercising a controul over the several local courts.

In an evil hour, this natural simplicity was violated by a wretched attempt at logical demarcation: suits in general (spiritual excepted, as before) were distributed under three unmeaning heads: pleas of the crown, common pleas, and exchequer causes. Exchequer causes meant revenue causes † Pleas of the crown and common pleas meant nothing at all but, in a course of ages, a meaning was to be made for them, made by a tripartite scramble: the miserable people, whose property it was tearing to pieces, remaining in hot water all the while. Pleas of the crown, judged of under the cognizance of a set of judges whose principal occupation consisted in hanging men under the name of *felons*, followed the person of the king in his perpetual rambles. Common pleas and exchequer causes became stationary at Westminster. exchequer causes by custom, common pleas by law.

Attached all this while to the person of the king, was a most indispensable officer, whose business it was to give form and authentication to all permanent expressions of the king's will and pleasure—to all permanent mandates issued by him—to all contracts to which he was a party. This officer stood distinguished by the name of chancellor. Of the distinguished subjects in whose company the monarch spent his time, those who were not ecclesiastics sometimes could read, and sometimes not.—the ecclesiastics always could: the chancellor was always an ecclesiastic.

What this minister could not find time for, was the administration of justice, or whatever was administered under that name: what he could and did find time for, was to sell permissions to apply for justice elsewhere. By the opening of this shop, the people of England were divided into two classes: to those who could raise the money, justice was sold; to the remainder, it was denied. Note, that what was thus sold at the great shop was not justice itself, but leave to buy it (that is, a bad chance of it) at another shop.‡

* Mitford on Equity.

† By an exchequer, was meant a table in which squares of two different colours were ranged in alternate order: an excellent sort of table for several very amusing games—a very indifferent one for arithmetical calculations. Before the introduction of the Arabian arithmetic, it was in general use for that purpose. Having now for several ages ceased to be employed as an instrument, it is still seen serving as a sign in public houses.

‡ Out of this abomination has sprung (to name one out of a thousand) the option between proceeding by *original* and by *bill*, in most sorts of causes not criminal; a demand of debt for in-

Justice was thus regularly polluted at the very fountain head: polluted, by an arrangement, in which the mischief of extortion was the most apparent; but the mischief of complication, an invisible but endless train of mischief, not the less real because too subtle for an ordinary eye to follow, was the most felt.

The judges of the King's Bench (such was the title given to those who had cognizance of pleas of the crown,) the judges of the King's Bench, having no right to meddle at all, meddled in comparison but little, in causes between individual and individual: these, under the name of Common Pleas, had fallen to the share of the judges of another court. Besides the rapacity and insincerity inseparably attached under the fee-gathering system to the very station of judge, their conduct was so peculiarly marked by absurdity, and that absurdity so constantly fruitful in mischief and misery, that the complaints of injured suitors running continually to the king left him no rest. These judges were nailed by law to their bench at Westminster: the chancellor was constantly at the king's elbow. "These people are teazing me to death: these judges seem to have lost their senses. Go out to them; do, my good lord: hear what the people have to say for themselves, and see what is to be done."

The good lord was a spiritualist: spiritual ideas came last from Rome. What he had learnt, he had learnt at Rome; or at least from those whose learning had come from Rome. At Rome, in addition to polemical theology, in which his lordship was an adept of course, what was to be learnt over and above reading and writing, was Roman law. By Roman law, though everything had been done badly, everything had been done. Of the distresses which, by the outcries raised by them, had given so much disturbance, a great part had been produced by those vacuities, which the stupidity of the judges had rendered them unable, or their obstinancy unwilling, to fill up.

Of the English mode of administering *soi-disant* justice, and of the sort of justice administered in that mode, his lordship knew as little as he cared. With Roman justice, and the Roman mode of administering it, he was more or less acquainted.

Roman law, the seat of monarchical despotism, and the source of the most restless usurpation, had all along been an object of just suspicion to the few great lords, who in their assembly, during its short-lived and precarious existence, shared with the king the power of sovereignty. "We understand little enough of our own laws, but we understand nothing at all of yours: our own we are used to, and we won't suffer any change." Such had been the answer by which a project copied from Roman law without thought, had been repelled in like manner without the trouble of thinking.

Popular expressions are a well-known mask, and sometimes an effectual one, for measures that are unpopular, or might otherwise have been so. *Equity* was a term that had all along been in use, for distinguishing what presented itself as most popular in law. Against whatever changes the reverend Romanist might find himself disposed to introduce in the character of relief, he found a hobgoblin ready armed,—the horror of innovation: to encounter it, he opened his rhetorical budget, and produced the soothing sound of equity. Ye are suffering under the plague of stupid and unjust judges. ye are afflicted: behold in equity, pure and holy Roman equity, behold in it a balm for all your sorrows.

To fill up, in a considerable degree, the gaps which had been left in English law by its home-bred professors, a head was found to be an instrument not altogether necessary: a hand, with a pen in it, was sufficient.

Few, except professed shoemakers, know how to make shoes; few that find any difficulty in fetching a pair from a warehouse. In the Roman law, the clergy had been used to see a sort of warehouse, in which slops of all sorts were to be had ready made, and in any quantity, and without the trouble of taking measure. Nothing could be more fortunate. To take measure of feet for new shoes, would

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stance. As the chancellor had found means to oppress the people, the judges found means to cheat the chancellor. Without waiting for his permit, they made a succedaneum to it in their own manufactory, and sold it for their own profit: and without any other expense than a few lies; for ink and parchment were found by the plaintiff. This spurious equivalent they called a *bill:* the genuine one retained or acquired the name of an *original* (an original writ.) Of the qualities possessed by the chancellor's ware, there were some which somehow or other they could not contrive to give their own: accordingly they sold them at a cheaper rate. One of these properties was that of converting the defendant into an outlaw; of which above, in Chap. XIII. *Chicaneries about Notice.* Another advantage in dealing with the chancellor was, or at least is, that, in case of appeal called writ of error, you save one stage of jurisdiction: in time, from half a year to a whole one or more: in money, between £20 and £30.

Here, then, the plaintiff has his choice: for so much money he may give the defendant so much torment; for so much more money, so much more. A plaintiff, who, having a dishonest man to deal with in the character of defendant, has a provident attorney, goes to the chancellor's shop at once: if not, in his passage through the Exchequer chamber, defendant and his attorney, with the assistance of the chief justice of the King's Bench, give him sufficient time and reason to repent it.—*Vide supra*, Chap. IV. *Corruption particularized* (under the head *Writs of Error*, p. 214.)

have been found by these adepts a comparatively easy task: to take measure of exigencies for new laws, if the laws were to be good ones, was altogether out of their line; as much so, as out of that of their home-bred colleagues. To make good shoes they would have had nothing to unlearn: to make good laws, had their situation admitted of their harbouring any such wish, they would have had a great deal to unlearn almost everything they had ever learnt, since they had been learners.

Not but that the field of law had in that school been surveyed long enough, and anxiously enough: but it was in no such point of view. It had been worked in, long enough and industriously enough: but it was to no such purpose. Prepared by jargon, it had been thick sown with iniquity, delay, and vexation: thicker than even the English field. that it might be rich in fees.

A course of procedure for continued inquiries, or for continued interposition, good from Rome too, or anywhere, if not to be had otherwise, and no better to be had But *equity?* — what had all this to do with *equity?* What more than with so many other fair and pleasant and popular words that might be mentioned? — justice, right reason, or conscience? But equity was the cant word that happened to present itself. One cant word, *innovation*, had been employed to set men against changes from that quarter,* it required some other cant word to reconcile them to it: this happened to be uppermost. Man calls himself a rational animal, and thus it is he is governed. To govern a camel, the Arabs put a hook into his nose to govern a man, you sound a cant word in his ear, — *church, liberty, equity, jury;* and with this the animal with the two legs is led or drawn as you please.

As to equity, cant it was, and nothing else, as anybody may see that chooses it.

What had equity to do with the forcing a man to do what he ought to do, any more than with the punishing him for not having done what he ought to have done? with settling long accounts, any more than with settling short ones? with settling a dispute between three parties, any more than between two? with making distribution of a mass of property taken together, any more than with making a separate disposition of any or all of the articles it was composed of? with making an executor, or any other man, pay what he ought to pay without having promised it, than with making him pay it after he had promised? with making a man fulfil an agreement about a hundred pounds' worth of land, any more than with making him fulfil an agreement about a hundred pounds' worth of cows or horses.

* Nolumus leges Angliæ mutari.

One part of the beauties of equity still remains to be brought to view.

In the jurisdiction assumed by the courts of equity, may be distinguished (in so far as, in so thick an entanglement, anything can be distinguished) two branches, which, for this purpose, may be expressed by the terms, the *originally operating*, or necessary branch, and the *controuling*, or abusive branch. By the originally operating branch, let us understand that which operates in the cases where the business which is done by equity is not meddled with at all by common law. This branch is that we have been glancing over, and which was rendered necessary, we have seen how. By the *controuling* branch, let us understand that which operates, where what has been doing, and doing without reproach to those by whom it has been done, at common law, is, at the mere suggestion of the defendant, overturned if he prevails, stopped for an indefinite time at any rate, by a court of equity.

Among the various classes of depredators, one has been distinguished in which they hunt in couples. One of the pair runs violently against a man, and knocks him into the kennel; the other, with sympathetic eagerness, runs up to his assistance, drives off the assailant, helps up the sufferer, and picks his pockets. The ruffian thief is common law; the hypocrite thief is equity.

Of the *controuling* branch of equity business, the principal part will be brought to the view of the man of law by the word *injunction:* injunction, applied to the stopping of proceedings in a common-law court

A view has been given of the species of sham justice called *special pleading* the practice of injunctions is a sort of aggravation of that grievance. The same fraud, the same hypocrisy; but, by means of still more barbarous vexation and delay, productive of still richer pillage.

For a twelvemonth or so, your debtor has been fighting you off in a common-law court: the powers of common-law delay are exhausted: you are on the point, as you suppose, of getting your due. in comes a writ of injunction, and now you are at the commencement of a suit in equity.

The pretence may be, no matter what; since, for the purchase of the delay, there is no sort of use in its being true. The following is as natural as any, in the common-law suit, the decision in your favour was grounded on the evidence of some one else; but you, in the common-law suit the plaintiff, now by the equity suit converted into a defendant, — you, of your own knowledge, know, as you have done all along, that the fact on which the verdict was grounded was not true. The common-law judges will not allow you to be interrogated; the equity judges will; there needs therefore a suit in equity.

The pretence may be as mendacious, as in the case of the common-law pleadings: for the same providence that granted the mendacity-licence in that case, extends it on to this.

In a court of conscience, the same common sense and common honesty that reprobate special pleadings, would have reprobated the injunction along with them. Your debtor being in the presence of the judge, and you in the same presence at the same time,—whatsoever each of you knows in relation to the fact in dispute, would have come out upon the spot, extracted by your reciprocal interrogations.

You see how poor a resource special pleading is, in comparison with an injunction; that is, would be, if either were to exclude a man from the benefit of the other. A sham plea, if it comes at all, must come in the middle of the suit: and the suit, though it has ever so many of them, is still but one suit, and that but a common-law suit. But an injunction is an entire suit, a second suit, and that an equity one, piled upon the first. The common-law suit is a dwarf; the equity suit, a giant mounted upon his shoulders.

By the injunction, the common-law suit may indeed be stopped at any stage—may be stopped at the earliest. But your adversary and his solicitor know little of their business, if they bring it out a single moment before the last.

Note well here in what the abuse consists. Not in the giving powers for compelling the testimony of the party; for without such powers there is no justice.

The abuse, then, consists, not in the giving of those powers; but in the leaving to him, who wishes for them to no other purpose than that of an instrument of abuse, the faculty of delaying the use of them to so late a period; and by sending him to a fresh court, obliging him, as well as enabling him, to plunge his injured adversary, as well as himself, in the depths of a fresh suit.*

Of the morality of the priest of equity, let three short features of his divinity serve as a sample:—1. For mendacity, so long as your debtor confines himself to the character of plaintiff, care is taken never to punish him: accordingly, lest he should be punished, care must be taken that *mendacity* shall not be *perjury*. 2. For abstaining from mendacity, were he ill enough advised to do so, he would be punished: he would be punished by the loss of his cause: for, of whatever fact the plaintiff *is not* informed, and therefore for the requisite information applies to the defendant, he must give to understand that he (the plaintiff) *is* informed, saying that it is so and so. 3. If, for the proof of any fact on your part, you have need of the confession of your debtor, care has been taken that you shall not have it without a third suit, a second equity suit, in which you are to be plaintiff, with the benefit of the mendacity-licence, and under the same obligation of making use of it.† All this under the notion of affording, at the end of two, three, or four, years, a chance, but that a very inferior chance, of that justice which in a court of conscience,

* We have seen the purposes in respect of which admission of the parties with their testimony in the first instance, and if possible in the shape of *vivâ voce* testimony, is essentially conducive to the ends of justice. We have seen the fatal success with which common law had laboured to exclude all that body of light, in her workings towards the sinister ends of judicature. Equity, by partial admissions given to the excluded lights, though but too frequently broken into false and fallacious colours, has, upon her own extortionate terms, in a group of cases considerable in number and extent, rendered to justice a perhaps unintended service, while occupied in preserving to her own profit the sinister ends of judicature. Here follows a list, or at least a large sample of these cases:—

1. Bill against two or more, to know against which of them an action shall be brought.

2. Bill of discovery against defendant, for the extraction of his testimony (the self-disserving part of course is the part called for) in the epistolary mode.

3. Bill of discovery for the discovery of sources of written (and probably real) evidence, in his custody, or power, or knowledge: a wretchedly imperfect mode of searching for it; persons who for want of interest are not capable of being made defendants in the principal suit, not being comprehendible in this preliminary suit.

4. Bill for the perpetuation of testimony; *i. e.* for the preserving it from the danger of deperition, in case of danger of death or incurable mental debility by reason of age. The interrogatories addressed in the first instance to the defendant, in the epistolary mode: not till afterwards to the extraneous witness; and then administered, and the evidence received, *in secreto, per judicem vel judices ad hoc.*

5. Bill for the examination of a witness *de bene esse*, dog-latin for *provisionally:* the witness being on the point of expatriation: to prevent the certain retardation, and more or less probable deperition, that might otherwise attach upon his testimony.—*N. B.* In case of his return, the principal suit being in a sufficient state of forwardness, this provisional examination goes for nothing: his testimony is collected over again: if in equity, in the same mode; if at common law, in the common-law mode.

† By these three observations, a short, but of itself conclusive, proof is given of the intimacy of the connexion between the exclusionary system, and the entire technical or fee-gathering system, of which it forms at once an instrumen and a branch. It is to give the requisite facility to the operations of profitable injustice, that th door has been so frequently shut against the ligh of truth.

Through the same medium the reader ma have perceived, that, under the appearance of digression, the matter of this book constitute such a part of the work as could not have bee spared.

in the self-same case, would have been administered in less than a thousandth part of the time.

By the originally operating branch of the equity business, the mischief of delay, vexation, and expense, is simply augmented. by the controuling branch it is more than doubled.

When common law has picked the bones of a cause, equity comes in and sucks the marrow.

To the evil produced by superior rapacity, as between court and court, is added the evil that results from the having two courts to be dragged through, instead of one. The device of bandying a cause from pillar to post is thus employed, and with increased effect. It is bad enough to the suitors, when the suit is to be bandied from court to court in the same system of courts: when bandied from system to system, the journey is longer, and still worse.

To the evil of more than doubled delay, vexation, and expense, is thus added the evil of complication. The evil of enhanced delay, vexation, and expense, is the more prominent and sensible, the mischief of complication is more radical and extensive Confusion in practice is thus fixed and protected by confusion of ideas. In the language of lawyers, and thence in the conceptions of their dupes, oppression being confounded with relief, men are prepared to cling to both with equal pertinacity.

When the two sets of courts were at daggers-drawn, the suitors were crushed by their collision. For above a century and a half they have been upon the best terms, and all this time the suitor has been a sufferer by their confederacy. *discordia pestis, concordia exitium.*

Had either got the better, the suitor would have had but one court to be dragged through, and now he has two.

Mark well the profundity of the artifice In virtue of the mixture of the two systems, and the confusion generated by that mixture, mischief is everywhere, blame nowhere.

Common-law procedure is imperfect shall not the imperfection be supplied? Equity therefore is indispensable. But would equity suffice without common law? Still less; for, besides the still more excessive delay and expense, its jurisdiction is composed of nothing but a few scanty and incoherent scraps, and it trenches upon trial by jury. Viewed with reference to the ends of justice, neither is superfluous, both together are wretchedly inadequate: viewed with reference to the ends of judicature, neither is superfluous, both together constitute as perfect a system as heart could wish, or ingenuity devise.

Viewed with reference to the ends of justice, the natural system, as exemplified in the practice of courts of conscience (though wanting powers, such as might easily be given to it, to fit it for universal use,) is beyond comparison more efficient than common law and equity put together: but, in proportion as it approaches to perfection with reference to the ends of justice, in the same proportion is it inapplicable with reference to the ends of judicature.

Chaos is the grand rampart of chicane: and for the organization of chaos, the services of equity have been beyond price.

§ 4. *Absurdity of the distinction between courts of equity and courts of law.*

Two sets of courts, professing to pursue the same ends, but by different and discordant means means so completely discordant, that, though both systems may be wrong — wrong to any degree,—yet by this discordance alone, were there no other cause, it is rendered impossible for them to be both right.

Common law with you, equity against you. And has it ever been seriously imagined that there exists in the nature of things any difference corresponding to this difference in sounds? that in the same sort of case, in the same individual case, there should be two sets of courts, one proceeding and bound to proceed by one set of rules, the other by another set of rules; the one bound to do what the other is bound to undo, one bound to govern itself by a set of rules, which, if the rules by which the other is bound to govern itself be right rules, cannot but be wrong ones? Is this duplicity a real improvement?—are the ends of justice served by it? If so, why not pursue the example of improvement as far as it will go?—why withhold from the country the benefit of more and more sets of mutually repugnant rules? If such be the advantage of placing the suitor in the service of two ever-jarring masters, law and equity, why not give him as many more such masters as in heaven there are stars? If such be the advantage of setting the work of common law to be undone by equity, why not set *conscience* to undo the work of both, *rectitude* of all three, *propriety* of all four, and so on without end?

Why refuse the benefit of that improvement to so many causes as are tried by courts of conscience, and by justices of the peace out of general sessions? Why not to each such magistrate two sets of ears for the oyer, and two sets of voices for the terminer of each cause?—an ordinary pair of ears for hearing according to law—a longer pair of ears, upon the pattern of Midas's, for hearing according to equity? an ordinary voice for pronouncing according to law—a *falsetto* for pronouncing according to equity?

Why not, for the purpose of diminishing the mass of misdecision, vexation, expense,

and delay, in the practice of courts of conscience, divide the commissioners into two sets, one sitting on the left side of the court, the other on the right side; the left side acting by rules which bind them to give the cause in favour of the plaintiff—the right side by rules which, in the same individual cause, bind them to prevent the plaintiff from getting anything by the decision; and ready at any time to put a stop to the cause, from first to last?

Or if precedent be preferred, why not bestow upon the judges of courts of conscience the duplicity of nature possessed for so many hundred years by the court of Exchequer? Why not give to every court of conscience the same ideal division into two metapysical sides—the common-law side and the equity side; by the help of which, sitting always on the same bench and on the same part of the same bench, they may have their equity days and their common-law days; as in certain shops a lady may choose whether she will buy the same muslin dear or cheap, by paying her visit on an ordinary day or a cheap day?

Can any man of common sense and common honesty lay his hand upon his heart, and say of this learning, that it is anything better than elaborated confusion, and licensed pillage?

And is this dupery to be among the glories by which British freemen are raised above continental slaves?

In England we had a court once, that sat in a chamber, with stars for ornaments on the roof of it. It had of course, like its fellows, a set of rules of its own. We had then star-chamber justice, in addition to equity justice, and common-law justice. Star-chamber justice has been convicted, and has abjured the realm.

In France there was a sort of court once that sat in a chamber with a marble table in it: court of the marble table was accordingly the appellation given to it: there we see marble-table justice.

If justice be good in proportion to the number of its varieties,—after reviving star or star-chamber justice, as we have imported equity justice from Rome, so from France let us import marble, or marble-table, justice.

The same learned persons who at present have so distinct a perception of the difference between common-law justice on the one part, and equity justice on the other part, and the absolute necessity there is for equity justice in addition to the other, will then have a perception equally distinct of the difference between common-law justice and equity justice on the one part, and marble justice on the other; and the equally urgent necessity there will then be for marble justice, in addition to both the old sorts. Always understood, that it be sold according to a different set of rules, and that there be a different set of courts or shops for the sale of it in this new shape, with a more liberal price upon it, proportioned to the superior beauty of the shape.

Trust, fraud, accident: in these three leading terms, the institutionalists used to behold the essence of all the powers exercised under the name of equity. Trust, yes: it has already been seen how, for want of knowing its value, law having, along with so many other pearls, thrown it upon the dunghill, equity picked it up. But *fraud* and *accident*, how short are their united powers of being able to typify the smallest part of the work that has already passed before us? Fraud? As to combating it, yes:—doubtless, among the frauds which law was so busy in organizing or protecting, there were some which equity scrupled not to fight with: better get money, though it were by doing good, than not get it at all.

But *law* too, especially in these latter times, law came gradually to discover that there are frauds and frauds: that if some are to be supported, policy requires that others should be fought with: and that, in short, whatsoever are destined to be defeated, better that law herself should have the defeating of them, than that the job should be left to equity.

Meantime, if it be proper that one judge, with equity in his mouth, should be occupied, or destined to be occupied, in defeating frauds, can it be endurable that another judge, or, at another time, the same judge, with common law in his mouth, should be occupied in the support of them?

And what was the legislator about, while two sets of judges, both being, or professing to be, under his command, were thus busying themselves in opposite ways about fraud—one employed in setting it up, the other in overthrowing, or *making believe* to overthrow it? Answer:—Fast asleep, as usual: foxed by essence of nonsense, poured down his throat on both sides.*

If a separate court could ever be eligible for a particular sort of causes, it would be for complex causes: for causes which, in their nature, requiring an indefinitely protracted portion of the judge's time, necessitate delay; or, with less prejudice than the great bulk of causes, admit of it.

In the courts called equity courts, so it happens that causes of this description are found almost exclusively, in comparison with the courts of common law. Why? Because, the

* As to *accident*, the idea pointed out by the word is so vague, and requires so much explanation to fix it, that it would be impossible to pursue it without plunging into details diverging too widely from the present purpose. Death, as we have seen, being among the contingencies too strange to be provided for, it may be imagined how well qualified these sages were for coping with other *accidents*.

constitution of these latter courts confining all the real part of the business within the compass of a single sitting, and this cramp not extending to the equity courts, the latter description of courts are the only courts (the ecclesiastical courts excepted) in which, well or ill, the sort of business here in question can be so much as pretended to be done.

But, avoidable or unavoidable, what has complication to do with equity? Under Rome-bred law, all over the continent, causes of this complicated description are disposed of; and in no part of the continent is any such sponge or any such scourge known, as a distinct sort of court, under the name of an equity court.

Yes: in equity may be seen a curse peculiar to English justice. Poland has her *plica;* the Alps, their *goitres;* England has her *equity.* This plague (be grateful, Scotland!) has not crossed the Tweed.

In Scotland, these complex causes are disposed of as well as simple ones: and in Scotland there is no such court as an *equity* court, unless indeed it be said that (what comes to the same thing) for a supreme civil court (vexation, expense, and delay considered) there is no court but an equity court.

In all countries, it is true, equity is spoken of—that, or the equivalent, whatever be the language. Judgment for the plaintiff more strictly conformable to the letter of the law, where there is a law; judgment for the defendant more consonant to equity. Equity spoken of as rectitude, propriety, probity, good faith, may be spoken of: the dictates of justice, as contradistinguished from the dictates of a bad law.

In every country where there are bad laws, there will be equity in this sense: in no country except England is there any such thing as equity, in the sense of another and a distinct body of law. In no other country are there two sorts of law—a sort of law called equity, a sort of law called law, in a continual state of conflict with one another. It is not the word that is the grievance: it is the two sets of judges pulling different ways, and, between them, tearing to pieces the property of the suitors: it is the oscitancy of the legislator, sitting mute and drivelling, while under his nose two sets of servants, both saying to him, —"Lord, lord!" are ordering and disordering the concerns of his household, laying about between them and pillaging according to as many repugnant sets of rules, never pre-announced, and (as completely as they could be made and kept) to all but learned eyes inscrutable. It is the mountebank imposture of a particular set of dealers, pretending to possess a monopoly of that almost everywhere too dear priced commodity, which, if honestly sought for, would be found everywhere or nowhere. This is your only shop for equity! None to be had anywhere else for any price!

Equity! applied to what we feel of the practice of the courts to which it has given a name, it is a term of derision, a cruel mockery.

Equity! in what class of ideal beings is it to be found? Is she like justice, a sort of goddess, and would you see her likeness? Look for it among Jefferies's and Kirk's lambs. Is it a remedy? It sweetens like sugar of lead: it lubricates and soothes like oil of vitriol, or butter of antimony.*

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* *Lawyer.*—Well, sir, you who are pleased to rail thus against equity, can you tell me what equity is?

Non-Lawyer.—Yes, sir: *abracadabra:* a word without a meaning.

Lawyer.—Well, then, can you tell me what it is which makes a court of equity in contradistinction to a court of common law?

Non-Lawyer.—Yes, that I can, sir: but please to observe, that it is more than any gentleman of your cloth has ever yet done. A court of equity is any court in which, be the service demanded what it may, the course of procedure is in a certain form: the instrument by which the service is demanded being the sort of instrument called a bill in equity. Give that form to your demand, you institute an equity suit: if the court be entitled to entertain a demand in that form, it is an equity court.

Lawyer.—Pray, then, sir, if I must descend to the level of your ignorance,—by the use of your unlearned language, can you tell me what are the sorts of services which a court of equity is in use to render, when called upon by a bill in equity?

Non-Lawyer.—No sir: any more than you can. Equity services, any more than sheep or horses, are not to be enumerated or distinguished without names. For common-law demands there are names, though as bad a set as heart could wish, or ingenuity devise. Comyns gives about six-and-thirty civil ones, besides criminal. But as to equity demands, if not absolutely none, there are next to none.

Lawyer.—But cannot you give me some general words of description, under which all the sorts of demands which a court of equity regards itself as entitled to give effect to, may be included?

Non-Lawyer.—Alas! no, sir: unless those which I have already submitted to you in that view should obtain the honour of your acceptance.

Lawyer.—Sir! sir! this is but evasion: but now, sir, to put your proficiency to the test at once (for, as I find you have conceits of your own, I have a mind to try you,) can you, or can you not, tell me what it is in a demand, that brings it within the number of those to which, if presented in the form of an equity bill, an equity court is prepared to give effect?

Non-Lawyer.—Dear sir! no more than the lord chancellor, or the pope of Rome. Why will you be so hard upon me? Why, sir, there was a gentleman once that was so learned, especially in divinity, they made him a lord chancellor: with all his learning, he did not know—at least before he was a lord chancellor: I wonder whe-

§ 5. *War between law and equity—Compromise between them—Its monstrous results.*

For a long time (as has already been observed) law and equity were at daggers-drawn. In proportion as time had given to each a more correct view of its own interests, it came to be understood on both sides, that there existed not in fact any such opposition between those interests, as had been imagined. Ages ago, like Lockit and Peachum, they shook hands and embraced. Since then, instead of fighting and scolding, their activity has employed itself in finding out ways and means for playing into each other's hands.* Why should law quarrel with equity, for having found a use for some of her refuse? When my lord chief justice has had his pickings upon the *error*, how is he the poorer, if the bones of the cause go to be picked on the other side of the passage? One day out of twenty, a fit of daintiness takes my lord chancellor: he won't try the cause, not he; not for this time without proper evidence: such cookery as his own establishment affords is not nice enough; the mess must go over the way, to be dressed in a style in which nobody but *law* knows how to dress it: and then it is that an issue is sent to be tried by the lord chief justice, sent with as polite a grace as if it were a slice of venison, dispatched with his lordship's compliments, to be tossed up over the lamp on the other side of the table.

For a long time, no conception was entertained of the possibility that equity justice and common-law justice could be woven in the same loom, or measured out from the same shop. In process of time, when the two sorts of dealers had coalesced, and learnt to play into one another's hands, a grand discovery was made. Not only might the two sorts of courts carry on trade in a connexion, and to their mutual advantage; but one and the same man (it was found) might manufacture both sorts of goods, and serve out both sorts of ware at once. To manage this, all that was necessary was, that each man should practise the art of dividing himself into two halves, neither half knowing what the other is about, until the critical moment when the time comes for the equity hand to raise itself, and in such manner as by its fall to stop or overturn the work that has been done by the common-law hand.

Hence it is that England not only has been, but still continues to be, so fruitful in a sort of monster, such as Africa, with all her monstrosities, never yet disgorged: a sort of judge, a double-faced and double-fee'd judge, with a conscience that has two sides to it; the two surfaces with no more communication between them than between the *plus* and the *minus* side of the Leyden phial, before the chain or the wire has brought about an intercourse: two half consciences, each as ignorant of what is done by the other as the right hand and the left (though to a purpose somewhat different) have been taught to be: the equity conscience bound by sympathy in the hands of sleep, while the common-law conscience is spinning out delays, and picking up fees — fees predestined to be useless to everybody but the receivers.

Here, then, and from hence, you may see sights such as Pidcock never could show:—

1. In Westminster Hall, under the name of barons, one chief and three puisne judges, each with the two half-consciences.†

2. In the city of London, a lord mayor, with a conscience for a year together, but no longer, thus split into two halves.‡

3. In Wales, duplicity doubled; six eminently learned persons, in England advocates, in Wales judges;‖ each with the two half-consciences.

4. In Ireland, where each English abuse is so sure to find a younger brother, a set of monsters of the same breed, except that Ireland has no Wales.

5. In the distant dependencies, here a lawyer, or set of lawyers, each with his two technical half-consciences; there a governor with the technical equity half, in addition to whatsoever entire conscience he may have received from nature.

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ther he has ever known since: if yes, he is not so busy now but that he might tell us. In short, sir, the best answer I can give, and it is a very poor one, is this: If there were a sort of service which I wished to have rendered to me by my lord chancellor, and if I were unable to apply for information in a proper manner to any such learned gentleman as yourself, I should rummage to see whether a case could be found in which, on an occasion exactly the same as my own, a service exactly the same as that I stood in need of had been rendered: if fortunate enough to find one, and rich enough to make use of it, I should be inclined to try the experiment: if not thus fortunate, I should not know what to do.

* Mitford, p. 128. "Indeed, in most cases it is held, that the plaintiff ought to establish his right by a determination of a court of law in his favour, before he files his bill in equity." In this way it is that equity "prevents multiplicity of suits." It compels one suit, under the notion of preventing others that might never have taken place.

† Any one of the Barons of the Exchequer may sit in equity.—*Ed.*

‡ The Lord Mayor, by virtue of his office, is judge of a court called the Lord Mayor's Court which possesses to a certain extent an equity jurisdiction. The Recorder usually presides in this court.—*Ed.*

‖ By the 11 Geo. IV. and 1 Will. IV. c. 70 § 14, the Welsh courts are abolished, and jurisdiction over Wales given to the Westminster Hall courts.—*Ed.*

Imagine the following dialogue between a non-lawyer, an English lawyer, and a French lawyer —

French Lawyer — Everything as it should be? Yes, that it is of course, whatever it is, and yet I hear odd things of it They tell me you have judges who, give them so much money, decide in favour of the plaintiff, give them so much more money, morbleu, they decide in favour of the defendant Pray is this true? How stands this matter?

English Lawyer. — What judges, what courts are you speaking of?

French Lawyer.—I understand there are a whole heap of them, more than I could remember, had they all been named to me say, for example, the great court of Exchequer in Westminster Hall, and all the great travelling Welsh courts In these instances, then, —for these are enough, I suppose, at least to begin with,—pray, is the report true?

Non-Lawyer —Exactly so

French Lawyer —Diable! And is this generally known?

Non-Lawyer —Universally

French Lawyer —But pray what says your parliament to all this corruption?

Non-Lawyer —Corruption? Hold, sir;— there you are in a mistake Were this done by judge A alone, or judge B alone, in a case between C and D, and not in a case between E and F, this would be corruption, for this would be irregular but being done regularly, that is, by every such judge, in favour of every defendant who comes up to the terms, and that in every individual case whatever of this and that general description, there is no corruption in the case.

Another thing — corruption is an offence an offence is something contrary to law but this is all of it according to law

French Lawyer.—Criminal if in retail, lawful if by wholesale! an odder sort of trade still than I expected to find it Yes, let him sit on counter, bench, or woolsack, an Englishman, wherever he is, is a shopkeeper But, pray now, tell me a little, how is it managed? The parties being met in the presence of the judge, does the judge give notice immediately, and say — Here, Mr Plaintiff, give me so much, and I give the decision in your favour; unless you, Mr Defendant, think it worth while to give me so much more, and then I give it in yours?

English Lawyer —Parties in the presence of the judge! The court a regular court, you a lawyer, and suppose any such thing suffered in it! The cause may have been before the court for six months, or twelve months, or ever so many more months, and, unless by accident, the judge may know no more about it than you do. At last comes the trial: and then it is that the judge, that is, either one of the four judges of that same court, or some one judge of some other court, knows of it for the first time.

French Lawyer.—Well, but when at last he does hear of it, —and do, for shortness, let us suppose it to be a judge of that same court: how then at last does he manage?

Non-Lawyer. — We must put a case;—let one serve for a hundred. Bond by which *Ligatus* engages to *Vinctor* not to do so and so under a penalty of twenty pounds. action on the common-law side of the court by Vinctor, alleging a breach, and claiming the penalty. Breach proved, the judge says to the jury, if you believe the witnesses, you will find of course for the plaintiff. damages twenty pounds

French Lawyer.— Good: but what chance has the defendant all this while?

Non-Lawyer —Have patience. In the court of Exchequer, and all those other double courts, every judge has two consciences, with a partition between them, and an ear and a hand for each As yet it is only the common-law conscience that knows anything about the matter,— the common-law ear being the only one that has been spoken to, the common-law hand the only one touched What you are expecting is, that Vinctor will get his twenty pounds Ligatus knows better things. When the judge directed the twenty pounds to be given to Vinctor, it was because his equity conscience, with its ear and hand, knew nothing about the matter Four or five months after, just as Vinctor is going to take out execution, in steps Ligatus into the equity office, and files his bill Equity ear is whispered into, equity hand touched, and so forth Hand touched, up it starts, by a pre-established harmony and, without any expense of thought (for all this is done by mechanism,) lays hold of the common-law hand, and stops it. Vinctor may now bid adieu to his twenty pounds.

French Lawyer — Good but surely what the equity conscience will do is no secret, and the equity hand, being the strong hand, stops the other of course. A mighty pretty case this of yours but, begging your pardon, where was the use of putting it; for where is the man that will realize it? Will any counsel be weak or dishonest enough to advise a client to be at the expense of claiming a penalty under a law that may be stopped at any time?

English Lawyer — Dishonesty indeed! — the thing not punishable! You a lawyer, and talk about dishonesty! As to weakness, there is none in the case.

Non-Lawyer. — It is all matter of calculation. You see there are two prices. The price of law is so much — the price of equity is so much more. The first thing for Vinctor to consider, is the state of Ligatus's finances. What cares Vinctor for the equity hand, if Ligatus cannot pay the price for raising it?

Suppose Ligatus's finances not altogether insufficient, then, along with his temper, it will be advisable to think of the magnitude of the penalty. Due or not due in point of honesty, Ligatus — if so it happens that, being well advised, he loves himself better than he hates his adversary — Ligatus will pay the twenty pounds. Besides the chances of not obtaining the relief after all, he will find himself not a little out of pocket, when he has obtained it (if to obtain it be his fate) by addressing himself to the equity side of the learned and double conscience.

French Lawyer. — So, then, you have in England, if I understand you right, two opposite sorts of law, the one or the other of which prevails, according to the form in which the plaintiff addresses himself to the judge. We had once a double diplomacy; you, according to your Burke, a double cabinet: but now it seems you have constantly a double bench, and one should think a double parliament: and this is the equity you are so proud of!

Non-Lawyer. — True, except as to parliament. The eye of parliament is single, would it but awake. But whenever equity has been on the carpet, parliament, as if blindness were a duty, has always been fast asleep.

French Lawyer. — And so, then, the effect of this duplicity is to have one sort of justice to sell to the poor, and another to the rich: and the rich man's justice so much the stronger of the two, as to turn the poor man's into waste paper!

Non-Lawyer. — Not exactly so: unless a particular explanation be given to the words *poor* and *rich*, and for this particular purpose.

As for the *poor*, — if by the poor you mean the great majority of the people, there is no regular justice for them at all, unless it be for hanging them, or something in that style: the only classes concerned here, are two higher and much less numerous classes, the middling, and the class above the middling. It is between these two classes alone that the distinction lies; or, if you must say poor and rich, say the relatively poor and the relatively rich. It is as between them (to the extent of the debateable ground that lies between common law and equity) that the two sorts of justice are distinguished, and the two prices put upon them: to the relatively poor, a dear sort of justice, which is not the strongest — to the relatively rich, a sort of justice which is still dearer, but is the strongest.

CHAPTER XX.

FIFTEENTH DEVICE — MEANS OF SECURING FORTHCOMINGNESS, USELESSLY DIVERSIFIED.

For various purposes, on various occasions, the ends of justice require, sometimes that *things* — sometimes that *persons*, be forthcoming, at the disposal of the judge.

Sometimes in the character of sources of evidence: sometimes in the character of portions of the matter of punishment: sometimes in the character of portions of the matter of satisfaction; or else as securities or instruments for the obtaining it.

It is in these characters that they find a place, under such titles as *mesne process* and *execution*, in the books of technical jurisprudence.

On or by the same object — on or by the same thing, or even the same person — different operations require to be performed, according to the purpose or end to which justice requires that it or he be made subservient.

Where the purpose is the same, different operations may again be requisite, according to the nature of the thing, according to the condition of the person.

Of all these operations, be they what they may, not one, of which vexation, expense, and delay, in quantities variable *ad infinitum*, are not inseparable concomitants. In each instance, is the quantity or value of this mass of collateral inconvenience greater, or less, than that of the direct mischief consisting of such chance of misdecision or failure of justice, as, for want of the operation, might be the result? On the answer given to this question of fact, the propriety or impropriety of the operation will depend, in each individual instance.

Here, then, are so many demands for diversification: so many circumstances calling for diversity of arrangement at the hands of the legislator and the judge.*

* For example: when, under the notion of causing a man to deliver up his property for the payment of a debt, a man is thrown into prison, — if the ends of justice were in view, a matter worth inquiring into (especially where, as yet, it has not been ascertained that he owes anything) would be, whether he be in his right mind or no; and whether, upon his removal, speedy or instant death is or is not likely to be the consequence.

Questions of this sort, sitting in a court of *natural* procedure, a man, if he have the bowels of a man, does not regard as beneath his cognizance.

Accordingly, when, in the case of Daniels (who, being in custody on a charge of fraud, should have been brought before the lord mayor for the purpose of examination,) representation was made, alleging that danger to life might be the consequence of removal, due regard was of course paid to it: for here was an unlearned judge; and cognizance of the apprehended mischief was of course presented to his notice.

Impassible, like the Epicurean gods, learned judges look down with generous disdain on any such trifling exigencies. Accordingly, — so the fees [illegible] the *capias* (or whatever else may be the word) be but secured, — debt or no debt, a man out of his senses forms as fit an inhabitant of a

If, to the demand thus presented by diversity of exigence, little attention has been paid,—attention has not been wanting to that which is presented by *diversity of courts*.

Four courts in the one great hall at Westminister: four courts,* each with a mode of its own for compassing the same point. Each mode, of course, abundantly well adapted to the ends of judicature, each mode as abundantly defective, with respect to the ends of justice.

Thank heaven, that of these courts there are no more than four. each of them presenting a compound of impotence and violence, feeble where good is to be done—powerful to do evil. Had there been eight of them, we should have had eight different modes of plaguing a man, to the same end, or on the same pretence: each of them efficient or defective, according to the ends to which (as above) reference is made †

Uses of this device:—

1. Helping to furnish rubbish, materials for the sham science For the uses of sham science to the partnership, see the device intituled Principle of *Nullification*, and the device intituled *Jargon*, or *Jargonization* ‡

The remaining uses would be but repetitions of the uses there enumerated making business, nursing uncertainty, establishing and supporting arbitrary power, blinding the legislator, awe-striking legislator as well as people, driving the legislator by disgust from the task of reformation

Thus far as to the mere diversity, and its uses. As to the imperfections above spoken of, multitudinous as they are, there is not one of them but has its use but to exhibit them, each with its train of uses, would require a volume within a volume If nature, as hath been said, hath done nothing in vain, so neither hath jurisprudence.‖

jail, as a man in his senses—a dying man, as a man in health. In either case, apply for redress, you will get none, even for all your fees; these things being among the *minima* de quibus *lex non curat:* and here no diversity appears in the practice of the courts.[a]

* There are literally six courts,—viz. the Queen's Bench, Common Pleas, Exchequer, the Lord Chancellor's, the Master of the Roll's, and the Vice-Chancellor's.—*Ed.*

† This topic belongs, in co-ordination with *evidence*, to the general head of *procedure*.

‡ *Supra*, pp. 253 and 280.

‖ Take a grain for a sample of the bushel:—Moveables or immoveables, freehold or copyhold, interest present or future, certain or contingent, money in hand or receivable,—in whatever shape or shapes the property of a debtor happens to be vested, justice requires alike that the creditor should have the benefit of it. Justice? Yes: but not so English regular judicature.[b] Diversity upon diversity: option upon option, each of course incomplete, and pregnant with injustice. Of immoveables (to a given value,) if copyhold, no part, upon any terms: if leasehold, the whole: if freehold, the half, or, if already halved, the half of that half, and so on: as if a house, like a cheese, were made to be cut out into slices. His body in a jail you might have had till lately, if you had liked it better: but then (except in this, that, or the other case) you must not meddle with any of his property: if you do take it, it is not, it cannot be, of any use to you (unless it be for revenge,) but as a sponge out of which property is to be squeezed: and this use, care was taken that you should not make of it. He was sent to jail, that my Lord and Co. might receive their fees: he was kept in jail, and with all his money in his pocket, that not you, but the jailor, my Lord's nominee the jailor, might squeeze it out of him, in fees and furnishings: and, lest there should not be enough for jailor and customer, not a penny of the debts due to him were you ever enabled to receive.

[a] Commons' Report on Imprisonment for Debt.—April 1792.

[b] A vast improvement has been effected in this branch of the law, by the 1 & 2 Vict. c. 110. By § 11, the sheriff, by writ of *elegit*, is to deliver execution of all the debtor's lands, tenements, rectories, tithes, rents, and hereditaments, including copyholds. And by the following section, the sheriff, by writ of *fieri facias*, may seize any money, bank-notes, cheques, bills of exchange, &c.—*Ed.*

CHAPTER XXI.

SIXTEENTH DEVICE—CREATION OF NEEDLESS AND USELESS OFFICES.

Made offices are partly the effects, partly the causes, of made business. Create useless work, you create the necessity of useless hands for the performance of it.

But it may happen, that, in the first instance, a determination may be taken to add at any rate to the number of hands: that done, there can be no difficulty in adding to the quantity of business for those hands. Take any given instrument, let it be signed by one person and one person only,—here you have but one office put another person to sign it at another time, and under another official name, receiving of course a fee for this his trouble, here you have two offices. put a third person, three offices, and so on. Before, increase of business produced increase of offices now, increase of offices produces increase of fees In the latter case, is there, or is there not, any addition made to the quantity of business? Answer, Yes, or no; whichever is most convenient Yes, because so much more is done, No, because what more is done is done to no use, and so does not properly deserve the name of business: it is John doing nothing, and Thomas helping him

If half the hands employed in heaping together that execrable mass of moral and intellectual filth, called in technical language a

record, — if half the hands thus employed in the practice of vice, under and for the benefit of the titled guardians of the public morals, were but employed as they so easily might be, — what service might not be rendered to the ends of justice! Misdecision, vexation, expense, and delay, — entries, the object of which would be to contribute, in a determinate assignable way, to the prevention of those several mischiefs: such are the entries, the only entries, that ought to be made, to guard against misdecision. The evidence entered at length, in the few cases that could pay for it by their importance; in the others, the names of the witnesses, with the species of evidence delivered by each, under its several distinguishable modifications, denominated for the purpose. To guard against delay, and thereby against vexation and expense, the length on each occasion, with the causes of it: and whether approved by both parties, or granted at the suit of one, maugre the opposition of the other.

Of the offices thus manufactured, does the profit go directly or indirectly into the pocket of the judge? the use to judicature is already stated. But it may go elsewhere, and still not be lost to judicature. If, settling to a mass worth stooping for, it finds its way into the hands of some person of high account, — high enough to possess a voice and interest in the legislative body, — it goes there to form a corrupt interest: it constitutes, *ipso facto*, a mass of the matter of corruption, employed in affording perpetual protection to abuse. The great man, be he who he may, becomes a member of the partnership, and, though a dormant, not the less a useful one. Add to this union his honour the minister, and here you have corruption doubly corrupted.

CHAPTER XXII.

SEVENTEENTH DEVICE — SHAM PECUNIARY CHECKS TO DELAY, VEXATION, AND EXPENSE.

UNDER this head may be placed every case in which, to an obnoxious practice attended with a profit (especially if with a pecuniary profit) to which no assignable limit applies, a fixed or limited loss has, in the character of a restraint and of a remedy, been opposed.

Exemplifications are, —

1. Fixed or limited sums given under the name of *costs*, to be paid on the score of some step, some special incidental step, productive (as almost every step is productive) of its particular delay.

2. Costs given, though unlimited, under the notion of a reimbursement made to the party injured by this or that step, at the charge of the party. who has made it, or imposed on his adversary the obligation of making it, — costs, though in this sense unlimited, given in a case where the profit by the delay may be greater than these costs.

3. Deposits: money, in a fixed or limited sum, exacted or pretended to be about to be exacted antecedently to the taking of this or that step: to be returned or not returned according to the propriety or impropriety of the step, as evidenced by subsequent lights. When not returned, such deposit has in general been given to the adverse party, in the name of costs: in some instances it has been allotted to some public fund; such as the revenue at large, the poor,* and so forth.

A penalty to which, in any instance, it can happen to find itself inferior to the profit of the transgression, operates, in that instance, not as a penalty, but as a licence.

In most, if not in all the instances in which this remedy in any of the above shapes has been applied, its incapacity of effecting its professed object, the cure of the disease, is so perfect and so obvious, that to suppose it capable of escaping the notice of the authors would, under the notion of a compliment to their probity, be an injury to their more highly prized virtue, *intelligence*.

Does it require science to teach a man (especially to teach him in vain) that a quantity which is sometimes greater than another will not always be equal to it?

It would therefore be an injury to this policy, to refuse it a place in our catalogue of devices.

In this character it is of admirable use like most other articles in the catalogue, a polychrest.

1. Use to reputation: display made of the love of justice: vigilance to discover the disease, wisdom to devise the remedy, probity and activity to apply it.

2. Use to reputation again, if judiciously managed: display made of the virtue of humanity, if the sum be fixed at or limited to a low rate: the lower, and thence the more ineffectual, the greater the portion of praise from this source.

3. Security of the profit to the partnership, in the several cases in which the loss to the dishonest party is inferior to his profit from the offence.

Venerable personages! Their zeal is indefatigable — their sapience unfathomable: but so perverse and so constantly increasing is the wickedness of mankind, their utmost exertions leave them still behind it.

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* Lawrie.

CHAPTER XXIII.

EIGHTEENTH DEVICE — DOUBLE-FOUNTAIN PRINCIPLE

How delightful, could a contrivance be found for enabling the judge to give judgment for plaintiff or defendant at pleasure! The pinnacle of perfection would be mounted at one spring. To a first glance, the idea presents itself as no better than the love-sick vision of some fond amateur of chicane.

In practice, it has not yet stretched (it must be confessed,) nor seems likely to stretch to so all-embracing an extent in the regions of jurisprudence as to cover the whole field But, though quiet and silent in its motions, the more accurately it is measured, the more prodigious the progress of it will be perceived to be.

Sought or unsought, the effect flows naturally, and as it were of itself, from the anarchy that results from whatever degree of influence may have been preserved to the dictates of justice and common sense, in conjunction with the suggestions of this or that one among the sources of iniquity and absurdity that have already passed in review Exquisite invention! or, at any rate, felicitous result! Reason herself pressed into the service of absurdity! Injustice could not have thus enlarged her empire, without leaving a corner of her throne to justice

The double-fountain device derives its name from the contrivance of those jugglers, who, by an ingenious application of the laws of hydrostatics and pneumatics, serve to the customer, out of the same vessel, wine of either of two colours, white or red, at pleasure

This device is grafted on any one of the three former devices, — the principle of nullification, the principle of fiction, and the principle of jargonization. It consists in the putting an occasional stop to the current of decision drawn from these several corrupted fountains: drawing the decision from the right fountain, *pro hâc vice*, instead of any of those wrong ones. Far from being diminished by this apparent departure from the ends of judicature, the advantage obtainable from these several devices receives considerable increase No danger in any shape can ever attach—neither punishment nor so much as disrepute can ever attach upon any judge, who, in spite of any number of previous decisions given against the merits on the ground of this or that quirk, or fiction or jargon, takes upon him to decide in favour of the merits. Thus it is, that, to the extent of the ground occupied by quirk, fiction, and jargon, you possess, in virtue of those principles, alternating at pleasure with the principles of reason and justice, the faculty of giving the case in favour of plaintiff or defendant, as you incline. Praise you are sure of: all that you need consider is, which of two sorts of praise is most to your taste. Decide against the merits, on the ground of the quirk, the fiction, the jargon, you receive the joint praise of profound science and inflexible steadiness — the praise of adhering to the rule *stare decisis*. Decide in favour of the merits, disallowing the quirk, discarding the fiction, the jargon, you receive the praise of liberality — of attachment to the laws of substantial justice

Bribes you cannot receive, if neither side is prepared to offer any friendship or enmity you cannot gratify, if both parties are equally unknown to you or indifferent: but whether you do or do not turn it to account in any way, the power you possess to the extent of the ground occupied by these commodious principles, is not the less arbitrary. The fault is all your own, if, as often as you have occasion in any of these shapes, you fail of administering to your prejudice or your humour the gratification put into your hands — of profiting by the opportunity of crushing your enemy, of serving your party or your friend

A flaw is alleged in an indictment Are the pursuer's party-attachments supposed to be on the wrong side? Precedents are chains of adamant to you *fiat justitia, ruat cœlum*, is the word Are the man's attachments where they should be? You burst by inspiration from the trammels of chicane, and you quote the quirk-abjuring ejaculation which a moment of contrition wrung from the conscience of Lord Hale *

Is interest objected as a ground of exclusion to a material witness? Here you are most completely at your ease There stand the cases, in two rows on one hand, those in which the objection has been allowed — on the other, those in which it has been disallowed length of the rows, as nearly equal as heart could desire Exclude the witness, you bow to the name of Lord Kenyon, and with him pronounce the laws of evidence to be the perfection of wisdom. receive the wit-

* The following admirable passage is no doubt the one alluded to by the Author: — "In favour of life, great strictnesses have been in all times required in points of indictments; and the truth is, that it is grown to be a blemish and inconvenience in the law, and the administration thereof; more offenders escape by the over-easy ear given to exceptions in indictments, than by their own innocence; and many times gross murders, burglaries, robberies, and other heinous and crying offences, escape by these unseemly niceties, to the reproach of the law, to the shame of the government, and to the encouragement of villany, and to the dishonour of God. And it were very fit, that by some law this overgrown curiosity and nicety were reformed, which is now become the disease of the law, and will I fear in time grow mortal without some timely remedy." 2 Hal. P. C. 193. — *Ed.*

ness, your bow points to Lord Hardwicke, and with him you confess your disposition to admit lights.

The advantage gained by the principle of nullification would be imperfect, but for the occasional dash of ill-applied reason, by which it is made up into the double-fountain principle.

By the double-fountain principle, more business is made than could possibly be made by the fountains of corruption if set running by themselves. Suppose a flaw started — exactly the same flaw that had already been made fatal: here, if the practice of drawing decisions occasionally from reason were unknown, certainty would thus far take place: the merits would in that instance have, and be seen to have, no chance: the benefit of the argument would be lost to the profession, as well as the sweets of arbitrary power to the judge.

CHAPTER XXIV.

NINETEENTH DEVICE — LAUDATION OF JURISPRUDENTIAL LAW.

WHEREVER jurisprudential law reigns, certainty is impossible: it has no ground to stand upon. Jurisprudential law is sham law: to ascribe stability to this creature of the imagination, is to ascribe stability to a shadow.

Statute law has everywhere a tenor — a determinate collection of words: there is the will, and there is the expression of it: — we know whose will it is, where signified, by what signs expressed, what parts are to be found in it. Jurisprudential law, is law made by nobody, at no time, and in no words.

In statute law, words may here and there be ill chosen; and, from the infelicity of the choice, uncertainty as well as misconstruction may arise; but no sooner is the flaw perceived than it may be remedied. Jurisprudential law is perpetual disease, perpetually unsusceptible of all cure. From statute law, yes: but, so far as statute law extends, jurisprudential law is (or at least ought to be) extirpated; if it be not, the disease, so far from being cured, is aggravated. There is the statute law to give certainty; there is the jurisprudential law to take it away.

In jurisprudential law may be seen, not the parent only, but the protecting guardian, of all these other abuses. In it, the founders of the fee-collecting system have ever beheld the offspring of their own brain, the work of their own hands, the fruit and pledge of their own power. Statute law is the work of whom? Of the legislator — the lawful, the real, legislator. Jurisprudential, of whom? Of the judge — of the underhand workman, always making work, always disavowing it when made — of the Birmingham coiner making his own trash, and passing it off for the king's — of the dishonest valet, stealing out in the dark, going about in his master's name, and receiving homage in his clothes.

By what legislator, by what genuine legislator, recognised as such, and in pursuit of public ends, could any devices such as those over which we have been glancing, have been set up? By what legislator? unless, perchance, under the guidance of some Achitophel member and instrument of the fee-collecting partnership, serving the ends of judicature while talking of the ends of justice.

That which exists not, cannot be known. So far as the dominion of jurisprudence spreads, ignorance is universal, misconception endless.

An article of statute law is a drop of water, in the state of water, or in that of ice: an article of jurisprudential law is the same drop in the state of vapour. In the solid or liquid state, you know where the drop is, you see it, you may weigh it, you may measure it: you see the bounds of it: those bounds are narrow and determinate. In the state of gas or vapour, unless you have it in a bottle, you know not where it is, you do not see it, you cannot weigh it, you cannot measure it: assignable bounds it has none, unless it be the limits of the atmosphere.

Such is an article of jurisprudential law. In the form of statute law, a single line might, perhaps, contain the substance of it, and that perfectly: in the form of jurisprudential, the same article shall fill a folio volume; and the larger the folio, the more indeterminate the import of the article. To a command, there is an end: to a dissertation, there need be none.

In statute law, non-notoriety is an accidental disease: of common law, it is the inseparable essence. In statute law, the disease may be cured as soon as discovered: in common law, every remedy is so much added to the disease.

Non-notoriety is sometimes an inbred but always curable disease, sometimes an extraneous defect, in statute law; not non-notoriety merely, but uncognoscibility, an aggravated and incurable exacerbation of the same disease, cleaves to the essence of jurisprudential law.

Introduced by jurisprudential law, every pretended improvement, every improvement that, if introduced by statute law, would be a real one — every slip of common sense and common honesty forced into a soil so repugnant to both, brings into action the double-fountain principle. Fear not on this ground to earn the praise of liberality. Plant your improvements; round your periods; proclaim the ardour of your zeal for justice: all this you may do, and earn the praise of justice without prejudice to the ends of judicature.

While under the genial influence of the double-fountain principle, the old rank weeds are numerous and strong enough to spring up and choke the new plants: all this liberality is but a more refined way of carrying on the manufactory of made business *

By the uncertainty of the law, the partnership interest is served in three distinguishable ways:—1. The number of suits is increased, 2. The quantity of business receives a further increase, from the quantity of advice which men are necessitated to purchase—advice before a suit, during a suit, and for fear of a suit. 3. In proportion to the degree of uncertainty, the judicial members are invested with a degree of power proportionably arbitrary, and thence applicable to the purposes of the partnership in all imaginable ways

Going to law, I have a chance—not going to law, I have none such is the encouraging speech which the interest of the partnership requires should as often as possible be made by the parties, each to himself, on both sides. The oftener a speech to this effect is made and acted upon (provided always it be on both sides,) the greater and more glorious, and thence the richer in profit, the uncertainty.

Out of the manufactured necessity of advice—advice which, by the operation of the same cause that gives birth to the necessity, is so often rendered fallacious—arises that branch of the partnership concern which may be called the *opinion* trade. Of this, a few words under a separate head.†

Jurisprudential law—the imaginary law extracted by each man for himself out of a mass of jurisprudence—is a vast hot-bed of uncertainty. By statute law, in proportion as it extends, keeping clear of entanglement with jurisprudential law, that most poisonous of all weeds is extirpated.

Hence we have two distinguishable devices, hatched by the technical system, more especially the English branch of it laudation of jurisprudential law—contempt of statutory law.

In two instances that I have chanced to meet with (there may be twenty for aught I know,) the single word *policy*‡ has served a chief justice or puisne judge of the King's Bench, for superseding the use, as they have on so many occasions set at nought the declared will, of king, lords, and commons.

Transplanted from parliament (its only proper soil) to the King's Bench, this word, coupled with the unlimited faculty of applying it (and what limits are ever set to the faculty of applying it?) was of itself sufficient to erect judicature into a despotism. Omnipotence required but a word to create light; jurisprudence required but a word to create darkness

Not but others, each of them capable of supplying its place, might be found in superfluous abundance, to the right and left, by any one that had taste and courage for the task.

In *Christianity is the law of the land*. ‖ there are seven words, but in those seven words, coupled with the application made of them, there is matter sufficient to supply the place of an inquisition, and to afford to orthodoxy, under each successive change, a perpetual security against disturbance, by barring out all argument on either of two sides at pleasure, and supplying the place of it on the other side.

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* Compared with the absence of everything that can be called *law*, imaginary as well as real—of every pre-existing standard which can serve either to the use of the judge in the way of direction, or as against the judge in the way of controul,—even jurisprudential law is a blessing of prime magnitude.

Compared with statute law it is a nuisance.

The use, however, of jurisprudential law, to assist in the making of statute law, is incalculable. In the character of a foundation, it is necessary to the very existence of statute law; at any rate, of a body of statute law grounded on experience; a foundation without which it is incapable of being well adapted to what ought to be its ends.

The materials for the legislator to build with, are *cases calling for decision*: cases whereby the demand for legal obligations, and for exceptions to these obligations, is, or has been supposed to be, created. In that species of intellectual wealth which consists in collections of those cases, put into method in various ways, no nation is near so rich as the English. The decision may be absurd and pernicious: the case is not the less valuable.

From these considerations, the state of human society in respect of law may be divided into three periods:—

1. The barbarous: in which the judge is suffered, and obliged by physical necessity, to act without any pre-existing rule: and accordingly, as far as depends upon general rules, without controul, as well as without a guide.

2. The semi-barbarous: in which, as depends upon rules, the judge has no surer or more instructive guide, nor any more efficient controul, than jurisprudential law: amended more or less by such particles of statute law as the spur of particular exigencies has called forth.

3. The completely improved or civilized: in which the standard of obedience rests throughout on the basis of statute law; jurisprudential law being completely extirpated—extirpated in form, however preserved in substance.

† *Infrà*, Chap. XXVI.

‡ *Utility* would not have served the purpose. Utility is a familiar unassuming word, recognising all men's competence to judge, and for that purpose inviting them to hear, and look, and weigh, on both sides. *Policy* involves mystery, importing exclusive wisdom, and excluding from the research all who do not expect to be recognised in the character of politicians.

‖ 3 Keb. 307. 1 Vent. 293. Rex v. Carlisle, 3 B. & A. 161.—*Ed.*

Temporal tyranny established by a single word, and spiritual added to it by seven more!

What security does any such word as *policy* afford against the sinister interests and inclinations of the judge? — what security has it ever afforded in taking into his own hands offices, on the abuse of which his power is supposed to afford a check?

Will you believe Lord Mansfield? Judges are higher, better, fitter legislators, than king, lords, and commons. "Common law" (says he in so many words) "is superior to an act of parliament."* Superior? how so? The reason is not the less brilliant for being unintelligible. "It works itself pure from the fountains of justice:" fountains abundant on the ground-floor of the great hall, unknown (it seems) above stairs. Send a man to common law for purity! Send him to the common sewer to cleanse himself. As he taught, he practised.

Mansfield superior, in his own theory, to king, lords, and commons. Mansfield, when a reforming fit came on him, chose to do everything by himself, with *io*, *mio*, and *arrio*, in the character of mutes and train-bearers.

Another sort of thing, whose reputation for working itself pure is rather better established, is Thames water. Working itself pure on ship-board, it has nothing to do with fountains.

CHAPTER XXV.

HABITUAL CONTEMPT SHOWN BY JUDGES TO THE AUTHORITY OF THE LEGISLATURE.

A STATEMENT of the instances in which the authority of Parliament has been, and continues to be, trampled upon by its sworn servants, might fill volumes upon volumes.

When misinterpretation is the instrument — scientific misinterpretation, — how plainly soever wilful, the contempt may in general be covered by effrontery. The sense we put upon the law is the sense which it is the intention of the author should be put upon it — so we say, to whom it belongs to say so; and who are you that take upon you to say otherwise?

Cases, however, are not altogether wanting, in which such insincerity cannot be altogether put out of sight — not by any degree of effrontery on one part, nor by any degree of carelessness and obsequiousness on all others.

Of this number are cases of *arithmetical contradiction:* as if a man were to say (is it credible that a man should have said?) this guinea and this guinea added together, do not make two guineas: or, this first guinea and this second guinea and this third guinea added together, do not make three guineas.

By a contradiction of this kind (if a book of practice now before me is to be believed,) the judges of three of the four great courts, for there is no exception, did manifest in the year 1796, and, for anything that appears, do continue to manifest, an open declared contempt for the authority of parliament.

"Where a statute gives double costs," says Mr. Palmer,† "they are calculated thus: — the common costs, and then half the common costs. If treble costs; — 1. the common costs; 2. half of these; 3. and then half of the latter." If this be so, then, as often as parliament has ordered the judges to give treble costs, so often do these sworn executors of the will of parliament refuse to give so much as double costs.

The grand mischief attendant on such practices is, that, in proportion as they come to light, they weaken, not to say root out of the bosom of the people, all confidence in the engagements taken by the law. They destroy the credit, not only of those who deserve so little, but of the legislator himself, who, howsoever himself deceived and imposed upon, never, certainly, wishes to deceive. For, in a case like this, except through the means of these his servants, it is impossible for the legislator ever to keep his word. But, by a determination taken by them, and regularly pursued to the extent of this wide-extending case, so have they ordered matters that he never shall keep it, in any one single instance.

But, the greater the mischief resulting to the public from this treachery, the greater the advantage accruing from it to the contrivers.

Let the legislator say or do what he will, the authority upon which the fate of the subject has its immediate dependence, must, in every case, be the will of the judge. Upon the will of the legislator it does not depend, upon any other supposition than this, viz. that the will of the legislator will of course find the will of the judge conformable to it. Suppose this conformity constant, the subject is, comparatively speaking, independent of the will of the judge: to know what the will of the judge will be, no more is necessary to him than to read the will of the legislator in the letter of the law. On the other hand, suppose this conformity altogether out of the question, the dependence of the subject upon the will of the judge is absolute: in other words, the power of the judge over the subject is completely arbitrary. But the more arbitrary the judicial authority can succeed in rendering itself, the greater the degree of perfection in which the purposes of the partnership may be carried into effect. Absolute

* Atkins, i. 33.

† Table of Costs, p. 14. Edit. 1796, fifth edition.

perfection in this line would be attained, if in no case the subject could find or suppose himself safe in regarding the tenor of the law, the words of the legislator, as sufficient evidence of the eventual will of the judge. In this state of things, regarding the words of the legislator as no better than a snare, the subject would view in them, on each occasion, neither more nor less than the necessity of repairing, fee in hand, to some professional member of the partnership, in whose opinion might be read the most probable conjecture that the nature of the case admitted, of the eventual will of the official and governing members.

To this pitch of perfection, the plans of the partnership have never yet been brought but a more effectual step towards it than that which has been made by the course of mock interpretation here exemplified, cannot be imagined. If a premium were held out for the highest insult that could be offered to the authority of the legislator by the power of the judge (viz by wilful misinterpretation simply, unaccompanied by a direct disclaimer,) no higher than this could by the utmost effort of ingenuity be devised Instances of this sinister policy may be found in most unhappy abundance and by every insult thus offered to the legislator, an additional nerve is given to the arbitrary power of the judge. but a single instance, such as the one here in question, is sufficient to do prodigious service If, where the legislator says, *give three shillings*, the judge will not give so much as two—if the authority of the law is in this case openly set at nought,—in what other instance can there be any sufficient assurance of its not being dealt with in the same manner? If to such contempts, and for such a length of time repeated, the legislator has been insensible,—to what others can any sufficient assurance be had of his being less so?

That the interest of the partnership requires that the uncertainty of the law should for ever be at its maximum, is evident enough that their endeavours must have been constantly directed towards that object, follows of course. that the establishment of a precedent of the above description, viz a misinterpretation which cannot possibly have been other than wilful, goes further towards the effectuation of that object than a hundred or a thousand that might by possibility have been undesigned, is another proposition that seems scarcely open to dispute.

Observe the extent of the effect produced by this manifestation of anti-constitutional disobedience. To banish out of the breast of the subject all confidence in the declared will of the legislator,—in a word, to produce the requisite degree of uncertainty,—it is not necessary that it should be understood that it is a rule with the judge always to run counter to it; were that the case, no uncertainty, no such degree of uncertainty of which every man must be more or less sensible, could ever take place. What is sufficient is, that, in no particular instance, the subject (without consulting a man of law) can be sufficiently assured whether any regard will be paid to the will of the legislator, or no: and, to produce this degree of uncertainty, a single course of precedents such as the above, even without the help of so many others as might be added to them—enough to fill volumes upon volumes,—is quite sufficient.

Lawyer — A pleasant conceit, indeed! And so, then, sir, according to this vision of yours, lawyers of all classes—advocates, judicial officers, judges themselves—are all in a partnership, all traders,—and a capital object with these traders is to destroy all confidence in the breast of their customers—is so to order matters that their customers (or say, rather, those whom they would be glad to have for customers) may never believe a word of anything they say to them! Surely this is the first time that a general destruction of confidence was supposed to be a benefit to trade!

Non-Lawyer. — Visionary enough the notion, as thus stated, certainly but a little circumstance, sir, has escaped your notice. Where trade is open, to destroy confidence may indeed be to destroy trade Suppose two rival shopkeepers A and B A loses the confidence of his customers, B preserves it what follows? B's trade of course flourishes—A's is destroyed But of these traders (the avowed traders we are supposing) neither possesses any monopoly, whereas, in the station occupied by the real though unavowed traders we have been speaking of, the business not only is an object of monopoly, but of necessity ever must be. To the purposes of the partnership, I have shown you how essential it is that the judge should have destroyed, as far as possible, the confidence, on the part of the people, in the engagements taken by the legislator By the course taken for this purpose, the reverend functionary has destroyed, it is true, in a great degree, not only the confidence that the people would otherwise have reposed in the words of the legislator, but also the confidence which they would otherwise have reposed in himself and his own proceedings But, by this double destruction, what does he lose? Just nothing: for they are not the less under the obligation of going to his shop On the contrary, his profit is promoted by it: since the uncertainty of the law increases with it, and his profit increases with the uncertainty of the law.

Accordingly, as I have already, sir, had the honour of bringing to your recollection, — be it with personal character as it may, there

exists not under the sun any sort of person whose public character, and in so essential a point as that of veracity, is so completely blasted as that of an English judge: so successful, because so well-directed, have been their learned labours in that line: and this not in carelessness and wantonness, but in all sobriety and sadness: inasmuch as the uncertainty of the law, and thence the magnitude and certainty of the partnership profit, were so evidently dependent on it.

Not only, by every such open contempt manifested towards the will of the legislator, has the uncertainty of the law been increased, and the certainty of lawyer's profit (and in particular of the profit attached to the *opinion* branch of the trade) been increased along with it; but so has it by every *condition* annexed to a legislative command to which the legislator himself had annexed none: and thence it is that the exclusionary system, which forms the main subject of these pages, is (as well as so many other systems of astute defeasances) so much *added*, and meant to be added, to the uncertainty of the law: that glorious system of uncertainty, which is the real as well as so generally acknowledged source, sir, of all your glories.

In the present instance, a special sinister interest added its force to that general interest whereby (as above) they are continually urged to do as much as they dare towards destroying, on the part of the people, all confidence in the legislature. To prevent vexatious suits, was the professed as well as real object of these restrictive and remedial clauses: but every vexatious suit prevented, is a bird, or rather a covey of birds, snatched from the snare of the fowler—from the fangs of lawyers.

While a regular and deliberate system of insult has thus been opposed to the united authority of king, lords, and commons, where has been the House of Lords? where has been the House of Commons? In the House of Commons, is there not a committee appointed, or supposed to be appointed, at the commencement of every parliament, or of every session, called the committee of justice, or the committee of courts of justice?

An equal degree of contempt for the authority of the legislator is manifested by every application of the principle of nullification.

On a former occasion, the principle of nullification was considered in its character of an engine of fraud; in respect of its particular and more immediate effects, on each particular occasion, to the prejudice of the party having right on his side.

On the present occasion, the character in which it presents itself to view is that of an engine of usurpation.

The principle of nullification has been employed, the application of it warranted and ordained, by the legislator himself. An offence having been created, and punishment appointed,—the judge doing so and so, the proceedings against the defendant, it has been declared (declared by the legislator himself) shall be null and void: *i. e.* the defendant, though guilty, shall go free.

In this case, the application thus made of the principle has been, on the part of the legislator, an act of inconsistency and imprudence; on the part of the lawyer, his scribe, to whose unfaithful hands he has committed the task of giving expression and effect to his will, an act of imbecility or treachery.

On the part of the judge, the mass of substantive law in question being the work of the legislator, every application made of the principle of nullification is a contempt—an act of insurrection against the authority of his constitutional superior. Condition, extension, limitation, modification, exception (expressions interconvertible, expressions in effect the same,) by the legislator, none at all annexed: none, at any rate, to the effect in question. To this declaration of the will of the legislator, the genuine and lawful legislator,—the judge, by help of the principle of nullification, attaches exceptions of his own at pleasure. To the extent of these exceptions, the will of the legislator is in effect frustrated, the law repealed.

Lawyer.—Contempt! What contempt? Do you consider who it is you are speaking of? Why use such harsh words? In the character of legislator, any more than in any other, is man infallible? Is it not a case continually occurring, the case of an exigence unforeseen by the legislator, brought by particular occurrences under the eyes of the judge? In the interpretation of laws, in the application of them to particular occurrences, exists there anywhere that system in which some latitude of discretion has not been considered as virtually reposed, reposed of necessity, in the hands of the judge? But, as often as any such discretion is employed, is there not, according to your own account of the matter, some act of virtual repeal or enactment performed?

Non-Lawyer.—As to the power of interpretation, and the latitude proper to be assumed in the exercise of it, it is on this occasion nothing to the purpose. Any such exception as, in the honest opinion of the judge, the legislator, had the particular occurrence or state of things been present to his view, would himself have made,—an exception of this description, yes: provided always that the liberty thus taken with the actually declared will of the legislator, be confessed and notified to the legislator, with opportunity given to him, in case of disapprobation, to annul and stop it.

By an arrangement such as this, every

unfo... ...dience would receive its remedy, and constitutional allegiance remain inviolate.

On these terms, but on these only, contravention, momentary and provisional contravention, to the actually declared will of the legislator, might be and ought to be, not only a power, but a duty: option between the letter and the spirit of the law would not be, as now, an organ of arbitrary power, operating upon the double-fountain principle.

But nullification! your principle of nullification! it is no less repugnant to everything that could in any case be or have been the will of the legislator, than to his will (on whatsoever subject) as actually expressed and declared.

Name, for example, that crime, if you can, of which it would have been in any case the wish of the legislator that it should be practised with impunity as often as the malefactor could find means to bribe the clerk (or whosoever it be on whom it depends) to make the flaw, or supposed flaw, of which your judges, in their wisdom and their honesty, are pleased (as often as they are pleased) to make that use.

To make one instance serve as a sample for others by hundreds and by thousands, let us turn to the practice in regard to *convictions* by which word, are presented to the eye of a lawyer, convictions pronounced by justices of the peace acting out of sessions, for delinquencies referred to their cognizance by particular acts of parliament

Trying the cause under the forms or noforms, of natural procedure, of pure and universal justice, the magistrate pronounces the defendant guilty and, to ground the further proceedings, signs a record or memorandum, certifying the existence of the decision so pronounced. At the instance of the convict, the court of King's Bench, without so much as pretending to know anything about the facts, *quash* the conviction, liberate the defendant, set at nought the statute.*

Non-Lawyer.—Liberate the delinquent, and without evidence, after he has been convicted, and by lawful authority, upon evidence? Pray, on what ground is this done?

Lawyer.—On what ground? Because the magistrate had not set forth the evidence

Non-Lawyer.—Why should he have set forth the evidence? Had the legislature ordered him to set forth the evidence?

Lawyer.—No: it was not necessary.

Non-Lawyer.—What, then? had anybod else ordered him?

Lawyer.—No: it was not necessary.

Non-Lawyer.—What! not even you? you, who quash his decision for not having set forth the evidence? By what ingenuity was he to have discovered this to be your will and pleasure?

Lawyer.—We never meant that he should discover any such thing. Can you be so weak as to suppose we did? Are we such simpletons, do you suppose, that, when it is really our wish a man should do a thing which he would have no motive to do unless he knew it to be our pleasure,—that, in such a case, we should really omit to make him know that it was our pleasure? Did you ever know an old woman silly to such a degree of silliness? No, sir our wish, and our determination, was to quash the decision at any rate. To quash a just decision, or to do anything else that ought not to be done, a pretence, you know (or you ought to know,) we must always have. As to what the pretence is, it matters very little If the evidence had been set forth, we should have found another. When we have a mind to get rid of a decision, do you think we are ever at a loss?

Non-Lawyer—I must confess, I do not very well see how that misfortune should ever happen to you. But, as to the quashing of the conviction, pray what may have been the use of it?

Lawyer.—Use of it? Abundance of uses.

1 In the first place, this was making so much business Down comes the money,—quash goes the conviction, like a snail under our feet

2. In the next place, we throw cold water on a bad precedent The natural system is the rival and mortal enemy of our system: we abhor it we do what we can to crush it: by its encroachments it robs us, by its justice it puts us to shame

The Turks have a prophecy that some day or other the Christians will drive them out of Europe We have something between a hobgoblin dream and a prophecy, that one of these days the natural system will drive ours out of Westminster Hall Our wish is to stave off the fatal day as long as possible

By thus quashing, we turn the arts of the enemy against himself. he lets off a clause, to rob us of our business, and out of that very clause we make more business.

3 In the third place . .

Non-Lawyer.—Oh, a truce! a truce! I see very well—any man who will not shut his eyes may see with half an eye—how well you understand your business. Only one question more.—Is it a rule with you, pray, to quash every conviction that is brought to you to quash?

* Indictments, appeals, convictions by justices (in many instances,) and the proceedings thereon, may be removed from the inferior courts into the Queen's Bench, by writs of *certiorari facias*. The validity, and not the merits of such proceedings, is alone taken cognizance of by the superior courts, and they are accordingly confirmed or quashed.

Lawyer. — No: that would not be good policy.

1. In the first place, if this were the case, sooner or later the legislator might find us out, and grow angry.

2. In the next place, it is not at all necessary; every alternate one does just as well: we do not stand counting; there would be no use in it: but that proportion, or thereabouts: the nearer to it the better, if there be any difference.

Non-Lawyer. — But, if every conviction were to be quashed without exception, would not this crush the designs of the enemy more effectually? Would it not humble him still more, display the weakness of the natural system, and cure the people of having recourse to it?

Lawyer. — Possibly, in some degree: but that is not worth thinking about. Not to insist on the danger, of which you have a glimpse already, — if in this way we served a distant end, we should disserve the immediate one. If men did not see somewhat of a chance of having their convictions held good, there would be none defended: all that business would be lost.

Non-Lawyer. — Oh yes, I see, I see: your world is like the philosopher's: nothing without its sufficient reason. But the legislature, all this while, what have they said to all this?

Lawyer. — Said? Nothing at all. Do what we will to them, they never say anything to us; they never have been used to it.

Non-Lawyer. — So then you have plenty of business in this line: a rare trade, this quashing trade!

Lawyer. — No; no great things after all: the rogues have almost grown too cunning for us. Rob us of it, to be sure, they durst not; but, little by little, they have found out a way of stealing it from us.

Non-Lawyer. — Steal business from the law? Parliament strip lawyers of their business? Oh, terrible! this is the very worst of larceny: this is *contra pacem* with a vengeance. Sad usage indeed! But pray, how do they manage it?

Lawyer. — They provide a *form*, a skeleton form: and then, say they, every conviction that is according to that form is good. The form is a skeleton form with blanks in it, such as are in Burn's Justice: the justice has nothing to do but to fill up the blanks: the business is so easy, a viper might as soon bite a hole in a file, as any of us find a flaw in it. Now what do you say to this?

Non-Lawyer. — Say? why, that you are insidiously and barbarously dealt with. But you have one thing for your comfort.

Lawyer. — Comfort, indeed! What comfort? where is it?

Non-lawyer. — Nay, you have two comforts. One is, that of seeing how much they are afraid of you: that if they do take business from you, they take it not as robbers, but as thieves. Why think of the molehill they have filched from you? Think rather of the mountains they have left, and dare not meddle with.

Another is (for it shows itself through your lamentations,) that the old business is still left to you: so that the damage after all is rather *lucrum cessans* than *damnum emergens*: the business does not increase so fast as it might; that is all.

Lawyer. — Alas! you are very much mistaken. From the old statutes there may be a remnant of business left, it is true: but it grows less and less every day. Every day brings new statutes, spreading over the old ground, and covering it with these cursed forms: by and bye there won't be a spot left in which a flaw will be to be found.

Besides that the stock of flaws and quibbles is almost exhausted; and (to let you into a secret) the people begin to find us out: we cannot go on quashing through thick and thin, as we used to do. We are forced to draw up: we are forced, little by little, to turn liberalists. There is that passage in Hale against quibbles. It haunts us: it follows us like our shadow. It will blow us all up one of these days.

CHAPTER XXVI.

OPINION-TRADE.

THE opinion-trade is not, properly speaking, itself a device; it is a natural result, and a distinct branch, of the aggregate mass of profit reaped from the contrivances already brought into view under that name: but on this occasion the fruit cannot pass altogether unheeded, any more than the tree that bears it.

This branch of the partnership trade has for its sole foundation, the uncertainty and uncognoscibility of the law: properties essentially attached to its existence in the shape of jurisprudential law, howsoever chequered with patches here and there of statutory.

Should the legislator ever have the force to know his own will, and the grace to grant to his submissive subjects the possibility of knowing it and conforming to it, instead of being punished or plagued for not having conformed to it, there ends the opinion-trade: there vanish the opinionists, like animalcules, upon the drying up of the puddle in which they feed and float.

The publication of reports (histories of adjudged cases) is another arrangement unfavourable to the opinion-trade. Here we see an interest within an interest: Mammon divided against itself.

When an opinion is taken, before and in contemplation of a suit, the service sold by the opinionist consists in a conjecture concerning the part which, in the case as stated, the judge is likely to take. If, instead of the interests of the law partnership, the interests of the community were the objects regarded, means would be afforded to the subject for obtaining beforehand, at the hands of the legislator or the judge, that information, of which, at the hands of the opinionist, he purchases at present a precarious and often fallacious conjecture. A provision for this purpose would constitute a natural appurtenance to the body of the laws.

The opinionist entertains a natural antipathy towards the reporting lawyers So far as the information they furnish extends, so far it goes towards narrowing and starving his trade.

He knows not what to say against them, and yet something must be said. They publish too much—more than used to be published the science is overloaded by the quisquilious matter they rake together and preserve They publish too soon, before they have taken the requisite time for digestion the science is clogged by crudities But, to do quite right in the sight of the opinionist, there is but one course they can take and that is, to have done publishing, to give up their branch of the trade to his

When the reporters have done their worst, there remain the old cases, over which they have no power The cases themselves (the old cases) are reported, it is true but what perhaps may here and there not have been reported, are certain opinions of the reigning judges, the potentates of the day, respecting the matter of these cases Sects form themselves about this and that quirk or quibble, as formerly among the Romanists The technical system, wherever it sets foot, can never be without its Proculeians and its Sabinians "Where the treasure is, there will the heart be also" A *plenum* of technical ideas is a *vacuum* of rational ones. the head that has fitted itself up for jurisprudence, has unfitted itself for everything else The jargon which has been giving occupation to the official hour, gives relaxation to the social. The lawyer fights over again his arguments, as the conqueror his battles the learned lord finds that entertainment in quibbles, which the learned king used to find in puns

Twelve *dii majorum gentium* find an Olympus in Serjeants' inn: the opinionist lawyers are their priests. The will, or, in learned language, the *opinion*, of the god, is to be learned through no other channel than the will of the priest. The gods of the Pagan hierarchy had each his priest: the jurisprudential have theirs in common.

Advice to parties and attorneys:—If it be a knotty point, particularly open to controversy—a point in conveyancing, for example, or any other that seems to lie deep,—seek not for that soundness of understanding, which would be but an *ignis fatuus*; betake yourselves in preference to some grave person in a silk gown, a *coætaneus* and *contubernalis* of the reverend band. The table-talk of the ermine forms the privileged science of the silk gown. At first hand, the opinion of the ermine is not to be bought, at any price: but, whether at first-hand or second hand, what matter, so long as it is obtained?

From no one guinea given to an opinionist lawyer, does any judge ever receive the smallest share; for that would be a bribe: a sort of profit as unknown, as it is unnecessary, to any English judge But the source of legal profit is in the abyss of legal uncertainty and the benefit of the uncertainty is the patrimony of the firm, in the profits of which no member is without his share.

One abuse grows out of another abuse. It is because, in the field of litigation, the pursuit or defence of a man's due is so expensive, that he applies to the opinionist to learn whether it be worth his while to hazard the expense and thus the expense receives an addition,* and that a certain one, in the first instance and this additional burthen rests, without alleviation, on the shoulders of the party injured, for it is not allowed in costs.

If the cause of action lies but a hair's breadth out of the most beaten track, your attorney will not proceed without an opinion. Profit is no object to him to the reputation of virtue he is not alike insensible His fidelity and zeal are proved, by his anxiety not to plunge his client into an unprofitable expense his modesty, by his unwillingness to rely on his own judgment Nor yet, in so far as reputation is concerned, is he altogether insensible to his own just claims For his defence against the imputation of ignorance, rashness, or rapacity, he has a right to that sanction which the usage of the profession affords to that branch of it in which he serves. Prudence thus comes in, to make up the group of virtues

Whether in his opinion the cause be good or bad, the attorney finds his advantage in this practice If good, profit is always increased, and not the slightest loss of reputation hazarded. If bad, he thus exonerates himself of all responsibility, his reputation is put under cover, and, if the profit of the suit is lost, the profit of taking the opinion is at any rate so much saved out of the fire.

But, of the ceremony of consulting the oracle, the loss of the suit with its profit is by no means a certain consequence. So far as

* From two, to thirty or forty guineas, including the attorney's share.

the question of law is concerned, the opinionist may indeed be depended upon for not giving as law what he really does not look upon as law; so much reputation would be lost to him, and nothing gained in lieu of it. But the law depends on the facts: on the state of the evidence, as laid before the opinionist in the instrument called the *case*. By a very slight deficiency either in point of correctness or in point of completeness, on the part of that mass of supposed facts, such an opinion may be produced, as, while it engages the client in a suit predestined to be unsuccessful, shall secure both members of the partnership from all danger of reproach.

It is the interest of the attorney not to extract from his client (if he can avoid it) any fact which, if brought to view, would betray the badness of his cause. On the part of the client, this sort of suppression finds itself continually favoured, partly by passion, partly by ignorance. Either he is not aware of the influence which the fact would have on the cause,—or, if he is, the pain attached to the idea of it deprives him of the resolution to bring it out.

The propensity of the bulk of clients thus to deceive themselves, while deceiving their law-advisers, is no secret to either the honest or dishonest among attorneys. The honest have to fight against it: the dishonest keep the discovery to themselves, and avail themselves of it; turning to their own account the proficiency thus made by experience in the science of human nature.

To the opinionist, whether the mass of supposed facts be correct or incorrect, complete or incomplete, is matter of the most complete indifference: or rather, if incorrect or incomplete to the effect of representing the client in the right where he is in the wrong, so much the better: since, in that case, a suit which ought not to be brought may come to be brought, and the opinionist to be employed in it.

Should the incorrectness or incompleteness be upon the face of the statement so glaring as to force itself upon the notice of the learned sage, will he take the trouble to give intimation of it? Not if he be wise in the way of worldly wisdom. Labour it will cost him; advantage he will not gain in any shape: the lips of the attorney may thank him, the heart of the attorney will not thank him, for an article of information by which on one hand the deficiency of the attorney is held up to view, while on the other hand the suit with its profit is nipped in the bud.

Numberless are the ways in which, with or without consciousness of wrong, the attorney may, without any risk of reputation to himself, engage the client in a groundless suit. Whatever the client states as fact, the attorney assumes as fact: by this demonstration of respect and confidence, he does not lose; by the opposite demonstration he might incur the displeasure of the client, as well as lose the benefit of the suit.

But, though the fact should be exactly as the client states it, the advantage which, on the occasion of the suit, the client will be able to reap from it, depends altogether upon the evidence: upon the faculty of adducing such evidence as shall obtain admission, and be found persuasive. By the attorney, it is either known or suspected, that (whether through inadmissibility or through insufficiency) the evidence will not serve. But, if he be ordinarily wise,—especially if in the person of the client he has the advantage of dealing with an uninformed mind, such as are those of the bulk of clients,—he will not be so unpolite or so imprudent as to suffer this knowledge or suspicion to pass the bounds of his own lips.

What, then, after all, is the sort of intercourse thus described? It is a sort of previous inquiry or trial of the cause performed upon bad evidence — upon evidence commonly incomplete and incorrect, for the purpose of determining whether it shall be put into a course of being tried upon correct and complete evidence.

To the account of the technical system of procedure may this fruit of it be set down: since under the natural it has no place. Why? Because, under the natural, the facts are brought to light, with the utmost degree of correctness and completeness which the faculties, intellectual and moral, of the witnesses, admit of: brought to light with less delay, vexation, and expense, than what attends the production of that partial and naturally unfaithful picture, which, through so treacherous a medium as that of the pen of the attorney, is, in the course of the opinion trade, placed under the eye of the venal and uncommissioned judge, by whose decision nothing is decided.

Is it a case in which both parties are heard together? Self-partiality draws from each of them such of the facts as promise to operate in favour of his claim; the same force extracts from the lips of his adversary, information of a contrary tendency: and in both instances with as much promptitude, as well as correctness and completeness, as the collision of interests can command. Titius cannot have an interest in getting evidence for a false fact, but Sempronius has an equal interest in bringing down detection upon the falsity: Titius cannot have an interest in the suppression of a fact, but Sempronius has an equal interest in dragging it forth into light.

Is it of the number of those cases, in which one of the parties (at the commencement of the cause, the plaintiff) comes into court without the other, to demand the service

which, in that stage of the cause, he stands in need of at the hands of the judge? Adverse party, with his adverse interest, by the supposition there is none but it is the interest of the judge, the honest interest of the unfee'd judge, that, in this stage of the cause, the truth shall come to light, in a state as correct and as complete as may be. Why? Because (over and above all reputation, and the sacred regard for the ends of justice) by extracting from the applicant those truths which his inclination might have led him to suppress, or driving him out of those misrepresentations for which his inclination might have led him to obtain credence, the object of his application, unjust as by the supposition it is in this case, may be defeated at the time, and the labour of giving a joint audience to both parties, or whatever other labour on the part of the judge the grant of the ill-founded demand might have been productive of, will be saved

Thus it is, that, in whatever point of view the field be contemplated, technical procedure, with its endless train of afflicting consequences, presents itself as the disease, the foul disease, natural procedure as the simple, the pure, the efficacious remedy

CHAPTER XXVII

EXTENSION OF THE ABOVE DEVICES TO SUBSTANTIVE LAW, AS FAR AS APPLICABLE

Of the two main branches of the body of the law, the substantive and the adjective, it is to the adjective alone that the subject of evidence belongs The application of the above or any other devices to substantive law, falls not therefore within the compass of the present work It is for this reason, and for this reason alone, that the few exemplifications which have been given of the application of these devices have been confined within the compass of the law of procedure

The error, however, would be great, if it were supposed that it is to this comparatively narrow part of the field of judicature that the application of these contrivances for the pursuit of the ends of judicature is confined. True it is, that, of these two great branches, the adjective is that in the arrangement of which the judicial authority has had the greatest share. But, in every country more or less, and in England in particular, the share which that same authority has had in the arrangement of the main branch, the substantive, has been very considerable. Even in this branch, the part taken by the judicial authority may, in comparison with the part borne by the only competent and legitimate legislator, be styled the principal part: jurisprudential law forming the ground, statute law sticking on here and there a few patches upon that ground. In both parts of the work, the action of the same sinister interest being favoured with the same opportunities, the same character and complexion would naturally be exhibited by the work in both instances. As far as power extended and occasion favoured, the system of procedure would be adapted to the ends of judicature, the system of substantive law would be adapted to the system of procedure. The object in respect of the adjective branch, besides the multiplication of suits (understand always profit-yielding suits,) was to adapt the course of procedure to the purpose of extracting from each suit its maximum of profit What it was in men's power to do, in working upon the substantive branch, towards the common end of both branches, confined itself to the purpose of giving birth to the greatest possible number of suits to extract from each the greatest quantity of profit that it could be made to yield, lay exclusively within the province of the adjective branch Flowers necessary for the crop might be furnished by both branches. it was from the adjective alone that the fruit could be reaped

Intermediate ends common to each were, the nursing in the mind of the individual, in his character of suitor and client, the qualities of ignorance and error, on the part of the law itself, uncertainty, uncognoscibility, obscurity, ambiguity, and voluminousness

Of the devices or contrivances directed to those ends, five (viz exclusion of the parties — tribunals rendered inaccessible by distance — days fixed with long intervals — mechanical judicature — and acceptance of allegations in writing, at successive times, and under a licence for mendacity,) — these five, together with the office-multiplication principle, were arrangements exclusively adapted to the nature and texture of adjective law · the remaining ones, viz the principle of nullification (with its supports, jargon and fiction, and its compound with the principle of reason and utility, the double-fountain principle,) and the habit of magnifying jurisprudential law at the expense of statutory, of representing devices as more real than realities, shadows more solid than their substances,— these five share in the privilege of being applicable to both branches, the substantive as well as adjective, with equal advantage.

And is it then all delusion, the chief pride and comfort of an Englishman, the matchless excellence of his laws?

By no means from all that has been said, admitting it all to be just, no such consequence follows.

1. What there is good in the system, will be found to exist in a much larger proportion in the form of statute law, than in the form of jurisprudential law: in other words, to have been in a greater degree the work of king, lords, and commons, the legitimate le-

gislators, than of judges,* spurious usurping legislators, making base law underground, as their brother usurpers make base money, and like them, with one everlasting lie in their mouths, disowning their work. Of what has been well done, the far greater part therefore has been done, not by lawyers, but in spite of lawyers: lawyers grumbling at it as much as they dare, and doing what they can to spoil it.

The exertions of the brotherhood have been employed, not so much in the support, as in the destruction, of society. To be assured of this, any eye that is strong and single enough to bear the sight, need but read over the statutes containing the wretchedly scanty provision that has been made by fits and starts for the amendment of the law. In that small but fertile department of parliamentary history, may be read the wickedness of lawyers. It is a history that may match with that of Cartouche, Jonathan Wild, Japhet Crook, and so forth, except that it is without names.

2. It is not in human nature that the character of the technical lawyer should have completely, and in every instance, swallowed up the character of the Englishman or the man. The private interest (it has already been shown) is not on every point, nor on every occasion, in opposition to public interest. Sprinkled here and there over the surface of the law, some good (much or little, according to the object it is compared with,) might doubtless be to be found, that drew its origin from a learned bosom. But, were the proportion much larger than it is, it might not be the less true, that, if an inventory could be taken of the number of propositions of which the mass of jurisprudential law is composed, nine of them out of ten would be found absurd in themselves, mischievous in their consequences. Take this or that reasonable and useful proposition, you will find it swaddled up in a cluster of perhaps a dozen absurd and pernicious distinctions, extensions, conditions, exceptions, limitations.

But, for judging of the aggregate goodness of a body of law, no tolerably correct criterion can be deduced from the mere comparison of the number of rational and beneficial propositions contained in it on the one hand, compared with the number of irrational and pernicious ones on the other; no more than any estimate can be formed of the severity of a penal code, from the multitude of the penal laws contained in it. As in evidence, weight, so in provisions of law, *extent*, as well as number, must be taken into account. Sometimes an arrangement, of which the characteristic features may be composed in half a dozen words, shall have so much good in it as to compensate for a mass of irrational and pernicious matter sufficient to fill a volume. Take for instance, in judicature, the principle of publicity.

Were the most enthusiastic admirer of the English body of law as it stands, to be called upon for a list of the provisions on which his admiration grounds itself, he would find perhaps a score or two of pages, not to say a dozen or two, sufficient to contain it. Were he a non-lawyer, there would not be contained in it perhaps one, nor, even if a lawyer, many, of the propositions above alluded to under the description of irrational and mischievous.

The dunghill, were there enough of it to fill Augeas's stable, would not destroy the value of whatever pearls might be to be found in it; but the dung would not cease to be dung, any more than the pearls would cease to be pearls.*

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* If, in the mind of any person by whom the proofs exhibited in the foregoing pages have been perused, there can still remain a particle of doubt of the repugnancy of the technical system to the ends of justice, of its subserviency to the private interest of those by whom it has been administered, or of their consciousness of such repugnancy, as well as of such subserviency (always excepted the persons, whosoever they may be, who, at the time of the present publication, stand invested respectively with judicial offices,) —two sources of information, or either of them, may, to the satisfaction of any eye that may have the curiosity to apply itself to them in this view, afford matter abundantly sufficient for the removal of any such doubt.

1. One of them is, the series of the several acts of the legislature, which, under the particular title of acts for the amendment of the law, or without any such special profession, have touched with a hand more or less strong upon the predominant, the technical, system of procedure; endeavouring, or professing to endeavour, to remove or correct this or that particular imperfection or abuse.

In each of these statutes, besides a source of law, may be viewed a source of history: in the remedy, inadequate or adequate, designed or not to be so, may at any rate (as in a mirror) be seen, in a degree more or less distinct and vivid, the shape and colour of the imperfection or abuse: abuses in number so great as to be counted, one knows not whether to say by dozens, by scores, or by hundreds: and amongst them many a one so flagrant, as to be sufficient of itself, without the aid of any of its numerous associates, to overspread the land with misery.

Two sorts of glasses or mirrors are alike capable of being employed, in taking a survey of this distant scene: one, the lawyer's, the property of which, like that of the cylindrical mirror, is to give to a mass of universal deformity an artificial symmetry: the other a perfectly plain one, which presents each object in the shape, as well as colours, that really belong to it.

Viewing the scene with a glass of the first sort,—the same which Blackstone is so busy in putting on every occasion into the hands of his pupils,—the object that strikes the eye is the unceasing care and solicitude with which the legislature, having from the hands of its ever faithful counsellor the man of law a system originally wanting but little of perfection, have

CHAPTER XXVIII.

REMEDIES SUGGESTED FOR THE ABOVE EVILS

After so much as has been said of the disease, the purpose of the discussion would be in danger of being misconceived, discontent instead of reform might be taken for the ultimate object—misanthropy instead of philanthropy for the source, if nothing were said of remedies.

But, though the causes of the mischief appertain to the purpose of the present work, because without them no completely satisfactory account could have been given of the origin and probable cause of the system of exclusionary rules,—the remedies, any further than as concerns the abolition of the coercive rules, and the substitution of a body of simple instructions in their stead, are not, by any appropriate tie, connected with the subject of this work. An indication as brief and general as possible is therefore the utmost that the reader will probably look for, or be pleased to meet with, in this place.

I. Removal of the external cause of the disease, the root of the corruption: substitution of salaries to fees, throughout the whole nest of judicial offices.

II. Substitution of the natural system to the technical, throughout the whole field of procedure.

III. Transformation (gradual, but at length complete) of the substantive branch of the law, from its present form of jurisprudential law, or jurisprudential patched with statutory, into pure statutory.

IV. Arrangements to be taken for annexing to offices already in existence, or to a new office or set of offices to be instituted for the purpose, an interest in the preservation and amelioration of the fabric of the laws: a system of registration calculated for the express purpose of indicating the defects of the law (if any,) in proportion as experience gives them birth: and an officer or set of officers, whose function it shall be, to watch the appearance of all such effects, to take note of them, to present them from time to time to the notice of the legislator, together with an indication of the arrangements which present themselves as best calculated to answer the purpose of a remedy.

There is a time for all things: there may be a time even for justice. Fashions change: who knows, but, one day, even justice may be in fashion? Things little less strange have sometimes happened.

In the administration of what is called justice, the ends hitherto pursued have been (it has been seen) not the ends of justice, but ends opposite to those ends.

We have seen the chains in which the wisdom and virtue, as well as the power of the nation, have for so many ages been held in thraldom: chains forged by absurdity in the cavern of depredation. Time may come when men shall be weary of these chains.

Let us suppose (though it were only in the way of reverie,) let us suppose as in a dream, to some perhaps even pleasurable, and not the less so for being fantastic;—let us suppose a time—if not in the present, in some future age, the year 2440, for example—in which, in a sort of mad fit, or by way of frolic, a resolution were taken, in one or other

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watched every occasion to supply it with that little.

Viewed with the plain glass, being that through which alone an enlightened lover of mankind would ever bear to view it, the objects that strike the eye will be,—on the one hand, the enormity and multitude of the abuses: on the other hand, the negligence or ignorance of the legislator, and the patience of the people, as manifested by the length of time during which each abuse must have been covering and tormenting society with its baleful effects, before it could obtain its tardy, and almost always its altogether inefficient, or incompletely effective remedy: age after age groaning under the disease, and then at last comes, such as it is, the remedy.[a] To present the body of information here hinted at, would be to republish the several statutes in question, with a commentary upon each. To point out where and how the information may be obtained, is quite as much as will be deemed suitable to the present purpose.

Secretly, and under favour of the artificial darkness, it has been from first to last the occupation of the man of law, to infuse on every favourable occasion the poison of chicane into the fountains of justice: openly, from time to time, the same insidious hand has been extracting, or making demonstrations of extracting, this or that minute particle of the poison, in great ceremony. In which character is his claim to attention strongest and most reasonable? His real character of poisoner-general, or his assumed character of physician?

2. The other source of information is, the regulations of judicial procedure, established in different countries, as well as in the different courts in this country, by the authority of the judges. In that which has by this authority been done, may be seen (at least to the extent of it) the sufficiency of power; while in what has not been done, as well as in what has been done, may be seen the deficiency of will—throughout the course of so many generations and centuries, the perpetual and unvaried deficiency or rather utter absence of will (always and completely excepted the venerable persons, whosoever they be, by whom the offices in question may happen to be filled at the time of the publication of the present pages) to render the operations of judicature subservient to the ends of justice,—subservient to any other ends than those so often above designated under the name of the ends of judicature.

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[a] Examples:—1. Uncontrouled faculty of arrestation for debt. 2. Ditto of outlawries.

or both of the two proper places, to frame a system of procedure directed to the ends of justice. To gratify this odd fancy, what would be the one thing needful? It is comprised in one word—consistency. Yes: to frame a system of procedure as perfect and salubrious, as that with which the people at present are afflicted is depraved and pestiferous, the legislature needs only to tread in its own steps.

The exemplifications of the principal arrangements taken at different times by the English legislature for clipping the wings of the fee-collecting system, and substituting the pursuit of the ends of justice to that of the ends of judicature, may be comprised under the following heads, viz.—

1. Institution of courts in which the natural system of procedure has been preserved or restored.

2. Partial abolition of special pleading.

3. Abolition of fees, in judicial as well as other departments.

I. Courts of natural procedure preserved or instituted.

Let us begin with bringing under review the whole list of these courts together: they appear to be as follows:—

1. Courts martial: including the naval as well as the land branch of the military service: the mode of procedure not presenting, in the point of view in question, any material difference. *General* and *regimental* is a distinction, which, in the land branch, draws with it a difference respecting the constitution of the court, and the sort of causes cognizable, but none respecting the course of procedure.

2. Courts of inquiry. These, in the military service, serve for a sort of preliminary examination: an inquiry, having for its object the question whether the person who is the subject of it shall be placed in a situation so full of vexation in various shapes as that of a defendant in a criminal cause. Mode of procedure, to the present purpose, much the same.

In the above instances, but more particularly the first, the natural modes of procedure may be considered to be preserved rather than restored. Why? Because, in these instances, a strict regard to the ends of justice was so indispensable, that, under the technical system, the country could at no time have been preserved from utter ruin for six weeks.

3. Courts composed of justices of the peace, acting (whether singly or in companies) out of general sessions: the quarterly court of general sessions being courts of technical procedure.

4. Courts of request, more commonly called *courts of conscience:* one for each of the several towns or districts to which, on their respective application, it has been granted, by so many acts of parliament, with a jurisdiction marked out by each respective act.*

5. Courts composed of arbitrators chosen by the parties; with powers derived from a special article of statute law.

In whatsoever other respects the course of procedure observed in these several courts differs, in one of them compared with another (and the difference is not great,) it agrees in being unshackled by those rules with which it is fettered in the technical courts.

We have seen those devices and engines of fraud and injustice, which, having been invented and carried into effect by the technical system, constitute so many characteristics of that system. To none of these natural courts does the application of them extend.

In none of these courts of natural procedure is there anything to prevent them from directing their operations to the ends of justice. In no instance do they stand exposed to the influence of that sinister interest, by which, under the technical system, judges have been, in so deplorable a degree, diverted from the ends of justice to the factitious ends of judicature. In none of them is there any want of those powers which are necessary to enable the judge to pursue, with effect, the ends of justice; or if there be, and if the deficiency were supplied, as it might be and ought to be, the effect of the supply would only be to bestow upon them what is necessary to render them perfect in the character of courts of natural procedure; it would not bring them any nearer to the nature of the courts of technical procedure.

What distinction there is, is confined to evidence. In the courts of conscience and arbitration courts alone, is the practice in regard to evidence free from those exclusions, of which, under the technical system, it is composed; those exclusions, the irrationality of which has been announced, and will be brought to view in detail as we advance.†

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* To this list may be added the small-debt courts in Scotland, which correspond, in a great measure, with the courts of conscience in England, but have this generic difference, that they form a uniform system over the whole country. They are held by justices of peace for sums not exceeding £5, and by sheriffs for sums not exceeding £8: 6: 8. See 6 Geo. IV. c. 48, and 7 Will. IV. and 1 Vict. c. 41.—*Ed.*

† In arbitration courts (courts in which the judges are chosen by the parties,) there is no power either to compel the attendance of unwilling witnesses,[a] or so much as to employ fear of punishment, in the usual or in any other shape, for ensuring the veracity of willing ones: and,

[a] This was so under the 9 & 10 Will. III. c. 15; but now, by the 3 & 4 Will. IV. c. 42, § 40, the attendance of unwilling witnesses may be made compulsory. By this act the arbitrator is empowered to administer an oath to the witnesses.—*Ed.*

On every occasion, they afford the time requisite for making, on both sides, the necessary ground for right decision, and in particular, on both sides, for receiving whatever stock of material evidence the cause happens to supply On no occasion do they consume more than that requisite length of time Much less do they, on any occasion, so work up and improve delay, as to render it a cause of necessary misdecision and injustice, by the deperition of the matter of satisfaction, or of a source of evidence

On no occasion do they add to the unavoidable load of expense any mass of factitious expense, with or without design, either for the profit of the man of law, or the ease of the man of finance.

On no occasion do they add to that mass of vexation which, in the course of a suit at law, in one shape or other, is liable unavoidably to attach itself upon persons of different descriptions, any ulterior and factitious mass, the fruit of the negligence or the sinister policy of the legislator or the judge.

What, in a word, are the characteristics of the technical system of procedure? Exactly so many modifications of abuse. The practice of the courts of technical procedure is throughout infected with, or rather composed of, all of them from all of them the practice of the courts of natural procedure is free

The above observations are mere specifications of detail, to point the attention of the reader—to afford a security for the correctness of the general position in which they are included—and to manifest the impotence of *malâ fide* adversaries By way of recapitulation, let us repeat once more the general positions in which they are comprised The practice of the courts of technical procedure, being directed, under the impulse of sinister interest, to ends opposite to the ends of justice, is, throughout its whole texture, a compound of abuse the practice of the courts of natural procedure, having nothing to turn it aside from the ends of justice, and being uniformly directed to those ends, is pure from all such abuse

The countenance shown to the two systems, is the natural and necessary result of their respective aspects with relation to the interest of the man of law. Of the inexhaustible mass of eulogy with which the practice of the courts of technical procedure is so universally and indefatigably bedaubed, mention has been made already When you can find nothing evil to say of your adversary, say nothing of him: this policy is no secret to the dullest mind Of the courts of natural procedure and their practice, what do we hear said by the lawyers, or by anybody? Exactly nothing everywhere a dead and universal silence What can be more instructive, what more pregnant with confession, than this silence? By lawyers, nothing, for reasons too obvious to need or to bear repeating by non-lawyers, almost as little, because so successful have been the labours of the man of law, that non-lawyers feel the risk, or rather the impossibility, of ever opening their lips on the subject, but in the way of a chorus echoing the eulogies of their learned leaders

Should there be here and there an individual who, moved by the principles of genuine philanthropy and honest love of justice, should be desirous of satisfying himself by a convincing test in what degree the popular creed upon this subject is the result of prejudice nursed by sinister interest, and in what degree (if any) the expression of truth,—a short experiment will be found not unconducive to his purpose Taking any of those institutions, the establishment of which has been among the devices of the technical system, as above exemplified,—let him apply it, in idea, to the practice of any of the courts of natural procedure, and ask himself in what respect any of the ends of justice will be served by it The result may already be anticipated Attached to the courts which gave it birth, the abuse is protected from censure (because protected from scrutiny) by the prejudices, the solemn plausibilities, the ever-thickening cloud of incense, the flowing vestments, the ermine borders, the masses of false hair—just emblems of the falsehood poured out, as from a perennial spring, from the receptacles which it envelopes. Transplant it from that its native soil—transfer it, in idea, to any of the courts of natural procedure (courts of which the practice has nothing to recommend it to the man of law, nor anything to the non-lawyer but its subserviency to the ends of justice,)—it has no such defence to

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as no man can be subject to them without his own consent, it is only when both parties are willing to submit to justice, that their jurisdiction can come into existence A court that cannot act except when both parties are content to do what is right, bears but too near a resemblance to a physician (if such a one there were) who would not prescribe except when the patient was in good health.

In the institution of these courts, the legislature conceived itself no doubt to be providing so many places of refuge, into which honest litigants might make their escape from the harpies of chicane. The man of law knows better things Under his management, it has perhaps operated rather in increase than in diminution of the mass of made business. From those unlearned judges, who want nothing but power to receive the evidence in its best shape, an appeal is open on both sides to those profoundly learned judges, with whom it is an inviolable rule never to receive evidence for their own use in any shape but that which (in the opinion of everybody) wants nothing but the absence of the sort of security that has been made to depend upon the ceremony of an oath, to be the very worst imaginable.

protect it from the eye of scrutiny: all illusions vanish: the abuse presents itself to every eye in its native colours.

Does it happen to you, for example, to be a member of the unlearned class of judges, serving your country in the character of a justice of the peace? Take up in idea (but, remember, in idea only,) take up, in the character of instruments of justice, those devices, which, under the character of instruments of fraud and extortion, have been above enumerated as so many tools manufactured and habitually worked with by the superior and exclusively learned hands of lawyers. Hearing refused to parties. Tribunals put out of reach. Sittings separated by fixed and long-protracted intervals. Mechanical judicature. Pleadings in writing, at successive and distant intervals, spun out under a licence for selling lies. Nullification, destruction of just claims on grounds void of all relation to the merits: jargon without end: fiction without shame. Deck your proceedings with these flowers,— all or any of them,—and observe the consequence.

In the practice of courts military, of all sorts, land and naval, general and regimental, courts martial and courts of inquiry, the natural course of procedure has ever been preserved: and (as already observed) for a very simple reason. At no time, in that line of judicature, could human society and the practice of the technical courts have maintained a contemporary existence: *pugnant, nec in unâ sede morantur.*

So many times as, by act of parliament, jurisdiction has been given to justices of the peace out of general sessions, or the possibility of obtaining justice against unwilling debtors to an amount not exceeding forty shillings has been communicated to creditors by the establishment of a court of requests,—so many times have king, lords, and commons, joined in solemn proclamation to the following effect: The course of dealing pursued by learned judges is incapable of being employed with effect in the execution of our laws,—incapable of serving for the accomplishment of our predictions, for the fulfilment of our engagements,—incompatible, in a word, with the pursuit of the ends of justice.

In regard to natural procedure, and the courts in which it is in use, a supposition tacitly if not expressly assumed by lawyers is, that it is a sort of inferior, make-shift mode of administering justice (or something in lieu of justice,) employed through necessity, for the relief of those who cannot afford to go to the expense of justice according to the regular and proper (meaning the technical) mode: that the justice thus administered is a sort of inferior commodity, provided for the relief and accommodation of those who cannot come up to the price of the best sort; as neck-beef and sticking-pieces are provided by the butcher for those who cannot come up to the price of ribs and sirloins: that between good justice (*i. e.* justice as secure as possible from danger of misdecision,) between good justice on the one hand, and dilatory, expensive, and vexatious justice on the other, there exists a sort of natural and indissoluble connexion, between the best justice (*i. e.* justice secured in the highest degree against misdecision,) and prompt, cheap, and unvexatious justice, as natural and invincible an incompatibility and repugnance: that the more dilatory, the more expensive and more vexatious, your justice is, the more secure against misdecision it will be; that the less dilatory, the less expensive the less vexatious your justice is, the worse it is in that other respect; that, therefore, a sort of option is in every case to be made; and that people have to choose whether they will have their justice good and secure against misdecision, but dilatory expensive, and vexatious,—or to a certain degree prompt, cheap, and unvexatious, but in an equal degree exposed to the danger of misdecision, and in that respect liable to be bad.

As often as a court of natural procedure has been instituted (continues this hypothesis,) this option has been made.

In the case of the court of conscience, a cheap sort of justice has been provided, for poor and low people who cannot afford to have it good.

In the case of the extra-sessional justice-of-peace court, a sort of inferior justice is administered,—partly and in some cases for promptitude (because delays would be prejudicial to the interests of government, as trustee for the public at large:) partly and in other cases for cheapness; as in the case of the courts of conscience, for the accommodation of the poor and low people who cannot afford to go to the expense of the best sort.

Such is the hypothesis of interest and interest-begotten prejudice. What says the simple truth? Answer: Pretty exactly the reverse.

In complicated causes, different accidents are liable to arise, creating an indispensable demand for an extra portion of appropriate labour, of delay (*i. e.* of time, occupied or not occupied in such labour,) and thence of a proportionate extra quantity of vexation and expense.

These cases allowed for, and laid out of the account (and they are extraordinary cases —they compose the small minority of cases,) the repugnance and connexion are nearly the opposite to what, by the hypothesis, they are supposed to be: and, in a word, the degree of security against misdecision is in the inverse, more nearly than in the direct ratio of the quantity of delay, vexation, and expense.

In the regular technical courts, the quantity of delay, expense, and vexation, is greater—in a prodigious degree greater, than in the natural courts. This is a fact too notorious to be disputed, to be contested by any man, even by a lawyer.

But examine the system on the other ground—on that of security against misdecision,—you will find this security not increased, but diminished—diminished in a high degree, and in a variety of ways:—

1. By the exclusion put upon evidence—evidence in a variety of shapes, in all which (as will be seen *) it ought to be admitted,—and in consequence of such exlusions, not merely danger but certainty of misdecision, or (what is equivalent) failure of justice exclusion put upon the evidence of parties, and other indispensable or unexceptionable evidence.

2 By substitution of inferior and less trustworthy, to superior and more trustworthy evidence: inferior evidence admitted, while superior evidence, even from the same source, is excluded.

3. By depertion of evidence the consequence, partly and sometimes of the delay, partly and at other times of the expense and vexation: the party not able, or not willing, to defray the expense of procuring the evidence; including the factitious part manufactured by the system of technical procedure

4. By depertion or latency of the matter of wealth in the character of the matter of satisfaction, the consequence of the delay the property of the defendant (or if in this respect incidentally become debtor, the plaintiff) dissipated, or conveyed out of the reach of justice

5. By nullifications, and (in consequence of the delay resulting from them) depertion of evidence, or of the matter of satisfaction

6. By mechanical judicature, as already explained †

7 By non-production of evidence, or abandonment of just claim or just defence in other ways, through despair or incapacity of bearing the expense

Man, be he where he will, will have his weaknesses A court of natural procedure, any more than a court of technical procedure, will not be exempt from that common lot, by which every seat of power is doomed to become occasionally a fountain of injustice

But, between a court of natural procedure and a court of technical procedure, there is this simple difference. In the court of natural procedure, injustice is matter of accident: in a court of technical procedure, injustice (as we have seen) in every shape is matter of necessity. In one of its shapes, expense (viz such part of the expense to the suitor as becomes matter of profit to the partnership,) it was the end, the very direct and ultimate end, of the institution: in all its other shapes, delay, vexation, and misdecision, it has been, though not the ultimate, an intermediate end, as being a necessary means.

In a court of natural procedure, it is but too possible that occasional injustice should be done In a court of technical procedure, it is not possible to avoid doing continual injustice in the shape of needless expense, vexation, and delay, constantly, and without any exception, in the shape of misdecision, frequently Checks being in both the same, in a court of natural procedure the practice of the worst judge that ever lived would be a blessing, in comparison with that of the best judge that ever lived, in a court of technical procedure

In a word, how should it be otherwise, if that be true which every page of this inquiry has been presenting to view,—viz that natural procedure has invariably had for its objects the ends of justice, technical, as invariably, ends always different from, mostly opposite to, the ends of justice?

I have spoken of *checks* One of the pretences, if not the only pretence, employed by the technicalists in defence of their system, and the *forms* of which it is composed (meaning those which, under the name of devices, have here been stripped of their sheep's clothing, and exposed to view,) is, that these forms are so many checks to arbitrary power in the hands of the judge

But what, I trust, is by this time pretty apparent, is, that of these *forms* there is not one which, either in intention or in effect, has ever operated or can ever operate in that character and that amongst them there are few but what, so far from being checks, were in design, and are in effect (far from being checks to arbitrary power,) subservient to it in the character of *instruments*

Checks —of everything, or almost everything, capable of operating in that character, or needful for that purpose, the indication may be comprised in three words—publicity, appeal, jury Not one of these, surely, which is in the slightest degree incompatible with the natural system of procedure

As far as concerns the organization of the existing courts of natural procedure, they are susceptible of great improvements. but in respect of the mode of procedure, two single features (viz appearance of the parties before the judge, and *vivâ voce* examination of the parties, but especially the former) are enough to render them as much superior to the best of the regular courts, as the military tactics of European are to those of Asiatic powers. They afford no work for lawyers:

* See Book IX. *Exclusion.*
† *Supra*, Chap. XII.

the wonder is not great that they should not be to the taste of lawyers.*

II. Abolition of special pleading.

In every instance in which, by a clause in an act of parliament, a licence has been given to the defendant to plead the general issue, and give the special matter in evidence,—the delay and expense attached to special pleading has, by the literal import of the words, been dispensed with But so notorious in every such instance has the mischief been that would ensue to the defendant, who, having justice on his side, should forbear to avail himself of this indulgence, that no attorney who has any regard to his own character (probably no attorney at all,) ever did venture to forbear giving his client the advantage of it. In practice, then, the dispensation has exactly had (what it was intended to have) the effect of a prohibition: the licence by which men were allowed not to have recourse to special pleading, has had the effect of a prohibition, inhibiting, *pro tanto*, a practice so repugnant to every end of justice.

Almost every act (to use the words of Ruffhead,) "so far as it relates to officers of justice, of customs and duties, &c., and those acting under them, and highway, turnpike, and paving acts," give this authority, impose this virtual prohibition. Vide (continues he) the Statutes themselves.†

These instances amount already to several hundreds, perhaps to thousands.

In the greater part of them, the person to whom the indulgence is thus given is a sort of person to whom some special power has been given for some public purpose: but, though by far the greater number of cases are manifestly comprisable under this designation, others there may be that are not comprised in it.

Be this as it may: so many hundred times

* It is proper to observe here, that the praise bestowed by Mr. Bentham upon the existing courts of natural procedure, is confined, in the strictest sense, to the *procedure* of these courts, and by no means extends to the constitution of the courts themselves. In many of these courts, it is well known that justice is very badly administered. What, however, we may be very certain of, is, that the cause of this bad administration of justice is not the absence of the technical rules; and that it, over and above all other sources of badness, the practice of these courts were afflicted, in addition, with the rules of technical procedure, they would be not only no better, but beyond comparison worse, than they are.

The real and only cause of the badness of the courts of natural procedure (in so far as they are bad,) is that which is the cause of the maladministration of so many other departments of the great field of government—*defect of responsibility* on the part of those persons, to whom the administration of them is entrusted.

Causes of such defect of responsibility:—

1. Defect of publicity. In the case of a justice of peace, administering judicature, alone, or in conjunction with a brother justice, at his own house, or on his bowling-green, or wherever he happens to be, publicity does not exist in any degree. In the case of courts of conscience, there is (I believe) nominal, but there can scarcely be said to be effectual, publicity; since the apparent unimportance of the cause prevents the proceedings in it from being reported in the newspapers, and would prevent it, even if reported, from attracting in general any portion, sufficient to operate as a security, of public attention.

2. Number of judges. In many of the courts of conscience, the tribunal is composed of a considerable number of officers; though any greater number than one, or at most two (one to officiate when the other is sick, or, from any other cause, unavoidably absent,) can serve no purpose but that of dividing, and in that manner virtually destroying responsibility.

3. Defect of appeal. In a great variety of cases, no appeal lies from the decision of individual justices of peace, except to the quarter-sessions, that is to say, from the justices individually to the justices collectively. How fruitless an appeal of this sort must in general be (not to speak of its expense) is evident enough. What little value it has, is mainly owing to the greater effectual publicity attendant on the proceedings of a court of general sessions, which are generally reported in the local papers, and always excite more or less of interest in the neighbourhood.

4. The judges exempt from punishment or even loss of office, in the event of misconduct.

If the party injured by the decision of a justice of peace is able and willing to go to the expense of a motion for a criminal information in the King's Bench, or an indictment at Nisi Prius, or an action against the justice for damages; and if, having done so, he can prove, to the satisfaction of the judges, the existence of what is called *malice*[a] on the part of the magistrate, by whose unjust decision he has been injured: all these things being supposed, he may then have some chance of seeing some punishment inflicted upon his oppressor; though even then probably a very inadequate one; the prevailing doctrine being, that the proceedings of an unpaid magistrate ought to be construed *liberally* and *indulgently*, as otherwise no *gentleman* will consent to take upon himself the office.

But, without the above preliminaries, who ever heard of an English justice of peace who was so much as suspended from the commission, on the ground of any misconduct, however gross? And a country justice must either have very bad luck, or play his cards extremely ill, if, out of every thousand cases of misdecision, there be so much as one or two in which all these conditions meet.—*Editor.*

† Ruffhead's Index to the Statutes; tit. General Issue.

[a] In an action against a justice, according to Mr. Starkie, the plaintiff cannot recover more than twopence damages, nor any costs, unless it be alleged in the declaration that the acts with which the justice is charged were done maliciously, and without any reasonable or probable cause.—[Such are the terms of the act "to render justices of the peace more safe in the execution of their duty," viz. 43 Geo. III. c. 141. —*Ed.*]

as the legislature has given this authority, so many hundred times has it recognised the practice of special pleading to be a nuisance so many times as professional lawyers of the different classes (attorneys in the conduct of the defence, counsel in advising concerning the plan of the defence) have concurred in giving to their clients the benefit of this authority, so many times have they, by such conduct and deportment, subjoined their attestation to the same unquestionable and important truth *

In each particular case, the recognition (it may be said) goes no further than that particular case True because in no one of these cases could it with anything like propriety have gone any further because in no one of these cases did the statute, of which the clause in question made a part, belong to that too scanty class of statutes which have had for their declared object the amendment of the law (meaning that part of the law which concerns the course of procedure)

But, in each such instance, wherefore was it that in that instance the practice of special pleading was thus abolished? For this reason, and no other,—viz that in that instance the practice was seen to be repugnant to the ends of justice Repugnant! but why in these particular instances? Answer Exactly for the same reasons which render it equally so in every other instance that can be assigned.

If there be any difference,—if there be indeed a case such that, though repugnant in so many hundred other cases, it would in that case be subservient,—it rests with that man, if any such man there be, who, being willing, conceives himself able, to point out that case, and to bring to view the difference

In such case, let him mark well the task he will have to perform, viz to show that the points of fact in dispute in the cause will with more advantage upon the whole (regard being had to the several ends of justice, all of them taken together) be ascertained and settled by the chain of successive instruments of which the operation called special pleading is composed (the judge knowing as little of the matter as he cares,) than by the adjustment of the same points by the parties, together with such professional assistants as they may respectively think fit to have, at one and the same meeting, together with such subsequent ones (if any) as may happen to be necessary, in the presence and under the direction of the judge

This is the point here in question. Subterfuges may be grounded on the particular sort of case in contemplation in these statutes, viz the case where, by the allegation called pleading the general issue, the facts on which the merits of the cause depend may be sufficiently brought to view Such are the subterfuges that, but for this notice, would naturally have been started but, this notice being given, they are anticipated, and rendered unfit for use

The converse thing is, that the complete extirpation of this nuisance would not be *improvement* but *restoration* the abuse of language here in question having started up within time of memory,—no institutional book, or book of practice, that does not refer you to a time at which the pleadings were performed *viâ voce*, occupying in many instances fewer minutes than at present they do months. In those days, had it not been for the presence of the professional manufacturers of quibbles (assistants, not, as at present, substitutes,) and perhaps the absence of extraneous witnesses, and the minutes taken of what passed,—the proceedings of the Common Pleas or King's Bench would scarce have been distinguishable (in simplicity at least) from the present mode of proceeding in a court of conscience, or before a justice of the peace †

* Is there so much as a single case in which the necessity of special pleading will be seriously asserted, or any specific use whatever found for it? If there were any sort of case in which a pretence to that effect would be more plausible than in another, it would be the case of that sort of action (ejectment) by means of which the title to an interest in landed property is tried But, from this most important of all claims of property, the nuisance of special pleading has been cleared away. cleared away, and (what upon the first mention of it seems unaccountable enough) not in the way of legislation, but in the way of jurisprudence, by lawyers themselves But whatever they have sacrificed in this shape, they have made themselves ample amends for, by the clouds of fiction and jargon in other shapes, by which they have succeeded in rendering this important division of the field of procedure (naturally as intelligible as important) more completely unintelligible, and pregnant with misconception, uncertainty, and made business, than any other.

† A curious spectacle to any man, and an interesting one to him (if such a man there be) who has the interests of justice sincerely at heart, is to observe the diversity of the contrivances which, in different ages and countries, lawyers have had recourse to, the shifts they have sometimes been put to, to make business. In the time of Henry II,[a] and even so late as that of Edward I or II,[b] science consisted almost exclusively in nursing, for the benefit of a *malâ fide* defendant, lying excuses, by which the parties were prevented, as long as possible, from coming together in the presence of the judge. That consummation at length effected, no traces appear more of any further dispute or difficulty. The novelist takes his leave of hero and heroine, when he has brought them together in the presence of the priest: the institutionalist of those days takes his leave of plaintiff and defendant, when he has once brought them together in the presence of the judge. Ages

[a] See Glanville. [b] See Hingham magna.

III. Abolition of fees.*

In the early periods of political society in general, and of the British constitution in particular, fees, in the character of a retribution for services rendered to the public by individuals, were an indispensable resource. Mischiefs, inevitably attached to that mode of retribution, there were in abundance: but in these early periods none of the conditions requisite to the provision of a succedaneum were as yet in existence; neither the experience and wisdom necessary to indicate the existence of the demand for any such substitute, nor the degree of public opulence necessary for the supply of it.

For a long time past, this necessary degree of opulence has happily not been wanting; and, by the aid of the stock of experience that has so long been accumulating, the intellectual lights necessary to the application of that experience, as to the point in question, to its proper use, appear at length to have pretty generally illuminated the public mind.

In other departments of government, the sinister influence of this mode of retribution has been brought to light by competent authority: in theory the discovery has been made—in practice it has been profited by. Parliament has raised its amending hand, and in these departments retribution by fees has been abolished; retribution by salary has been substituted in its stead.

The precedent (or rather, in this case as in the two foregoing ones, the mass of precedents) is, upon the face of it, conclusive: at any rate to such a degree conclusive, that, if there be any person who, admitting the propriety of the substitution in these instances, is disposed to contest it in the one now before us, it lies upon him to point out the difference.

But it would be a conception very wide of the truth, were it supposed that the reason for the substitution were no stronger in this case than in those—that the malignity of the principle of corruption were no greater in the bosom of a presiding officer of justice, than in the bosom of an officer employed in the receipt, in the expenditure, or in any other branch of the public revenue.

But it is not to those other departments alone that the benefit of the principle of reformation has been extended: the judicial department itself has experienced its purifying influence.

In so populous a neighbourhood as that of the metropolis, the power attached to the office of justice of the peace had been converted, it was thought, into an instrument of trade: the multitude of the fees receivable in the course of a day, in a sort of court in which vacations are unknown, made up for the smallness of them taken singly. In the country at large, so moderate is the rate, so elevated for the most part the situation of the person invested with that office, it is not in the nature of things that the emoluments derivable from it in this shape should, in any point of view, be an object of regard. But in the populous neighbourhood of the metropolis, it had for a long time been to such a degree an object of regard, as to have attracted and placed in that commanding situation persons by whom it was regarded not merely as an object of desire, but as a necessary source of livelihood, serving in this respect in lieu of a profession or trade. Justices of the peace, of whom it was supposed that they had been drawn into the situation by such views, were distinguished from their colleagues in office by the appellation of trading justices.

Such was the policy by which one branch of an act of the last reign, called the general police act,† was produced. Within the district there in question, fees, though still allowed, and ordered to be received, were no longer allowed to be carried to the private account of the magistrates by whose authority they were received: but, lest for want of adequate retribution there should be a want of fit persons disposed to take upon them the duties of an office so laborious, and in which it was ne-

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and ages before this, Roman lawyers, acting in their own original theatre, had given themselves the benefit of a sort of special pleading; in their visit to this island they brought it with them of course. English lawyers, adding to the Roman mass of special pleading moulded to their own purposes, a mass of fiction and jargon of their own growth, have worked up a mass of mendacity and nonsense, such as the whole army of continental lawyers may look upon with envy and despair.

The climate of Scotland being somehow or other less favourable than that of England to the growth of jargon, and in particular of that nonpareil species which is called *fiction*; Scotch lawyers, notwithstanding their importations from the continent, appear (judging from some of their books) to have been sadly at a loss for materials out of which to spin out the thread of litigation: they have made a sort of Penelope's web of it, doing the work over and over again, as long as the patience of suitors could be made to last. See what has been said in Chapter IV. on the subject of sham representations.

* This, as the reader will observe, was written before the recent act, which, in the instance of the twelve judges, commuted fees for salaries. The evil, however, still subsists, in regard to a vast variety of judicial offices.—*Editor.* [This commutation was not finally settled, until the passing of the 2 & 3 Will. IV. c. 116. *Vide supra*, p. 109.—*Ed. of this Edition.*]

† By the 32 Geo. III. c. 53, seven public offices were established in the metropolis: there are now nine police offices, and by the last Police Act, 2 & 3 Vict. c. 71, that number may be increased. The police magistrates are paid by fixed salaries: all fees being accounted for by a receiver appointed by the Act of Parliament.—*Ed.*

cessary that the attendance should be so assiduous, a certain number of tribunals of this kind were set down in so many divisions of this district, a certain number of magistrates attached to each tribunal, and, in lieu of all emolument in the shape of fees, a certain fixed salary provided for each magistrate

To some parts of the plan, objections were made, while it was in dependency for acceptance: but to the part here in question, nothing like an objection ever was or ever could be made. Nobody in this instance made a doubt of the corruptive tendency of the retribution presented in the shape of fees, to no one was it ever matter of doubt, that, in some way or other, for the sake of the money attached to the business, magistrates of the description in question contrived somehow or other to make business: to no one was it ever matter of doubt, but that (howsoever it might be in respect of delay) factitious vexation and expense, to a degree calling loudly for the correcting hand of the legislator, was the result

But, whatsoever may have been the proportion of business made for their own benefit by those unlearned magistrates, it never could have been great enough to approach to a competition with the proportion regularly, and from the beginning of things, manufactured by their learned superiors and superintendents. Compared with the factitious vexation regularly inflicted by the courts of technical procedure — inflicted with the utmost regularity, without danger of punishment, without fear of reproach, with undefined power of punishment of their own creation for their protection against reproach, — punishment denounced or destined to be the severer, the juster and better merited the reproach, — compared with this, the utmost vexation attached to any profit ever made, or capable of being made, by any one of those unlearned magistrates, was a flea-bite

Proportioned — at least with an exactness sufficient to the present purpose — proportioned to the mischief suffered on the one part, has been the emolument received on the other. While the unlearned magistrate has been picking it up by shillings, his learned superior has been sweeping it in by pounds. Between them, to whom are we to look for the real trading justice? On the one part we see the prodigiously greater share of the profit; on the other, the whole of the odium, and the exclusive possession of the name.

The trading justice, so called, made business. Admitted. But (to say no more of profits, and quantities, and proportions) what means, what instruments, did he employ in making it? By what aggravation did he ever *add* to that degree and species of improbity, without which the effect could not have been produced? What did he ever do towards nursing ignorance, towards generating misconception, towards confounding and obliterating in the public mind the very idea of true justice? When did he ever refuse a hearing to both parties, or to either? When did he ever condemn a man unheard? In what instance is his tribunal removed, by his contrivance, out of the reach of those whose fate is attached to their attendance on it? When did he refuse, refuse to all men, so much as a show of justice, for four, for six, for twelve whole months together? In what instance did he ever keep parties for months and years upon the rack, while men in partnership and confederacy with him were loading them with vexation and expense by papers in which a small portion of unnecessary sense was drowned in a sea composed of surplusage, nonsense, and lies? In what instance did he ever, to the dismay and ruin of the suitor, break the faith plighted to him by the legislator by a decision in which no regard was so much as professed to be paid to the merits of the cause? By what jargon did he ever befoul and corrupt the language of common sense and reason? By what lies, under the name of fiction, did he ever defile his own lips, or compel suitors and their agents to defile theirs?

Thus it is, under the imperfect hold which the regard for justice and consistency hath as yet obtained over the human mind. Combined with weakness, improbity becomes an object of contempt, combined with power, the same improbity becomes an object of veneration. Acting on a petty scale, the unsuccessful robber mounts the gallows under his own name, acting on a great scale, the successful robber translates robber into king or emperor, and seats himself on a throne. The man who, without office or power, obtains money by false pretences, is called a swindler, and, under the name and pretence of temporary, consigned to perpetual, banishment (not to speak of slavery) the man who, in office, and with power for his protection, obtains the same money by pretences equally false, is styled a judge, and beholds for his benefit mendacity softened into fiction, and extortion converted into law.

Thus it is, even to this day: but till when shall it continue so to be? To cause it so to be no longer, parliament needs but to tread in its own steps.

Not that, by the mere substitution of salaries to fees, the mischief could now be cured. The rule, *sublatâ causâ tollitur effectus*, may hold in some cases, but this is not of the number of them. The Augean stable was not emptied, nor even in any degree cleansed, either by the fattening or the slaughter of the animals by which it had been filled.

If the system be an *immedicabile vulnus*, in the excision of it lies an indispensable part

of the remedy: for the remedy we need not go far; it stares every man in the face.*

CHAPTER XXIX.

APOLOGY FOR THE ABOVE EXPOSURE.

If the judicial character has been held up in a light considerably different from that in which it has been accustomed to be viewed—if it has been treated with a degree of unprecedented freedom,—it is not the *individual*, it is the *species* that has been struck at: nor yet the species, but in respect of that *situation* in which the conduct of any other part of the human species would have been the same.

The general predominance of personal interest over every other interest—over every other force that can be applied to the human mind—is a principle not only not capable of being done away, but which for the good of mankind there exists no sufficient reason for endeavouring, for wishing, to do away: since it is upon this general predominance that (when the matter is maturely considered) the continuance of the whole species—of every individual belonging to it, will be found to depend Bad as the consequences sometimes are of an over-anxiety on the part of each individual for his own welfare; yet, if the chief object of each man's anxiety were placed without himself—without the sphere of his own knowledge and experience, the consequence would be much worse. In the existing state of things, by this over-anxiety the well-being of society receives more or less disturbance: in the other state of things supposed, the very being of society would be very soon destroyed.

The man of probity and public spirit, the man of general and universal benevolence, is, not he in whose instance a continual sacrifice is made of personal interest, but he in whose instance situation and character have concurred in effecting between his personal interest and the public interest such a connexion, that, in labouring to promote the public interest, he is labouring to promote his own interest at the same time.

If it be of use to man to know man's nature for what it is,—most highly must it be of use to know what man's nature is, in the instance of those men on whose conduct the lot of all others is in so high a degree dependent. And, for the praise of a show of candour utterly incompatible with true wisdom, to forego any part of a species of knowledge at once so necessary, and (it might almost be said) so new, is a species of suavity, than which nothing could be more weak—few things more injurious to the interest of the state and of mankind.

Suppose a proposition had been made for placing in the hands of Bonaparte the conduct of the war carrying on against Bonaparte. The proposition would probably not have been acceded to; but for the refusal to accede to it no possible reason could be given that would not amount to this,—viz. that it would be against his interest to conduct the war in such way as to this country should be attended with most advantage.

But to conduct the war of this country against Bonaparte in the manner most advantageous to the country, would not have been more undeniably contrary to the interest of Bonaparte, than to conduct the business of judicature in the manner most conformable to the interests of the people in respect of the ends of justice, is contrary to the interest of the judges: circumstanced as are at present these arbiters of human destiny.

The pictures which, in this no less than in other countries, interest and interest-begotten prejudice have been so universally accustomed to give of men in high situations, and more particularly of men in the situation of judges, are such in the composition of which not only the extreme of imbecility, but, if not improbity itself, the effects of it in a very high degree, are combined.

Praise bestowed upon misconduct, upon misconduct in any situation or in any shape, is a bounty given for it; operates as an encouragement to persevere in it.

As in no other situation would any instance be to be found, where, with an interest so opposite to that of the public at large, so much power of giving effect to that interest is combined, so neither would there be found any other situation in which praise has been so little merited, and at the same time so lavishly bestowed.

The notion so studiously propagated—the notion that, by holding up in an unwelcome point of view the conduct of men in office, and more particularly in judicial office, their power or their disposition to comport themselves worthily in it is lessened,—this notion, convenient as it is to those who are thus studious to propagate it, is a notion than which nothing can be at once more erroneous and more pernicious. It holds up to view as a cause of disease, the sole remedy against that same disease.

* For want of the requisite limitations and exceptions, the most salutary rules may be carried too far, and misapplied. It is only in so far as it may be in a man's power to multiply fees by multiplying occasions for fees, that the principal reason for the abolition of fees has place. In other respects, it is of use that reward should keep pace as close as possible with service. The closer it keeps pace with service, the more it sweetens service; and alacrity, instead of disgust, is the result. Under a salary, it is a man's interest to be as idle and as negligent as he can venture to be, as he can be, without subjecting himself to punishment.

The notion that men's obedience to the laws, that their disposition to pay such obedience, depends in any considerable degree upon the good opinion, the respect and reverence, entertained by them for the individual by whom those laws are administered, is a mere fallacy Happily for mankind, in this country at any rate, it is bottomed on much firmer ground — on ground which is not exposed to be shaken by vice and improbity in the person of individuals

The disposition to pay obedience to the official mandates of a judge, has for its cause, not any opinion concerning the character of the individual, but the persuasion so thoroughly and so happily rooted in every reflecting breast, of the necessity of such obedience to the preservation of everything that any man holds dear This necessity being the same, under every variation which the character of individuals in that situation ever has undergone, or is susceptible of,—the persuasion is therefore altogether independent of he character of the individuals by whom the situation is at any time filled

If, indeed, by any disadvantageous impression given of the wisdom and probity of these functionaries, any such disposition were produced on the part of the body of the people, as that of rising up in arms against the authority of these functionaries (which, so long as they have the support of the supreme power, could not be done without rising up in arms against the authority of the supreme power,) then, indeed, the obedience of the people might thus be shaken, and insurrection and civil war be the result of the views thus given of the system of judicature

But, though such a result is as easy to conceive as any other, nothing can be more remote from probability or foundation in experience.

From what signs should any such effect be regarded as probable? From the present temper of the people? Deceived by the unanimous certificate and indefatigable eulogiums of all those who are supposed to understand the system—by all those at any rate who have the best means and strongest inducements to engage them to understand it, — the people are in the habit of regarding it as all-perfect, and their disposition towards it, far from being that of discontent and insurrection, is that of blind and indiscriminating admiration and obedience. To the miseries which so large a portion of them are doomed to suffer under it, no false certificates, no sophisms, can render them insensible. But, though incapable of being deceived as to the existence of the effects, they are not the less completely deceived as to the cause Whatever they suffer under the system, they ascribe to the nature of things; whatever they escape from suffering, the escape from is attributed to the system itself, and to its matchless excellence

In Blackstone they see their only guide — their only oracle and from the voice of this oracle, delivering itself under the influence of constant bribery, they hear the faultless excellence of the system proclaimed and trumpeted forth at every page

In history, is there any example of an insurrection, or (since the infancy of the Roman commonwealth) so much as the least disposition to insurrection, produced in the great mass of the people by the contemplation of any defects in the system of procedure?— so flagrantly defective as that system has in general been, so much more than even the system the defects of which are here endeavoured to be exposed to view

The following are the reasons for the condemnatory point of view in which the conduct of the fraternity has here all along been placed

It being their interest to secure the continuance of the whole body of the mischief, in its utmost magnitude, and this interest being universally understood, or rather (more than understood) felt — it is impossible, in the nature of men and things, that they should concur willingly in the giving up of any the smallest part of it, that they should forbear opposing every remedial measure with all their might, that they should give up any the smallest part of it without being forced and compelled to do so, viz by the clamour and pressure of the thinking part of the people, in and out of parliament, or that the people should be brought to apply any such pressure without a clear and thorough view and conviction of the depravity of the system under which they are suffering

Be the course of a man's conduct ever so opposite to that of his duty, ever so pernicious to the public interest, — so long as no disturbance of ease nor loss of reputation to himself is among the effects of his perseverance, his perseverance is among those things of which the public may be sufficiently assured

If, acting in a state of uniform opposition to every end of justice, and to the interest and welfare of the rest of the community, they receive the same tokens of affection and veneration that would be worthily bestowed on them if the line of their conduct were directly opposite—no expectation could be more idle than that of their changing their conduct, and ceasing to oppose the changes that would be necessary to render the course of judicature conducive to the ends of justice. Every observation, therefore, that can contribute to place their system, and their conduct under it, in its true and proper light, to expose it to that odium which is so justly due to it, is a means to an end — a necessary means to one

of the most beneficial ends that human virtue, seconded by human wisdom, can propose to itself.

To bring to light a violation of duty on the part of a set of public men, and at the same time to abstain from every observation the tendency of which is to deprive them of any share of that respect which the public has been in the habit of manifesting towards them, are courses of action absolutely and irreconcilably incompatible. An option must be made; the mischief must be left in its full force, or a line of argument must be entered upon, having for its tendency the eventually divesting them of a correspondent portion of this misplaced and ill-deserved respect.

In doing the mischief which, in the exercise of the power attached to your offices, you are in the habit of doing, and which, by taking a different course, it would be in your power to save yourselves from doing, either you know what you are about, or you do not: if yes, you are deficient in probity — if not, in understanding. This is the dilemma, which he who brings to view pernicious practice in a public man, or set of public men, is continually and unavoidably pressing them with: and this dilemma he must either continue to press them with, or give up his enterprise.

As between want of probity and want of understanding, the higher the degree of intellectual force demanded by, and necessarily exercised in, any situation, public or private, the stronger the assurance that it is not on *that* side of the mental frame that the failure is to be found. Although the profession here in question affords a remarkable proof how easy it is for sinister interest to reconcile to the grossest absurdity, and bring down to the convenient standard, the strongest and most strenuously exercised minds. Be the absurdity ever so gross, — make it a man's interest not to see it, — as often as it presents itself, he will shut his eyes; as often as it is spoken of, he will shut his ears: and in neither of these operations is there much difficulty.

This notion, about the duty of abstaining from everything that can tend to diminish the respect paid to the possessors of high offices, and judicial offices in particular,—observe to what it leads. It leads to this: that not only all present abuses are to continue without remedy, but all future ones are to go on accumulating, and accumulating without end. For where is the species or degree of transgression in which a man will not indulge himself, if, while continuing thus to indulge himself, he stands assured that he will not only be safe against punishment or dismissal, but continue in the enjoyment of as much respect, as if, by the directly opposite course, he had manifested himself in ever so high a degree a benefactor to mankind?

It is a notion invented by malefactors — by such as operate, upon the largest scale, for freeing themselves from that faint check which it is in the nature of public opinion to apply to a mal-practice, in those places in which mal-practice, if it has not that check, has none.

In this country, as often as mention is made of the judicial establishment (meaning the judges,) loud and incessant are the boasts made on the score of purity. Wherein consists this purity? What is the impurity, of which the existence is meant to be denied?

What, in the mean time, in respect of *purity* and *impurity* (or, to use its other appellation, *corruption*,) will be found to be the plain and real truth?

Of corruption in that sort of shape in which, in this country (thanks to the publicity of the judicial procedure,) it is not possible, and in which, were it possible, it would be to such a degree unsafe, that no man in his senses would be guilty of it,—they have not, any of them, ever been known, or so much as suspected, to be guilty. This is the case of common bribery.

Of corruption,— in that shape in which it consists in pronouncing an undue decision, in favour of this or that individual, or to the prejudice of this or that other, — no one of them has ever been convicted; possibly, of late years (for in the Earl of Mansfield's reign it was far otherwise,) no one has ever been suspected. But does it follow that no such injustice has ever been done? On the contrary, not a court in Westminster Hall, not a day of sitting, in which injustice in this shape may not have been abundant.

What is not known of any one of them, is, that, in any one given individual instance, corruption in this, any more than in that other shape, was ever committed. But what is known of every one of them (at least in so far as future conduct can be known from past habits, and discourses, and connexions,) is, that there is not one of them on whose conscience that facility which an English judge possesses of deciding a litigated point one way or other as is most agreeable to him, ever appeared to sit heavy; and that there is not one of them to whom the only possible *remedies* to that perennial fountain of corruption,—viz. the conversion of unwritten into written law, and the substitution of natural to technical procedure,—would not be objects of abhorrence.

The *power* of giving loose to all such partialities, is dear to them as their life's blood: and is credit to be given to them or to their eulogists, when they protest that the idea of making any *use* of that same power never so much as entered into their thoughts? On no account will they endure to part with the *means*: and can any credit be due to their protestations, when they protest that they

abhor the idea of applying those means to their *end*—to the only end in respect of which they can be of any use?

Of corruption in a judge, what and where is the mischief? In what shape can the mischief show itself, if it be not in the production, the known and wilful production, of one or more of the evils correspondent and opposite to the several ends of justice? But, that to a most enormous amount all these evils are actually and constantly produced,—all produced by every one of these servants of the public, and in every individual cause that comes before them without exception,—is matter of notoriety, and has been and will be brought to view over and over again in the course of these pages That, of all persons in the world, the authors of these evils are those to whom it is least possible that the existence of them should be unknown, is surely manifest enough

What is known of them is, that, by all of them more or less (though in much the largest proportion by the highest among them in power and influence,) profit in various shapes is derived from all these evils—profit, the quantum of which keeps pace with the quantity of the evils

Is this corruption, or is it not? If it be not corruption, surely it is something equally bad. If it be corruption, wherein consists their boasted purity? That, in any hazardous and retail way, they are not known to practise corruption, but that, in the safe and wholesale way, they do practise it, and are universally known to practise it

Of corruption in a judge is the mischief (not to speak of guilt,—for, when separate from that of mischief, the question of guilt is here an idle question)—of corruption in a judge is the mischief done away—is it so much as lessened—by the circumstance that in the commission of it he stands secured, not only against punishment, but against shame? Surely, by such a circumstance, the mischief (far from being lessened) cannot but be in an enormous degree increased

In the shape of partiality, favourable and unfavourable, suppose it the wish and intention of a man, in the sort of office in question, to be guilty of corruption every day in his life With the exception of the security afforded by publicity, and the feeble and scanty application of jury trial, nothing more proper or effectual could a man set about doing, than to continue in their present state the rule of action and the system of procedure: the rule of action without words for the expression of it; the system of procedure of that sort which has the refusal to hear or see the parties for its essential and characteristic principle: a state of things in which there is really no law, and in which that which by a cruel abuse of language is called the law, is no better than one immense and everlasting snare, a field covered on its whole surface with spring guns and man-traps, and without so much as a board to warn the passenger of the destruction to which he is doomed

If, under the notion of doing justice, that of fulfilling the *collateral* ends (as herein so often distinguished and described) as well as the *direct* ends, be included, it may be asserted, on the fullest examination and with the strictest truth, that in Westminster Hall, from year's end to year's end, in no one of its four courts, in no one of the causes therein (with or without hearing) determined (for in what is there called judicature, neither seeing the parties nor hearing them is necessary,) no, not in so much as a single one of them, is justice ever done

True it is, that—so far as concerns the *direct* ends of justice,—injustice, however deplorably frequent, and although rendered so by the same means, is not thus invariably constant In that sort of cause in which, quantity being pre-ascertained or agreed on, the question is simply (as in the case of a determinate thing, or things to a determinate value, a horse, a house, or a sum of money)—Shall it belong to plaintiff or to defendant?—in a case of this sort, in which justice would be the frequent result were the mode of trial cross and pile, injustice is not always the result But in the case where *quantity* is the subject and sole subject of the question,—as when, for instance (transgression being out of dispute) the only question is, what shall be the compensation or what the punishment—what the damages or what the fine?—in a case of this complexion, neither in respect of the direct ends of justice is justice ever done

He by whom compensation is received with reference to, and in consideration of a wrong sustained, is thereby (*i. e.* by and after the receipt of such compensation,) if so it be that the compensation be adequate, put in as good a plight as he would have been, had the wrong never been done On one supposition, therefore, and on one only, is justice, full and complete justice, rendered to the plaintiff: and that is, where the compensation, the money awarded to him, the damages, as it is called, is, to a certain amount, *excessive*

But, if in this way justice be rendered to one side, it is only at the expense and by the means of injustice committed to the prejudice of the other side and if it be true that (for example's sake, and thus, as it were, in the character of punishment) it is better that compensation should be excessive than defective, if it be better that the shape in which injustice takes place should be that of excessive charge in the name of compensation, and thus excessive loss to the defendant, than in

the shape of insufficient receipt in the name of compensation, and thereby undue loss on the side of the plaintiff; still, on whatever side and in whatever shape it falls, injustice is injustice.

Due to the plaintiff on the score of compensation, say £10. Money of his, which, after the receipt of what is allowed him at the charge of the defendant under the name of *costs*, would remain unreimbursed to him, say £20. Instead of the £10 damages, accordingly, say £30. The injustice at the charge of the plaintiff would thus be avoided; but injustice to the same amount at the charge of the defendant would at the same time be done.

Under a system so constructed, to take any course that shall not be pregnant with the grossest and most palpable injustice, will frequently (not to say commonly) be physically impossible.

Not a cause in which injustice is not done: injustice from which everybody profits, and for which nobody is to blame: not merely for which nobody is actually punishable, but for which nobody ought in justice to be punished; for which, in that sense, nobody is blameable. Here we have misrule brought to a system: the absolute perfection of misrule.

With how much less expense of thought, if not of ingenuity, might a system of real perfection, the perfection of good judicature, have been framed — a system, the very idea of which in the character of a possible system would be scouted as Utopian, — if a tenth part of the reward that has been reaped from injustice, had been attached to the investigation and development of the dictates of utility and justice!

But my Lord such-an-one, or Mr. Justice such-an-one, such honourable men, men who speak at least so nobly, — on every occasion, if you believe them, perfect slaves to justice, — can you impute to them any such horrible disposition as that of a *constans et perpetua voluntas suum cuique non tribuendi?* * Can you accuse them, on so much as any one occasion since their ascent to that high station, of doing anything that has presented itself to them in the shape of injustice?

Perhaps not: but consider that it is not by them that the system has been brought to what it is: they take it as they find it. Such as it is, it is of course to them the standard of right and wrong. No man ought to be wiser than the laws: no judge ought to be more honest than his predecessor. Whether he ought or no, thus much at least is clear enough, that there is nothing to be got by it.

Consider, that, in the judicial department, as in every other (bating casual irregularities,) the farther back you go in history, the more corrupt and profligate men are found. Consider, for example, that in the time of Henry VI., when judges wanted money, they used to fix upon any man that came uppermost, and, converting him into an outlaw, sell what he had, and put the money into their pockets; that the details of the operation were left of course to their clerks; † that the persons thus ruined, getting of course from the receivers no redress against the thieves, complained to parliament; and that parliament, by way of setting matters to rights, declared and ordered that things of that sort should not be done in future.‡ It was a little before this time that Lord Chancellor Fortescue wrote his puff direct, his treatise *de laudibus legum Angliæ;* since which time there has been a congenial trial of skill between lawyers and auctioneers: the worse the wine, the more need it has of the bush.

Love of justice, with them, is neither more nor less than the love of those established arrangements under which they have been born and bred — under which they have practised as advocates, and sat as judges. In this sense, indeed, their love of justice is strong enough: I suppose they never do anything but what is legal: whatever they do, the fact alone of their doing it, is to my mind conclusive proof of its legality. The Lord Chief Justice of England, would he do anything that were illegal? would he do anything for which, according to law, he were liable to be punished?

Indeed, should a fancy (for argument's sake) take a chief justice, especially if he had a seat in the cabinet, to do anything illegal, I do not very well see how it would be in his

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* See Heineccius on the Institutes, Chap. i. — ["Justitia est constans et perpetua voluntas jus suum cuique tribuendi," is the well known principium of the first title of the Institutes. — *Ed.*]

† The officers of the court used to make false entries of the personal appearance of the defendant, whereon they might ground the process of outlawry. It was for the purpose of putting an end to these false entries, that the 10 Hen. VI. c. 4, was passed. — *Ed.*

‡ At present, things are not exactly in that state. When a debtor, unwilling or unable to pay his debts, is proceeded against in a certain way (by *original*, the phrase is — do not attempt to understand it,) he is converted into an outlaw. The property, instead of being given to his creditors, is given (that is, is said to be given) to the king. A whole host of official men fasten upon it, like crows upon a carcase: the creditors, and after them the debtor, get the bones.[a] As to the official and other learned members of the legal partnership, — instead of getting the whole, as under the arrangement *temp.* Hen. VI., they do but come in *pari passu*. So far there is an improvement. — On the other hand, what they devour, they digest at their ease, under the shade of law. No parliament, to say, such things shall not be in future.

[a] Tidd.

power to compass it. Were the fancy that of going upon the highway, shooting and stripping the first passenger he met, he would stand no better chance, I suppose, than any other highwayman. But as to any mischief done in the exercise of the powers given to him by his office, — how any such mischief should have any illegality in it, — in the conception of that point lies the difficulty that presents itself as insuperable In such case, illegality means nothing, unless it means liability to punishment and as to punishment, — by whom, and at whose instance, and by means of what procedure, would it be to be administered? By removal? — think of precedents. By impeachment? — think of precedents; and of the understanding which seems to have been avowed, and to have become universal, on that subject

If punished, for what, too, should he be punished? For open and wilful violation of the spirit as well as letter of a positive law, on a point in which misconception is impossible? It is every day's practice *

Lawyer — But can you, without compunction, nay without horror, reflect on the disrepute, not to say the odium and contempt, that you have been thus labouring to cast upon so many characters hitherto held sacred, upon so many exalted personages, upon . . . .

* The case of treble costs. — See Chap. XXVI. *Legislature Contemned.*

Non-Lawyer. — Hold! spare yourself if you please, and at any rate spare me, the enumeration. the Red Book has done it already to our hands. So far as it may happen to individuals to find themselves concerned, I am as free to confess, as you will be ready to believe, that this part of the fruits that may be expected from my labours (whatever it may amount to) is not the part that I reflect on with most pleasure

One thing you will allow me that in no sense of the word *gain*, can I have promised to myself the having much to gain from it.

Another thing you will allow me that they are not so low in power, in dignity, in credit, in everything, as to be, on this or any other occasion, in danger of receiving, in the opinion and at the hands of the public at large, anything less or worse than justice.

As to any personal feeling on the part of any such high personages, should anything of that sort be really in question, I will freely own to you the system of arithmetic, which, as long as I remember, I have been in the habit of employing on all political occasions: every individual in the country tells for one, no individual for more than one From so obscure and weak a hand, should any particle of uneasiness find its way into any learned breast, — the assurance of uneasiness far more than equivalent being saved in unlearned breasts by hundreds, will be a sufficient equivalent.

BOOK IX.

ON EXCLUSION OF EVIDENCE.

PART I.

ON THE EXCLUSIONARY SYSTEM IN GENERAL.

CHAPTER I.

EXCLUSION OF EVIDENCE, ITS CONNEXION WITH THE ENDS OF JUSTICE.

THE system of procedure — judicial procedure — the system of adjective law, is a means to an end. That end is, or ought to be, the execution of the commands issued, the fulfilment of the predictions delivered, of the engagements taken, by the system of substantive law: the system composed of all the other branches of the body of law put together.

The law respecting evidence is one branch of that system of adjective law: it therefore ought to be, and everywhere in some degree is, one part of the means directed and applied to the attainment of that end. In proportion to the steadiness and consistency with which it does act in subservience to that end, is its congruity, its propriety, its fitness, the claim it has to be approved of, and preserved unchanged.

With indisputable propriety may the fulfilment of the predictions delivered by the substantive branch of the law be spoken of as an end of justice. And why not rather as *the* end? Answer Because, though the principal, and the only direct end, it is not the only one. Vexation, expense, and delay — burthens pressing on the parties throughout every step of the course pursued for the attainment of that end, — constitute, in their aggregate, the *price* paid for the benefits they derive from the substantive branch of the law. To these certain evils, vexation, expense, and delay (burthens infinitely variable in their amount, but in some amount or other unavoidable,) add the possible vexation — the vexation which, where it does fall, falls on the defendant's side only — the vexation which, in case of ultimate misdecision to the prejudice of that side, is produced by undue obligations imposed upon him: obligations of a penal or non-penal nature, according to the nature of the demand, and of the suit instituted in consequence: — the burthen of punishment imposed on him who has transgressed no law; the burthen of satisfaction imposed on him who has borne no part in any damage that has been produced, or at least in any injury that has been done or supposed to be done the burthen of the obligation correspondent to, and inseparable from, the collation or recognition of some pretended right, which, though claimed by the plaintiff, and conferred on him or confirmed to him by the judge, is really not his due.

The quantity of vexation, expense, and delay, without which the course necessary to the execution of the article of substantive law in question cannot be pursued with effect, — the price thus necessary to be paid for the chance of obtaining the benefit in question, — does it exceed the value of that benefit, or rather of that chance? In such case the price ought not to be paid the law ought rather to remain unexecuted. The vexation and expense, without which the evidence necessary to the establishment of the plaintiff's claim cannot be produced, does it exceed the value of that claim; the plaintiff being unable or refusing to make adequate satisfaction for it? In that case the plaintiff's demand ought to remain unsatisfied in that untoward state of things (in itself, and laying out of the account the work of interested lawyers and misguided legislators, happily not a frequent one,) the best choice left to the legislator, here as elsewhere, is the least of two evils, one or other of which is inevitable. A competition has place between two of the ends of justice: one or other of the contending branches of the public interest must yield one or other of them must for the moment fall a sacrifice.

By laying a barrow-full of rubbish on a spot on which it ought not to have been laid (the side of a turnpike road,) Titius has incurred a penalty of five shillings. No man was witness to the transaction but Sempronius; and, in the station of writer, Sempronius

is gone to make his fortune in the East Indies. Should Sempronius be forced, if he could be forced, to come back from the East Indies for the chance of subjecting Titius to this penalty? Who would think of subjecting Sempronius to the vexation?—who would think of subjecting Sempronius, or anybody else, to the expense?

Here and there a case may present itself, in which it may be matter of doubt on which side the balance lies, but in general there will be no difficulty all doubt will be removed by clear and indisputable principles In each individual instance, to weigh mischief on one side against mischief on the other, where occasion calls for it, will be a task suitable to the station of the judge To provide powers adequate to the taking of it, and acting in conformity to the result, will in every case be an attention suitable to the station of the legislator an attention demanded at his hands by the indisputable dictates of justice

In this instance we see an example of a case in which evidence ought to be excluded in which (all ends taken together) the exclusion is called for by a due regard for the ends of justice. one case,—and it will be found the only one This is, the case of preponderant inconvenience in the shape of vexation, expense, and delay: inconvenience preponderant over the mischief attached to a sacrifice of the direct ends of justice, the mischief produced by ultimate misdecision to the prejudice of the plaintiff's side, or (what is equivalent to such misdecision) the mischief produced by an instance of the non-execution of some article of the substantive branch of the law, or (what is less frequent) by the imposition of some undue obligation on an individual standing on the defendant's side of the cause, produced by the want of some evidence, which, had it been forthcoming, would have demonstrated the obligation to be undue

Wheresoever the case thus described is realized, the exclusion may be pronounced, and, according to the principle of utility ought to be pronounced proper, legitimate congruous, conformable, conducive, to the ends (understand always to the aggregate of the ends) of justice.

In every other case, the exclusion (I announce it not as a postulate, but as a proposition to be proved) may be pronounced, ought to be pronounced, improper, illegitimate. incongruous, unconformable, unconducive, repugnant to the ends of justice.

If the above positions be correct, the doctrine of evidence, in so far as concerns the question as between admission and exclusion, will be comprisable in a very narrow compass in one general rule, with an exception for its limit. The rule will be,—Let in the light of evidence. The exception will be,—Except where the letting in of such light is attended with preponderant collateral inconvenience, in the shape of vexation, expense, and delay.

Let in the light of evidence. The end it leads to, is the direct end of justice, rectitude of decision The consequence of the exclusion of it is ultimate injustice in respect of that end if to the prejudice of the plaintiff's side (by misdecision or otherwise,) failure of justice; if to the prejudice of the defendant's side, misdecision to the prejudice of that side, and consequent undue vexation and ultimate injustice: imposing on him, on the score of punishment or satisfaction, either the loss of some right, or some burthensome and painful obligation, to which it was not the intention of the substantive branch of the law that he should be subjected

Let not in the light of evidence not in every case, more than the light of heaven Even evidence, even justice itself, like gold, may be bought too dear It always is bought too dear, if bought at the expense of a preponderant injustice. Grant even that the dictates of justice were paramount to those of utility in its most comprehensive shape—that the sacrifice of ends to means were an eligible sacrifice—and that the aphorism, *fiat justitia, ruat cœlum*, instead of a rhetorical flourish, were an axiom of moral wisdom,—even thus, supposing the choice to be between injustice and injustice, the preferability of the less injustice to the greater would scarcely be contested

But, in the cases above described, supposing them ever realized, the price paid for justice must, upon the very face of those cases as here described, be acknowledged to be uneconomical and excessive Of the possibility of them being realized, we have seen already several anticipated exemplifications, we shall see them amply exemplified as we advance.

CHAPTER II

DISREGARD SHOWN TO THE ENDS OF JUSTICE UNDER THE EXCLUSIONARY SYSTEM.

Of the ends of justice, under their principal divisions, a view has already been given as likewise a view of the connexion that subsists between them on the one hand, and the arrangements capable of being taken for the exclusion of evidence on the other.

But, if this statement be correct,—under all established systems, the practice (for theory there exists nowhere any) will be found to be a tissue of errors and inconsistencies compared with others, each system infinitely various—compared with itself, each system infinitely inconsistent.

But (it may be said) under all their varieties, these exclusions, thus universal, as you yourself admit, and even proclaim, does not their universality prove the prevalence of one

common principle? This principle, then, has it not the universal voice of all mankind, or at least of the most civilized and intelligent among mankind, to sanction it, and attest the reasonableness of it?

Yes, indeed: it has that sort of sanction; its reasonableness is proved by that medium of proof, by which, till within this century or two, supernatural evidence of various kinds, evidence by duel, by ordeal, was pronounced superior in trustworthiness to all human or other natural evidence.

No, truly: the concord in this case is far from being alike real as in those. In substance, the mode of inquiry was in those instances the same: if between nation and nation there was a difference, it was confined to formalities, to unessential modes; here the arms employed by the combatants were of one sort, there of another sort; here a ring was to be taken out of bubbling, and supposed boiling-hot, water; there a party, supposed to be blindfolded, was to take a walk between two rows of heated, or supposed to be heated, ploughshares. But in the case of the exclusions put upon evidence, the agreement was rather in words than principles. One nation, or rather some one corrupt or lazy lawyer in that nation, called for exclusion on one ground; another lawyer, that is, the lawyer of another nation, called for it on a different ground: by each of these lawyers, the decision pronounced by the other was reprobated. Just as if there appeared in a cause a gang of lying witnesses, all contradicting one another, each giving a different account of the same business: they all agree, it may be said, for they all agree in lying — they are all liars. Look to words only, you may thus make harmony, in all cases, out of the most discordant elements.

In the established systems (for in one respect they will be found not discordant,) in the established systems, if non-exclusion be taken for the general rule, the exceptions must be searched for in very different sources from the only justifiable ones. Yes: in one respect they do agree; and it is this: that in no instance are the exceptions drawn from the source just mentioned. If at every other step the direct ends of justice are contravened, the contravention is gratuitous: at any rate, in no instance has it for its warrant and its cause a regard for any of the other ends of justice, the collateral ends: in no instance have men stopped to inquire whether the inconvenience inseparable from the execution of law, in the shape of vexation, expense, and delay, will or will not be preponderant when compared with the mischief attached to the non-execution or undue execution of that article of substantive law on which the suit has been grounded.

Various as are the exceptions taken in these systems to the rule of admission, they will all of them (unless here and there one should be found dictated by the mere force of blind and unaccountable caprice) be found referable to one or other of two leading terms: *deception* and *vexation*: anxiety, real or pretended, for the avoidance of deception, and consequent misdecision, on the part of the judge; anxiety, real or pretended, for the avoidance of vexation: anxiety to avoid giving birth to inconvenience in that shape.

Of neither of these fears (supposing that the conduct of the man of law has been governed by it,) of neither of these fears can it with propriety be said that it was directed to an improper object. In the first, we see an apprehension pointing to the direct end of justice. in the other, an apprehension pointing to one of the collateral ends of justice.

But, in so far as fear of deception was the actuating principle, we shall find in every case the measures dictated or supposed to be dictated by a regard for that object, altogether unsuitable, or rather directly repugnant, to the avowed purpose. And again, so far as fear of vexation was the actuating principle, we shall find the measures dictated and produced by that principle equally incompetent. The vexation — that vexation which was to afford a sufficient reason for the justification of direct injustice, for the contravention of the direct ends of justice — will be found to be a quantity either evanescent, or purely ideal, or, though real and considerable, balanced and overbalanced by a preponderant advantage inseparably connected with it.

Thus much for the cases which afford room to conceive that reason and utility have in any shape been consulted on the occasion of the exclusions that have been established. But the cases will be but too numerous and various in which the discovery of any the least colour or shadow of reason will be seen to be a problem altogether insolvable by the most penetrating and industrious eye.

In referring to these two heads (deception and vexation) the exclusions put upon evidence by the established systems, — what I mean is, not so much to vindicate the considerations which, in the minds of the authors, were actually productive of those several arrangements (a task in many instances by much too difficult for any human mind,) as, among the legitimate ends of justice, to bring to view that one, to which the arrangement in question, supposing it dictated by the ends of justice, bears the most obvious reference. For supposing the objects in question (deception and vexation) to have been really in view, the arrangements, with whatever sort of success, would at any rate have been directed towards the ends of justice; those of which deception, avoidance of deception, was the object, towards the direct ends of justice; those

of which vexation, avoidance of vexation, was the object, towards that one of the collateral ends. in principle, the arrangement at any rate correct, howsoever in the application misguided and unfelicitous

In regard to the exclusions here ranked under the head of vexation, — incongruous exclusions put upon evidence under the notion of avoiding to produce vexation,—the reality of that object, in the character of a final cause of the arrangement in question, will in many instances appear probable enough, or even indisputable But howsoever the case may be in respect of humanity, small indeed is the wisdom that can reasonably be inferred from the regard thus paid to one of the ends of justice. Here, as elsewhere, so far as evidence is concerned, everything depends upon proportions If the avoiding to produce vexation were the only object necessary to be regarded in legislation, no child in leading-strings would be unequal to the task The result would be, not the putting an exclusion upon evidence in here and there an instance — not the shutting the door against evidence in the instance in which, by the arrangements in question, it was shut, — but the shutting the door against all evidence tendered on the side of the plaintiff, in whatever cause, or, to speak strictly, the abolition of the whole system of procedure, the abolition of all coercive laws

To judge, therefore, whether, in the instance of a lot of evidence excluded on the score of vexation, the exclusion be warranted or unwarranted, — produced by a childish emotion, or by a considerate and manly regard for the ends of justice, — inquiry must be made whether the advantages attached to the act from which the vexation is seen to flow, have or have not been set against it on the opposite scale Referring to the proper place for the details, to assist the conception of the moment let one example suffice A witness being called on the other side, and standing in readiness to be examined, — that to put a question to him, the answer to which, if true, would have the effect of subjecting him to an obligation (a legal obligation, non-penal or penal,) would give birth to vexation in his breast, is not to be doubted But in that vexation, great or little, is any sufficient reason to be found to warrant his being exempted from the obligation of making answer? By no means The evil of the vexation, be it ever so great, is more than counterbalanced by the good flowing from the substantive law (coercive as it is,) by which the obligation is imposed By itself the weight is great but the weight in the other scale greatly overbalances it

To this case of a spurious exception on the score of vexation, apply now the example above given of a legitimate exception on the same score, and observe the difference By depositing to the rubbish, Sempronius, the East-India writer, would have given the public the benefit of the five-shilling penalty, but he would have retarded, to the amount of one knows not how many thousand pounds, the augmentation of his fortune Place now on the carpet (instead of the future nabob, the East-India writer,) a malefactor, who, in consequence of his answers to the questions about the rubbish he is supposed to have seen laid on the road, comes to be convicted of a robbery and murder committed on that same road

In this case, if the quantity of the vexation be the only object which the eye of the legislator is open to, how much greater the vexation than in the other! But, in the East-India writer's case, the benefit of the five-shilling penalty is all that there was to set in the scale against the vexation all the good that the case affords consists in the benefit of the five-shilling penalty whereas, in the malefactor's case, the good is composed of the chance of the benefit of the five-shilling penalty, with whatever benefit depends upon so much of the security afforded by the law against robbery and murder, to add to it

CHAPTER III

GENERAL VIEW OF THE MISCHIEFS OF THE EXCLUSIONARY SYSTEM

Evidence is the basis of justice to exclude evidence, is to exclude justice

On the plaintiff's side, in a suit of a criminal nature,—an excluding rule, as often as it has the effect of shutting the door against an article of true and unfallacious evidence necessary to conviction, operates as a licence for the commission of a crime

In the exclusionary system may therefore be seen a fund of encouragement constantly applied to the production of all imaginable crimes

On the plaintiff's side, in a suit of a non-criminal nature,—an excluding rule, as often as it has the effect of shutting the door against an article of true and unfallacious evidence necessary to the giving effect to a rightful demand, operates as a denial of justice

In the exclusionary system may thus be seen a fund of encouragement constantly applied to the production of injustice in all its shapes, to the prejudice of the plaintiff's side to the destruction of all those private rights which it has been the business of the substantive law to create, and for the efficiency of which it stands pledged

On the defendant's side, in a suit of a criminal nature,—an excluding rule, as often as it has the effect of shutting the door against an article of true and unfallacious evidence necessary to acquittal (evidence sufficient for

conviction having been delivered on the other side,) operates as a licence for inflicting punishment upon the innocent on a false pretence of criminality.

In the exclusionary system may thus be seen a fund of encouragement constantly applied or applicable to the oppression of the innocent, by the infliction of punishment, in all its shapes, on persons in whose instance it is groundless and undue.

On the defendant's side, in a suit of a non-penal nature,—an excluding rule, as often as it has the effect of shutting the door against an article of true and unfallacious evidence, necessary to a decision exempting him from the obligation sought by the plaintiff to be imposed upon him (evidence sufficient for a decision imposing that obligation having been delivered on the other side,) operates as a licence for imposing undue obligation in general, a licence to oppression by all imaginable wrongs other than on the score of punishment.

Examples: Exclusion put upon all persons of this or that particular description, includes a licence to commit, in the presence of any number of persons of that description, all imaginable crimes.*

In a law which requires two witnesses for conviction, is included a licence to commit, in the presence of one single person of any description, all crimes and offences whatsoever.

This licence we shall find constantly granted by Roman law, and occasionally by English: in the former by jurisprudence, in the latter by statutes.

Consult your lawyer, or your law books: note the description of witnesses (and a most multifarious and extensive list of them you will find,) by which, were it not for the exclusionary system, your transgression would be capable of being made apparent, but under which, be your transgression what it may, you are safe.

Such is the invitation, such the encouragement, given by the exclusionary principle to dishonest men of all descriptions; and, *mutatis mutandis*, on either side of the cause.

If either self-conscious injustice, or its chief instruments, mendacity and insincerity, belong to the category of vice,—in the technical system in every country to a certain degree, but in England to a most pre-eminent degree, will be found an ever open school of vice—a source of moral corruption, pouring itself forth in a copious and uninterrupted stream throughout the mass of the people. By example, by reward, by compulsion, by every means possible or imaginable, we shall see (every man does see it that does not shut his eyes against it) this most mischievious of all vices propagated under the shelter of the technical system, propagated by the professed and official guardians of the public morals: and, among the instruments of this disastrous husbandry, are to be found some of the most efficient of the evidence-excluding rules.

From the above description of the nature of the mischief, may be deduced the description of the persons interested in the pushing it up to the highest possible pitch: *malâ fide* suitors on both sides, including malefactors of all sorts, their accomplices and well-wishers: men of law, as being the natural allies of malefactors and other *malâ fide* suitors: under the technical system, judges, and other official as well as professional lawyers: professional lawyers under any system.

Exclusion (as will be seen) is one of the grand engines by the help of which corruption has been enabled to gain its ends: and by which arbitrary power, with the *jus nocendi* it enforces, has been acquired; that faculty, the acquisition of which is so delightful to the human heart, whether, on the particular occasion in question, there be or be not a disposition to employ it.

An engine of power, good but how of arbitrary power? By means of what has been already described under the name of the double-fountain principle. Exclusion of evidence (barring the few exceptions of which account will be taken) is contrary to reason. But, as often as a judge has recourse to reason, he may be pretty sure of having the opinion of non-lawyers on his side. Establish, then, the irrational excluding rule, you have two fountains, from the one or the other of which you draw, as on each occasion is agreeable to you. Would you serve the plaintiff? draw from the fountain of reason: would you serve the defendant? draw from the fountain of the established rule, *stare decisis*. Secure of eulogium either way, the ground of it is at your choice. Adhere to the rule, you have the praise of steadiness, and superior probity: depart from it, you have the praise of liberality, and superior wisdom. Adhere to it,

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* Exclusion put, in a case of rape, upon the testimony of quakers, includes a licence to the whole army to storm every quakers' meeting-house, and violate the persons of all the female part of the congregation, in the presence of fathers, husbands, and brothers.

This licence is among the many of the same kind actually granted (as will be seen) by English lawyers. Defendants, the soldiers, could not be examined against themselves; co-defendants, they could not be examined against one another. Thus the licence is complete. Hire a witness among them, indeed—give him impunity,—your witness is a good witness, the interest ceases, and everything is as it should be: but what happens not unfrequently, none of them will accept your hire; their comrades would cut their throats.—[The defect alluded to with regard to the testimony of quakers in criminal cases, was remedied by 3 & 4 Will. IV. c 49. See Vol. VI. p. 381, Note 6.—*Ed.*]

you have the rigorists for your applauders, depart from it, you have for the same purpose the liberalists

If it be in the nature of the exclusionary rules to save the judge from deception oftener than it leads him into it, all this mischief may be found to be made amends for, and outweighed Whether it be in the nature of such an arrangement to be productive of any such advantage, is a question that will be considered in its place

CHAPTER IV

DICTA OF JUDGES ON THE EXCLUSIONARY SYSTEM

It may be a spectacle not altogether uninteresting to the reader, to see a picture of the exclusionary system, drawn by the hands of titled and official professors especially should it happen to be a matter of interest to him to consider, that, were the entire system of jurisprudential law to be represented in the character of Hercules, this member of it might be considered as his foot *ex pede Herculem* From this one limb, no very inadequate conception may be formed of the beauty and proportion of the whole He to whom it may be a matter of interest or curiosity to contemplate it in that character, need not fear to find himself in any such perplexity as the employer to whom the architect presented a brick as a sample of a house

In the few specimens, which the reader will now be enlightened with, of the wisdom of English sages, he will see at one and the same time how impossible it is to know how anything is, and how certain it is that everything is, as it should be He will see at one view a specimen of the discernment, the security, and the consistency, which shine forth with perpetual and undiminished lustre from those exalted stations and (as in the case of the royal sun of the seventeenth century) he may propound to himself for meditation, or to his neighbour for debate, — of which of this cluster of virtues is the splendour most conspicuous

I Peake (Edit 1801,) 152 Lord Kenyon, C. J. "All questions upon the rules of evidence are of vast importance to all orders and degrees of men, our lives, our liberty, and our property, are all concerned in the support of these rules, which have been *matured by the wisdom of ages*, and are now *revered* from their *antiquity* and the *good sense* in which they are founded. they are *not rules depending on technical refinements*, but upon *good sense*, and *the preservation of them is the first duty of judges.*" 3 Term Rep p. 707.

II. Peake, 159. The same Lord Kenyon, C J. "I premise with mentioning what was said by Lord Mansfield on this subject, that 'the old cases, upon the competency of witnesses [*i. e* upon the question whether they shall be admitted or not admitted,] have gone upon *very subtle grounds*'"

III. Ashhurst, J "There is *so great a contradiction* in decisions respecting the boundaries of evidence, that I rather choose to give my opinion on the particular circumstances of the case, than to lay down any general rule on the subject" 3 Term Rep p 27

IV Buller, J "This case involves in it the question which has been so repeatedly agitated in courts of law, what objections go to the *credit*, and what to the *competency*, of the witness" [what objections have the effect of excluding the witness and what objections have no effect at all,] "than which *no question is more perplexed*" Ib. on the same occasion.

V Grose, J "The distinction between *competency* and *credit* is *by no means accurately settled* in many of the books, the shade between them is so light that the boundaries of either can hardly be perceived [*i e* that it can hardly be known whether the witness is to be admitted or excluded] But in all the books which treat of evidence, there are certain *technical* rules laid down which are *highly beneficial* to the public, and ought not to be departed from" * 2 Term Rep. p. 268, anno 1788

VI Speaking of the question, whether, in a criminal cause, the testimony of a proposed witness, having an interest, which may be

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* *Reader* —Public?—beneficial to the public? technical rules beneficial to the public? Somehow or other, is there not something of an erratum here?

Compiler —No erratum at all In jurisprudence everything is right, when aright interpreted When that which has been said comes to be interpreted (or in his phrase *construed*,) various and numberless are the circumstances to be taken into the account amongst others, the subject-matter, the occasion, and the place.

If, at Surgeons' Hall, occasion happening to make mention of a certain disease, the learned professors were to speak of it as beneficial, highly beneficial to the public, could any doubt be entertained what public was intended?

I beg pardon of these professors, in that seat of real learning, for a comparison, which, if not aright interpreted, would to them be so full of injury. The master plague, which is at once their enemy and their friend, is combated by them with degrees of success, varying of course with the skill of the curator, and the idiosyncracy of the afflicted: but, whatever else may happen to be wanting, zeal, at the least, is never wanting. by them the disease was not created, by them it is not fostered; who among them was ever heard to eulogize it?

Who is the lawyer's neighbour? Answer, — the lawyer. By what man was the duty to his neighbour ever so fully understood, so assiduously practised?

Who are the lawyer's public? The public composed of lawyers.

affected by his testimony, in a future contingent civil cause relative to the same transaction, shall be admitted;—"The cases on this point," says Mr Peake, "are *so contradictory, that it is impossible to attempt to reconcile them.*" Thus far the institutionalist. In such provoking colours does the absurdity of this learning sometimes show itself, that the most wary and devoted votaries of the jurisprudential Themis are sometimes off their guard.

Observe now what follows in the preface (which is always the last part printed) of the same really useful and instructive treatise, in comparison with which the performances of the two titled institutionalists sound like the drivelings of an old woman in her dotage.

VII. Peake, Preface, v. "The chapter on parol testimony also is in a great measure new: for the rules of evidence in this respect have been so much *altered*, and so much light has been thrown on them by decisions, that comparatively little is to be collected from ancient books that is satisfactory on the subject. It was said by Lord Mansfield (1 Blac. 366,) with that force of expression peculiar to great minds, who exercise the right of thinking for themselves before they assent to the authority of others—'We do not sit here to take our rules of evidence from Siderfin or Keble.' Rejecting those cases which were not supported by *principles*, that great judge established a *system* for his successors to follow; and *competence* and *credibility*, so frequently confounded together, are now *accurately defined* and *well understood*."

Accurately defined and *well understood!*—these very objects, in the decisions concerning which, in the declared opinion of one of the noble and learned lord's colleagues, there was "so great a *contradiction*;" and at that same time, in the opinion of another of those his learned colleagues, a degree of *perplexity* than which a greater is not to be found anywhere. Such is the sort of matter endeavoured to be passed upon mankind for *accurate definition* and *good understanding* by men of law! Thus it is, that, as far as they have their wish, every intellectual object that comes within the sphere of their activity is defined and understood.

Understood? to be what? The answer is already given—given, and by the same hand:—to be (what they are) "so contradictory that it is impossible to attempt to reconcile them." The application of the observation has there indeed its limits: but whether any such, or any other, limits to it were necessary, the reader will soon be enabled to judge.

In those seats of learned wisdom, what should a man do, were his longing ever so anxious to escape from praise? "We do not sit here to take our rules of evidence from Siderfin or Keble," says Lord Mansfield. "and here," says the commentator, "we see the force of expression peculiar to great minds, who exercise the right of thinking for themselves." But, my good lord, if not from the decisions of preceding judges, as reported by any man whom chance has raised up to report them, from whom would you take your rules? From your own secret determinations, never communicated, and impossible to be conformed to, because impossible to be known? Think for yourselves, and welcome: thinking for yourselves, you think for us: but at least render it possible for us to know what you think, before you ruin us for not having conformed to it.

CHAPTER V.

SPECIES OF EXCLUSION.

A lot of evidence which one of the parties would wish to see produced, fails of being produced. Whence comes this failure? Is it that it might have been forthcoming, but the law or the judge will not suffer it to be produced? In this case, the exclusion put upon it may be said to be *positive*. Is it that it might have been forthcoming, but the law or the judge withholds any of those *aids*, any of those *powers* (coercive or remunerative, but more especially coercive,) which in the case of this or that other article of evidence are not refused, which are necessary to its being forthcoming, and for want of which it fails of being so? In this case, the exclusion may be said to be negative.

Supposing the exclusion improper, in the former case the injury done is more palpable, but in the other is not less real or extensive.

Positive or negative, at whose instance is the exclusion put upon the evidence? If the person whose evidence is in question be a party in the cause, then come the questions—Is it at his own instance; or at that of a co-party on the same side; or at that of *the* party, or, if several, of *a* party, on the opposite side? If he be an extraneous witness, then come the questions—Is it at the instance of a party on the same side of the cause as that of the party by whom his evidence is or would have been called for; or at the instance of the party, or a party, on the opposite side; or at his own instance; or at that of a third person, a stranger to the cause; or, in each respective case, at the joint instance of two or more such persons? By one person the exclusion may be called for on one ground, by another on another ground: on one ground it may be improper, on another not.

The exclusion put upon the evidence, is it put upon it at all events, or only in certain events? or, what comes to the same thing,

are there any events in which it may be taken off? Hence we see another distinction absolute exclusion, conditional exclusion

By the wonder-working hand of logic, conditions are changed into limitations, limitations into exceptions Improper if absolute, the exclusion may, by the conditions, the limitations, the exceptions, be brought within the pale of propriety, by its tendency to save collateral inconvenience, delay, expense, or vexation.

Of possible conditions, the number is infinite Distinguished from the herd, stand those which respect the existence of other evidence to the same facts

In some instances, the evidence in question is excluded, *unless* some other evidence is produced likewise Exclusion *nisi alia*, or *si non alia (probatio*, understood)

The most common as well as important case, is where the other evidence, thus made requisite, is required to be produced on the same side of the cause Exclusion *nisi alia ex eodem* (*latere*, understood)

Of this case an example is presented by the rule of law which requires two witnesses. Every man is excluded—every man, be he who he may, unless he comes with another in his hand Two propositions are here assumed. All men are liars, and all judges fools Without the second, the first (we shall see) would be insufficient.

Another case is, where the evidence thus made requisite is required to have been produced (or at any rate to be about to be produced) on the opposite or adverse side Exclusion *nisi alia ex opposito*, or *ex adverso*

To this head may be referred the exclusion put upon counter-evidence, in the case where the primary evidence, by which the demand for it would have been produced, fails itself of being produced If the evidence supposed to have been prepared against the character of Testis fails of being produced, any evidence that may have been prepared in support of the character of the same witness, will naturally be excluded And so in the case of *alibi* evidence Failing, on the other side, the evidence which supposed the man there, you have no need to prove him elsewhere

In every case of conditional exclusion, a case of absolute exclusion is included. By the condition, the limitation, the exception, the case is divided into two cases in one, the evidence in question is not excluded, in the other, it is. To the first of the two, the discussion concerning the propriety of the exclusion is confined

Where no condition, limitation, or exception, is spoken of, the exclusion must be understood to be absolute.

In other instances, the evidence is excluded, *if* there be other evidence *not* excluded, *unless* there be other evidence (understand, of this or that particular description) Exclusion *si alia*.

If the case afford other evidence, and that other evidence sufficient, and this sufficient and admitted evidence not attended with a mass of collateral inconvenience, preponderant over that with which the delivery of the excluded evidence would have come accompanied,— the exclusion, it is plain, can do no harm To this head belongs (as we shall see) one of the two classes of cases in which the exclusion put upon evidence is proper and justifiable

The party whose interest, according to his conception, would be served by the evidence, insists upon it. The collateral inconvenience with which it would be attended, is not noticed by him, or not regarded by him, or is perhaps the very and only cause, the final cause, of the demand he makes of it But by the judge it will be regarded, and regarded with other eyes

To this head will be found referable, kinds of evidence in great masses, against which, with more or less reason, the door is, or has been proposed to be, shut —1 Inferior makeshift evidence excluded, or proposed to be excluded, in consideration of ordinary regular evidence from the same source, 2 Ordinary excluded, in expectation of super-ordinary, more satisfactory and persuasive, evidence, from the same or other sources, 3. Where the demand for it is created by some other lot of evidence on the same side or on the opposite side of the cause,—any sort of evidence excluded, viz in the case where the evidence by which (had it been produced) the demand would have been created, fails of being produced

So far as the supposition of better evidence is verified, the inferior would produce the bad effects of irrelevant evidence so far as the supposition fails of being verified, certain misdecision, as certain as in cases of deception by bad and false evidence, is the result

PART II.

VIEW OF THE CASES IN WHICH EXCLUSION OF EVIDENCE IS PROPER.

CHAPTER I.

GENERAL VIEW OF THE CASES IN WHICH EXCLUSION IS PROPER.

Of the production of evidence, pecuniary expense is an ordinary vexation,—in some shape or other, in some degree or other, an inseparable, consequence. To warrant the production of any lot of evidence, the necessity of it to some one of the other purposes of justice (ultimate decision, when due, on the plaintiff's side, ultimate decision, when due, on the defendant's side) is an indispensable condition. A lot of evidence is proposed to be produced. The advantage proposed from the production,—is it imaginary?—is it outweighed by the inconvenience? In either case, exclusion is the result.

The cases, then, in which exclusion may be proper, may be distributed under two grand heads.—

I. To the first head may be referred, those in which no mischief at all can result from the exclusion.

If this be the case, it must be either—1. because the suit itself is of such a nature that no good can come from it; or, 2. because, though the part taken by the party by whom the evidence is called for be necessary to justice, the evidence in question is not necessary to his making it good. The plaintiff being in the right, the evidence is not necessary to the establishment of his demand; or, the defendant being in the right, the evidence in question is not necessary to his defence—to the saving him from that burden which the demand seeks to throw upon him.

To the first of the two divisions belong all those cases in which obtainment of the information sought for, is sought for, not in the character of a means, but in the character of an end: where, instead of calling for the evidence for the purpose of the suit, the suit itself is instituted for no other purpose than that of coming at the evidence: coming at the information wanted, by demanding it and employing the hand of the judge to extract it by force of law, in the character of evidence. The suit in this case is what has been called a feigned suit, or might better be called a sham or fraudulent suit; for the suit itself is real, though the object of it be disguised.

On this occasion, however, if the exclusion be to be justified, it must be understood that the party (say the plaintiff) has no right, on any score, to the information called for by him on the score of evidence: which is as much as to say, that he could not have obtained it by a suit professedly directed to that end. For if, having a right to it, he obtains it like a corollary in mathematics, in the form of evidence called for on the occasion of another suit, so much the better: the business of two suits is done in one: two birds are killed with one stone. If, in prosecuting for one crime or one wrong, you get evidence that enables you to punish, or compel satisfaction as for another, so much the better: out of two lots of vexation, expense, and delay, one is saved.

Thus to the man of reason not so to the man of law. To him it will be downright cheating—cheating him out of that part of the expense which becomes profit in his hands. If, of the evidence which the case affords, there be any material part behind, there wants no other ground for postponing the decision, though the suit be a single one. But if, of the mass of evidence sufficient for warranting a dozen decisions, in allowance or disallowance of so many different demands, the whole be brought forth on the occasion of one demand,—the controversy is as ripe for the dozen decisions in this case, as for the single decision in the other. But this sort of arithmetic does not accord with the books of the man of law. The ends of justice only are served by it the ends of judicature are sacrificed by it.

To the other division belong all those cases in which, howsoever it happens, the information tendered or called for in the character of evidence, is not necessary to justice: it is irrelevant, or, though relevant, useless, because there is enough without it, whether from a different source, or of a better kind from the same source; or whether there be enough without it or no, it is still useless, because sure to be refuted or outweighed by other evidence.*

In all these cases, as in the former, if the evidence in question were produced, the vexation, expense, and delay, attendant on the production of it, would be so much pure mischief, unpaid for by any advantage. There is

* As in the case of an incorrect transcript tendered on one side, the original being to be produced on the other.

more or less to put in one scale, there is nothing to put in the other

II. Thus much for the first principal head To the other, belong all the cases in which there is more or less to put in each of the two scales in the one, the mischief from the exclusion of the evidence (a mischief, in the composition of which, misdecision, or the danger of it, will in general be either the chief or the sole ingredient) in the other, the mischief from the admission of the evidence, a mischief which resolves itself into vexation, expense, and delay, jointly or separately, as already so often mentioned

In all these cases, we may see work, more or less, for the judge for the legislator, none at least if, in the drawing of his first lines, he has wrought with a skilful hand In every instance there is a question of fact to be tried; in no instance need there be, ought there to be, any question of law Understand, any *new* question of law, created by the arrangements here proposed to be made, relative to exclusion and admission for the question, whether a man has a right to the information on any other score than that of evidence (evidence in relation to a different suit,) is indeed professedly a question of law, but a question supposed to have been already settled, on its proper grounds

I First grand and proper head of objection to the admission of the proposed evidence The information is not really wanted as evidence, and is such as the party has no right to on any other score Or, though called for under the notion of its serving as evidence, it is not capable of being of any use

Questions for the consideration of the judge —

1. Has the party a right to call for the information in question, by a suit on purpose, having that object and no other? A question of law, but supposed to be already settled

2 The evidence proposed for delivery, is it necessary to justice? Is it relevant? Is either party in want of it? To either party is it capable of being of use? Questions which are, all of them, questions of fact questions upon which no light can be thrown by reference to rules of law, deduced or deducible from anything that has been done in any preceding cause.

If the answer to these several questions be in the negative, there is no account to be taken of vexation, expense, and delay To some amount, inconvenience in all these shapes cannot but be attendant on the production of the evidence but, as to the quantum, it is needless to inquire, since, for the purpose of the exclusion, there is sure to be enough; there is nothing to set against it

II. Second and last grand and proper head of objection to the admission of the proposed evidence. The delivery of it is attended with collateral inconvenience, in the shape of vexation, expense, and delay, to an amount greater than the advantage derivable from the admission of it, that is, than the mischief, in the shape of danger of misdecision, attendant on the exclusion of it

Questions for the consideration of the judge —

1 Amount of the mischief of misdecision (or, what comes to the same thing, failure of justice for want of decision) This depends upon the nature and importance of the cause: its nature, whether criminal or non-criminal; its importance, — if criminal, measured, on the side of the public, by the magnitude of the mischief — on the side of the defendant, by the magnitude of the punishment if non-criminal, measured on both sides by the value of the benefit and burthen at stake, taking into account the circumstances influencing sensibility on both sides * This will be at any rate a question of fact, including or not including questions of law, according as the legislator has done or left undone, done well or ill, the duty of giving a complete catalogue and set of definitions of the several crimes, with their respective punishments, of the several sorts of rights, with the several modes of satisfaction attached to infringement in each case But, be there ever so much of law, it will be a sort of law the demand for which is to be set down to other accounts, and not to this

2 Amount of the danger of misdecision; *i. e* of the probability of misdecision, considered as liable to result from the exclusion proposed to be put upon the evidence this will at any rate be a pure question of fact

Under each of these several heads, five propositions have presented themselves as true —

1 That, on each of the grounds indicated by these heads, cases may arise in which, whatever mischief may result from exclusion, a greater mischief may arise from non-exclusion a mischief, viz. in the shape of the vexation, expense, and delay, to which, separately or in conjunction, it may happen to be inseparable from the admission of the evidence

2 That, between the cases in which the quantities on the one side are the greater, and the cases in which the quantities on the other side are the greater, the separation is not in general (if indeed in any instance) so clear, as to be capable of serving with advantage as a foundation for any general rules

3 That therefore it is in all these cases incumbent on the legislative authority to leave, or rather to place, in the hands of the judicial, such a latitude of discretionary power, as shall enable it to form the estimate on both

* Dumont's Traités de Législation "Introduction to Morals and Legislation." (See Vol. I. p 21.)

sides, and thence to draw the balance in each individual instance, on the occasion of each individual suit.

4. That, inasmuch as on these grounds general rules cannot to any good purpose be laid down in the way of statute law, by the legislature itself — by the only authority avowedly and directly competent, at any given point of time, and of its own motion, and by its own authority, to lay down general rules, — much less can any such rules be laid down, to any good purpose, in the way of jurisprudential law, by a man exercising, under the mask of the judge, the authority of the legislator; professing obedience, when he is exercising power; pretending to find ready-made — made already by an imaginary being, the law, the very law which he himself is making at the time.

5. That, to obviate this propensity to do by bad means that which on this occasion ought not to be done by any even the best means, the legislator ought not to content himself, on this occasion, either with simply abstaining from tying up the hands of the judge, or even with committing to his hands the requisite latitude of discretion in express terms; but that it will be further necessary expressly to declare, that in no instance shall the judge, on forming his decision for the admission or exclusion of the evidence in that individual cause, make or admit of any reference to what may have been done by any other judge, or even by himself, in any preceding cause: any more than a jury does, in giving damages for a trespass against person or goods: for that, in these cases, the path of precedent is the path of constant error.

Of the absence of the discretionary power here contended for, what is the consequence? That the chances against right decision will be all along as infinity to one; in a word, that the decision pronounced will be almost always wrong and mischievous. The ground of decision in each case will be, not the circumstances of that individual case, not the proportions between the quantities in that case, but the circumstances of, the proportions between, the quantities in some other case: some other case, in which they have but one chance against an infinity of chances for not being different from what they are in the case in hand.

In a word, in a case of this description, the looking to precedent for a rule would be exactly as incongruous and mischievous as if, on an account between A and B, the balance were to be deduced, not from a comparison of the sum of the items on one side with the sum of the items on the other, but by copying the balance of a former account, in which the items, as well as the persons, were all different: an account between C and D.

In other words, and those more familiar to English ears, the question as between admission of the evidence on one hand, and exclusion on the ground of vexation, expense, and delay (jointly or separately,) on the other, ought in every instance to be treated as a question of fact, in no instance as a question of law: and accordingly it should be the special care of the legislator, by apt prohibitory words, to make sure, as far as it depends upon him, that no question of law shall ever be made of it.

CHAPTER II.

EXCLUSION ON THE GROUND OF VEXATION, IN WHAT CASES PROPER.

§ 1. *Modifications of which vexation, considered as a ground for excluding evidence, is susceptible.*

THE idea of vexation, judicial vexation, is a most extensive one: punishment itself — punishment in all its modifications — is but a modification of it.

Vexation is evil, any evil, produced by the hand of law: if with a *direct* intention (ultimate or not ultimate) the evil comes under the name of punishment: if not with a direct intention, whether with or without an *indirect* intention (which is as much as to say, with or without a prospect of this result, in the character of a consequence of the act of power exercised,) it then comes under the notion, not of punishment, but of vexation.

From the acts done, with or without necessity, in a course of judicial procedure; and in particular from the acts done for the purpose of the obtainment and delivery of evidence, — vexation (it will be seen) is liable to be produced in the breasts of persons of various descriptions, implicated habitually or occasionally in the juridical transactions: — 1. Parties; 2. Witnesses; 3. Third persons; 4. The public at large; 5 Professional lawyers, in the character of assistants to the parties; 6. Judges, and the official lawyers under them.

As to the vexation considered as liable to fall upon the parties in the mere character of parties, it belongs not to the present purpose. But a party, whether at his own instance, or at that of an adversary or a co-party, is liable to be received in the character of a witness: received to give information relative to the matters of fact in question, just as it might happen to an extraneous witness to do. It is in this quality, and this alone, that any vexation to which it may happen to him to stand exposed, is to the purpose here.

I. Of vexation by reason of *attendance*, the evil will not, in a direct way, naturally fall on any other person than the proposed witness.

In the character of a ground of exclusion, it therefore has no place, if, notwithstanding

the vexation, the proposed witness, by his own consent freely and fairly obtained, delivers, or is ready to deliver, such his testimony.

No more has it, in the opinion of the judge, if a compensation, such as in the opinion of the judge is an adequate one, be tendered to him: and in this case there is nothing which should render the compensation incapable of being rightly estimated, more than in a multitude of other cases in which such estimation is performed in every day's practice

In a remote way, it may however happen that the evil of vexation by reason of attendance shall fall on persons other than the proposed witness

One example is, when, in consequence of the evidence of the proposed witness, it becomes necessary to the party against whom such evidence makes, to oppose it by counter-evidence, such as otherwise would not have been produced In this case, to any vexation pressing on the proposed witness, must be added the vexation attached to the delivery of such counter-evidence which vexation (it being supposed to be of that sort which attaches on attendance) will, if uncompensated, rest on the shoulders of the counter-witness, if compensated (viz at the expense of the counter-party,) upon those of the counter-party at whose expense it is compensated

Another possible example is this — Over and above any vexation pressing upon the proposed attendant witness himself by reason of his attendance, some vexation (some positive loss, for example, or loss of an opportunity of gain) may befall some third person, by reason of some connexion which his interest has with the attendance of the proposed witness at another place An inconvenience of this sort will, to the extent of it, form as substantial an objection to the delivery of the evidence, as if the proposed witness were himself the individual suffering under it But, in this case, the difficulty of proof, where the mischief exists, will naturally be more considerable, as likewise the danger of deception by fallacious evidence, where the evil has no real existence.

In a mass of vexation produced by reason of attendance, four branches will in almost every instance be distinguishable four branches, producible respectively by the four following causes: —

1. Journey *out*, to the seat of judicature, viz. from the spot or spots at which, had it not been for the obligation of the attendance, the witness would, during the length of time consumed by the attendance, have been stationed. Of this branch of the vexation, the weight is of course variable *ad infinitum*, — having no other limits than those of the globe of the earth itself. Where the distance is considerable, this branch of the vexation will naturally be accompanied with the obligation of pecuniary disbursement: of which elsewhere, under the separate head of *expense*.

2. Attendance in court (*i. e.* in the presence of the judge by whom the evidence is received) during, or for the purpose of, the delivery of the evidence If, the witness being sick in bed, the judge, for the purpose of receiving his testimony, visits him at his bed-side, his chamber becomes thereby, to this purpose, a court of justice.

3 Demurrage Attendance in the neighbourhood of the court, for a length of time frequently uncertain — hours, days, or even weeks — that he may be in readiness to pay his attendance in court, when the time comes for the delivery of his evidence

4 Journey *home*, or from the seat of judicature, viz to the spot which, had it not been for the fulfilling of the obligation thus imposed on him, he would at that time have occupied

II Vexation by reason of *disclosure*, may fall to the charge of any person or persons to whom it may happen to sustain inconvenience in any shape from the disclosure of any matter of fact capable of being disclosed by delivery of evidence, which is as much as to say, any sort of fact whatsoever

These persons may be — 1 The proposed witness himself, or persons specially connected with him, whether in the way of self-regarding interest, or of sympathy, 2 Other individuals at large, 3 The public at large. including the members of the governing body, considered in respect of such their public capacity

For the different shapes in which vexation, in the case of an individual (the proposed witness, or any other,) may assume, look to the shapes in which injury may display itself, corresponding to the possessions in respect to which injury may befall him, viz person, property, reputation, condition in life *

Facts, from the disclosure of which it may happen to the public at large, or to government, in respect of the public interest, to receive harm, may be comprised under the general denomination of *state secrets* †

For the respects in which it may happen to the public at large to experience vexation from this source, consult the catalogue of public offences ‡

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* Dumont's "Traités de Legislation," — "*Introduction to Morals and Legislation*," (Vol I p 99.)

† If a witness is asked a question, the answer to which would disclose anything which might prove detrimental to the public service, the judge will interpose to prevent the answer from being given — *Ed.*

‡ Dumont, *ut supra* — "Introduction," &c. (Vol I pp 101, 141.)

In respect of that branch of the vexation by reason of attendance which consists of attendance *in court*, the witness has as many co-sufferers as there are persons of other descriptions on whom the same duty is imposed: the aggregate mass increases, consequently, with the number of these persons.

Among these persons must be distinguished — 1. The professional assistants so attending for the several parties; 2. The judge or judges so attending, with his or their official subordinates.

§ 2. *Vexation to the witness, or to persons at large, in so far as affected by his testimony, how far a proper ground of exclusion.*

Where the vexation, in all shapes taken together, that would result from the delivery of the evidence in question, constitutes a greater evil than the evil that would result for want of the evidence, the evidence in question ought not to be delivered. In the opposite case, it ought to be delivered, and if not about to be delivered without compulsion, compelled.

To determine the preponderance, as between the evil (the vexation) by delivery of the evidence, and the evil (injustice or danger of injustice) for want of the evidence, belongs of course to the legislator: in so far as, in the situation in which he acts, it lies within his power to make such an estimate as shall prove a just one in all individual cases. *Optimus legislator qui minimum judici reliquit.*

In so far as it lies not within the power of the legislator to form any such estimate, he ought to invest the judge with the power of forming an estimate for that purpose in each individual case.

So little can be done in this way with propriety by general rules, that the first and fundamental rule should be that which gives the requisite latitude of power to the judge: in relation to which, the limitations, if any, which it may be thought proper to apply to that power (*i. e.* where the legislator thinks fit to take the determination upon himself,) will come in afterwards as exceptions.

If the suit itself is instituted for no other purpose than that of procuring the disclosure (the disclosure not being intended to be made use of as evidence in any other suit,) there is not, in fact, any demand for the disclosure in the character of evidence. There is no real suit, at least no justly-grounded suit, for the purpose of which the disclosure is called for, to any such intent as that of its serving in the way of evidence. The suit is a feigned suit; an attempt to impose unlawful compulsion upon the witness, making the judge the instrument of it — making him lend his power in this way to a purpose to which it was not intended, either by himself or by the legislator, that it should be made subservient. In this case, the vexation, whatever it be, has no benefit to weigh against it in the scale — no such benefit, as the power of the law, applied in the way of judicial procedure, was intended to produce.

Let the compulsory process which the judge has the power of applying to a proposed witness for the extraction of his testimony, be the sort of torture applied to produce the pretence of unanimity in an English petty jury; viz. keeping him in a state of imprisonment, without meat or drink, and so forth. Let the fact, the disclosure of which is thus endeavoured to be obtained, be a secret in trade: understood or not understood in that character by the proposed witness; possessed by some other person, a manufacturer, and constituting his only source, and that an ample source, of livelihood. Were the disclosure compelled, and compelled by this means, here would be two persons, with a distinct injury inflicted upon each: on the manufacturer, wrongful interception of pecuniary gain, equivalent to wrongful imposition of pecuniary loss; on the witness, unlawful compulsion, by fear of corporally afflictive imprisonment. Just as if the plaintiff had got the witness into a room, and there kept him locked up without food and so forth, till he discovered what was wanted.

Such would be the consequence, if in lending his sanction to contracts (thereby adopting them, and converting them into so many particular laws,) the legislator were to include *wagers*; omitting to make an exception in respect of wagers having for their object the giving effect and impunity to the sort of injury just above described.

Two leading cautions present themselves as proper to be submitted to the legislator: the first tending to enlarge the sphere of exclusion on this ground — the other to contract it.

I. Fancy not, that, by the regard due to justice, you are bound to lay down any such unlimited rule, as that, on every occasion, every man has a right to the testimony of every other man, without regard to consequences. *Fiat justitia, ruat cœlum*, might lead you to this, if, as they are but too apt to be, the flourishes of orators were to be taken for inviolable rules.

Observe one consequence: all secrets then are at an end. From all those weaknesses, the mischief of which results rather from divulgation than from commission, malignity or idle curiosity tears the veil: the absolutely immaculate, if such there be in the world, excepted, all reputation is at an end. All that ill-humour, which, had it not been dragged forth into the light and air, would, like embers under ashes, have died away in the bosom in which it was kindled — died away without further consequences, — all this ma-

gazine of malignant combustibles, being dragged forth into the light, blazes out and kindles into quarrels.

From this source of unfathomable mischief, states are no more secure than individuals All cabinets, all war-offices, are laid open the most vulnerable part of each weaker state laid open to each stronger state which, whether in a state of actual or only premeditated hostility, lies in wait to take advantage of it

Mischief enough without doubt but by what means producible? Oh, for the means, nothing can be more simple They have been invented, they have been practised nor yet altogether without success Lay a wager Would you know the sex of this or that person?* Would you know the use or the uses that he or she has made of it?† Would you know to what happy exertion of invention your too successful rival owes his present opulence?‡ Would you, for the benefit of your liberal employer on the other side of the frontier line, know in what part of it the magazines of your own state are empty, in what other quarter such as are full may be fired to most advantage?‖ Here are your means. You and an associate of yours lay a wager. one, that the matter in question lies or lay in one way, the other, that it lies or lay in the opposite way To determine this wager, you call in as witnesses all persons whose situation and connexion have placed them in a way to know In a word, you take in reality that sort of course which in England the lord high chancellor forces you and your adversary to say you had taken (though it is no such thing) on pain of seeing justice denied to that one of you to whom it is due

II The opposite caution will not require many more words.

On the score of vexation, do not set down on the side of mischief (unless on the side of advantage you set down a sum much greater,) the certain or contingent result from any disclosure by which it may happen to the witness, or anybody else, to be subjected (whether in the way of satisfaction or even of punishment) to any legal obligation or (what is the same thing in other words) by which the law may come to receive its execution: by which the predictions and engagements taken by the substantive branch of the law, may come to be fulfilled

Be the amount what it may, all such vexation is overbalanced An assumption to that effect must in every case be made If the vexation be not overbalanced, the fault lies in the substantive branch of the law, in that part of the law by which the obligation is imposed it is to that branch of the law, and that alone, that the remedy should be applied The prediction made by the substantive branch of the law should be recalled, not disfulfilled, the engagement taken by it dissolved, not violated

To establish as a sufficient reason for the exclusion of the evidence, any vexation liable to result from it in this shape, is exactly as unreasonable as in an account current it would be to set down on either side a debt already paid and overpaid

The tendency of the evidence, is it to cause some other debt to be paid, which otherwise might not have been paid, or of which payment might not otherwise be obtained so cheaply or so speedily? So much the better. Is it to cause some other offence to be punished, which otherwise might never have been punished, or not so cheaply or so soon? So much the better In both cases, justice is done in two causes, at the expense of one

Upon the whole, then, let it be understood that, whenever the vexation that might be produced by the delivery or receipt of the evidence in question is stated as affording an adequate reason for the exclusion of it (*i. e.* as outweighing the mischief that would result from the exclusion of it,— viz the misdecision,) the vexation must be understood to be pure, and not having any such counterbalance to it as above-mentioned.

Yet it is in the case where it is thus overbalanced, that English lawyers make it a matter of pride and glory to carry it to account. On the other hand, where it has nothing at all to balance it, how often shall we not see it left out of the account altogether, as if no such mischief were produced.

Take for a feigned case, one that till the other day was in part a true one. A catholic priest, saying mass — that is, discharging the indisputable duties of his office — in England,

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* Vexation in respect of condition in life

The history of the illustrious and most extraordinary lady who for the greater part of her life appeared in a male character, and was known by the name of the Chevalier d'Eon, affords a real example to this purpose In the city of London, different sets of persons laid wagers on the subject of her sex: one of these wagers came to a trial in the Court of King's Bench, and on the occasion of that trial the lady herself was summoned to give her evidence. In this scandalous attempt, the vice of gaming was added to the private offence attempted, and, by the very attempt, committed in some sort, by this indecent and barbarous impertinence Had she appeared, the injury would have been a modification of the offence termed in the English law false imprisonment. Whether she appeared or no, it would, in a comprehensive system of penal law, embracing the whole catalogue of injurious acts, have come at any rate under the denomination of a *simple personal injury*.—See Dumont *ut supra*—"*Introduction to Morals and Legislation*," (Vol. I. pp. 99, 139.)

† Vexation in respect of reputation.

‡ Vexation in respect of property.

‖ Vexation to government, and the public at large: vexation having the effect of treason, to the destruction of the state

is liable to be hanged.* Delivering his testimony on a dispute about an affair of a few shillings, in which he has no concern, questions are put to him, the answers to which, if true, will, with a force sufficient for conviction, prove him to have committed the act thus converted into a crime. The vexation that would thus befall him, does it constitute a sufficient reason for stopping the mouth either of the witness or his examiner? By no means. The law which attaches this penalty to the performance of that religious duty, so long as it continues on the statute-book, must, to this as well as every other purpose, be taken for a good law; and fit and proper to be executed, as well upon the ground of this as of any other evidence. The law shall be as bad a one as it pleases the reader to suppose it. But in whose mouth does it lie to call it so, and to seek to defeat it in this way? In the mouth of the legislator? But in his hands is the power of doing away the mischief of the law, not only in this chance and solitary instance, but in all instances, and for ever. How inconsistent and absurd, to do away the mischief in retail, and, in the very self-same shape, leave it to remain in gross! In the mouth of the legislator? He contradicts himself. In the mouth of the judge? He contradicts the legislator, usurps his power, puts himself into his place.

Suppose that — instead of applying the remedy to the really peccant part, the substantive branch of the law — the legislator were to be inconsistent enough to determine upon applying it, and in the way here in question, to the adjective branch, — applying it in the shape of an evidence-excluding rule. What shall be the extent of the rule? Particular, or general? Shall it be particular, and stand thus: — A catholic priest, if called in as a witness in a cause in which he is not a party, shall not be compelled to make answer to any questions, the answers to which, if true, would prove him to be such? By the supposition, this persecution ought to be abolished: what does the rule towards the abolition of it?

Shall the exclusion, though made to no other end than that of serving as a remedy against the particular sort of tyranny here in question, be general? and accordingly, instead of a catholic priest, shall it say a *person*? and instead of the words *to be such*, say, to have been guilty of any offence? What a price would here be paid for the benefit of this remedy! The whole fabric of the law weakened, with all the securities that rest upon it; and the protection to the innocent religionist no better on this plan than on the foregoing one.

Instead of being the work of the legislature, suppose the extension to be the work of the judicial authority; on the occasion of some individual suit, the judge finding or making a pretence for stopping the disclosures, by an individual decision made on the occasion of that individual suit; and on the next occasion of the like kind another judge making, either out of the decision itself, or out of something of a general nature supposed to have been said on that individual occasion, a general rule. Of the additional mischief, intimation has just been given. Insubordination, contempt, usurpation; the confidence of the subject in the legislator shaken; disobedience preached by example — by the example of those whose employment, profession, and peculiar duty it is, to exact obedience from everybody else.†

To the vexation attached, as above, to the delivery of the testimony, when the will, the intention, to deliver it, has been formed, must be added for consideration the vexation that may come to be attached to the coercive arrangements which it may be necessary to take for the purpose of *causing* the will, the intention, to be formed. To this head belong, in the case of personal evidence, search for the person of the proposed witness: entry, with or without force, into the house, land, ship, or other receptacle, for that purpose: arrestation, detinue, conveyance, commitment, alimentation. In the case of real and written evidence, — entry as before; search as before; examination, seizure; detinue, conveyance; and in some cases, where the source of evidence is a living animal, alimentation, as before. In the case of written evidence, examination of books and papers, making of transcripts, extracts, translations, abstracts.

In regard to vexation of this casual and multifarious description, two propositions present themselves as expressive of the line of propriety on this ground.

1. In forming a comparative estimate, as between the mischief of admission and the mischief of exclusion, for the purpose of determining whether the evidence shall be re-

* By the 11 & 12 Will. III. c. 4, the punishment was commuted to perpetual imprisonment. This act was repealed, and the exercise of the Roman Catholic religion tolerated by the 18 Geo. III. c. 60, and the 31 Geo. III. c. 32.—*Ed.*

† Quære, on this and every such occasion — How much more mischievous has the offence been, in the case where, after the commission of it, the proof of it is brought out in that indirect and casual way, than if brought out in any of the more common modes? What alteration is made in the past mischief of an offence, by the subsequent incident (whatever it be) by which the commission of that same offence is brought to light? If none at all, then why is it, to what good end is it, that an offence shall, if brought to light by one incident, be punished with death, — if by another incident, go unpunished altogether?

ceived or excluded,—so much of the vexation (in whatsoever shape or shapes it presents itself) ought to be taken into account, as will take place notwithstanding any inclination on the part of the witness (including, in case of real or written evidence, the person on whom the production of the source of evidence depends) to yield the evidence

2. But in this account no vexation ought to be included, the necessity for which is produced by the repugnance of the proposed witness He himself being the author of it, be it ever so heavy, the weight of it can afford no just reason for depriving the party of the benefit of the evidence—of the legal service which is his due

As to the provision which it may be necessary and proper to make for the forthcomingness of the evidence, considered under its several modifications, as above, and in the several cases of difficulty that may arise,—it belongs rather to the subject of procedure at large, than to the subject of evidence The field would be much too wide a one to be inclosed within the limits of the subject now in hand

On this part of the ground, the utmost that can be done is to give principles Propositions fit to appear *in terminis*, though it were not in the character of laws, but of mere instructions, could not be given without giving also *in terminis* the laws (substantive as well as adjective) in modification of which they would have to operate

§ 3. *Vexation to the judge, or to any of his subordinates, how far a proper ground of exclusion*

The sort of vexation here in question is that and that alone, against which the exclusion of this or that mass of evidence is capable of operating as a remedy The vexation will therefore be of that sort, and that sort only, which is producible by excess in respect of the quantity of evidence which it has been made incumbent on him to receive, and turn in his thoughts, to serve as a ground for the decision he is called upon to pronounce in a word, vexation having *excess of evidence* for its cause

Flowing from this source, vexation to the judge has a claim to regard on a double account —1 In respect of the feelings of the individual, and 2 In respect of the consequence of it to the cause

On his own account, and looking no further, the feelings of the judge have exactly the same claim, neither stronger nor weaker, to be considered, as those of any other individual in the state.

Considering the matter in this single and abstract point of view, it may seem difficult to comprehend how it should happen that, if the evidence in question be material, a lot of vexation thus narrow in extent should ever swell to such a pitch as to form a ground sufficient in point of reason and utility for the exclusion of it

Difficult, yes, but not impossible especially under English law, especially considering among how large a number of persons it may happen to the judicial power to be shared; say a dozen occasional judges (jurymen,) and one permanent one, with from two or three to half-a-dozen or more subordinate judicial officers These jurymen have all been shut up together for twenty-four hours, a case that has sometimes happened value at stake, perhaps a hundred thousand pounds—perhaps not a hundredth part as many pence.

But (besides that, in this sense of the word *material*, there are degrees of materiality) what may happen is, that the information proffered in the character of evidence may be irrelevant altogether; of which case afterwards In this case there can be no difficulty.

The service of the judge is in some instances voluntary, in others compulsory. If voluntary, he derives from the office, in some shape or other, what in his own judgment (which is the only competent one) is a sufficient recompense But even in this case, vexation, labour, attendance, should not be imposed upon him to no use much less where the service is compulsory, as in the case of juries, and several other cases *

* The judge being considered as the sort of person on whose shoulders the labour and other vexation attendant on the delivery of evidence rests; the situation he may be in admits of an ulterior distinction of great practical importance

Distinct from the vexation, the unbalanced mental suffering, which in each individual instance may or may not be the consequence of the labour thus bestowed, there is one accompaniment which is altogether inseparable from it—viz. the consumption of time—the quantity of time occupied in the bestowing of such labour.

There are classes of judges, to the aggregate quantity of whose time, applicable to this purpose, there is no natural and absolute limit In this case are all judges but those who judge *en dernier resort* In this way, as in all others, whatever quantity of natural business there may be to be done, judges in sufficient number may naturally be found for doing it. If, at the same time that there are not fit persons enough ready to take upon themselves the duty without pecuniary retribution, pecuniary retribution cannot be found in sufficient quantity to afford to the number needed an adequate inducement,—in such case there exists a limit to the quantity of time applicable to the purpose in question, on the part of these subordinate classes of judges.

There is one class of judges, to the aggregate quantity of whose time there is a certain limit. In this case are, in every country, the judge, or bench of judges, to whom it belongs to judge *en dernier resort* Of the four-and-twenty hours in each day, there is a certain proportion which

What applies, as above, to the principal, applies, and for the same reason, to all subordinates.

But in this way, when the quantity of the vexation swells to a certain pitch, the connexion is most intimate between the personal interest of the judge, and the interest of the public at large, through the medium of the parties, or rather of such one of them as happens to have right on his side.

From an overload of evidence, comes perperplexity: from perplexity, misdecision: if the perplexity be at its maximum, an even chance of it. Probably in every system, certainly under the English, the instances have been but too numerous, in which (not to say misdecision) decision which to many impartial minds has presented itself as erroneous, has been traced up to this source.*

When the hearing of a cause has been drawn out to a length regarded as excessive, the principal matter and cause of the excess has generally consisted of the evidence.†

In causes of certain descriptions, to such a pitch has the mischief swelled, as to be regarded as a subject of general horror to persons whose situation in the state has threatened them with this species of forced service.‡

Much, in this case, will depend upon the modification given in respect of time to this species of service: whether *de die in diem* (with or without intervals of repose,) or the whole to be executed within the compass of one sitting, and thence, occasionally, towards the close of it, in a state of imprisonment and slow torture.

The personal suffering of the judge is not much in danger of passing unheeded, nor even unremedied, by the judge: at least by such person or persons on whom, in that commanding station, the duration of each attendance depends. Nor yet has it the less claim to the legislator's care: since to whatever relief it happens to be assumed or granted in these cases by the subordinate, without the observation of the superior, it may happen to be either insufficient or excessive.

But under the system of payment by fees (that is, under the regular part of the existing system of procedure in most countries,) vexation to the judge is apt to have an ulterior and much more important claim to notice. Under this system, vexation to judges and their subordinates is expense to suitors: changing its shape, it transfers its seat at the same time to other shoulders. The quantity given, on what individual it falls, is to the public (that is, to the aggregate composed of all individuals) a matter of indifference. The misfortune is, that, when the seat and shape of vexation is thus changed, the quantity of it tends to increase with a velocity plainly infinite. In this tendency, the final cause of the technical system has already been brought to view. On these terms, vexation, instead of being shrunk from, is courted: the crown of martyrdom graces the peruke of the judge.

Men of the class of professional lawyers (assistants to the parties) being, under all their varieties and sub-varieties, men,—vexation weighs as heavy on their shoulders as on any other.

(bating accidents) it may be, physically speaking, in the power of the judge to bestow upon this or any other species of labour: beyond this, the application of any additional quantity of time is not merely inconvenient, but physically impossible.

In either of two ways, the quantity of time applicable on the part of this court of *dernier resort*, is, physically speaking, susceptible of extension: one is, if two or more such supreme courts be instituted, each competent to all cases; the other is, if two or more such supreme courts be instituted, one competent to judge *en dernier resort* in one sort of case, another in another sort of case, as in the courts subordinate to them. But the first sort of arrangement leads directly to contradiction, to dissension, to civil war, to the dissolution of the government: the other keeps perpetually alive, at least, an imminent danger of those same calamities. Geographical lines of jurisdiction are drawn with ease and precision enough: metaphysical, logical, not without the greatest difficulty. As between subordinate and subordinate, where there is one superior to decide, the difficulty is not felt. But as between two co-equal courts, as above supposed, if a difference of opinion or will obtains, and neither will yield, this case resolves itself into the foregoing one—into the case just described, with its ruinous results.

In the constitutions of most States, there is, to this purpose, no difficulty. In whatever hands the supreme authority resides, the judicial authority *en dernier resort* is lodged, in effect: along with (to take the current division) the supreme executive, and the supreme legislative. In the constitutions of most states, this supreme authority rests in the hands of a single person, a monarch: and whatsoever may in other respects be the disadvantage attendant on that species of constitution, as to the point here in question there is at any rate no difficulty, no danger. For this, as for all other purposes, he has time sufficient at his command. The quantity of his own personal time is limited, like that of every other man: but the quantity of other persons' time, capable, upon occasion, of being applied by him to the termination of these or any other disputes, is without stint.

Under a mixed constitution, the difficulty may be altogether a distressing one. Delay increasing *ad infinitum*: injustice triumphing, impunity certain: law trodden under foot: power intended to be subordinate, converted into despotic and supreme. But the solution belongs not to this place—it belongs to the head of constitutional law; and, till the constitution of the government be given, every attempt would be premature.

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* Douglas Cause. † Hastings Cause.

‡ 1. Election Committees. 2. Wellesley's case.

But vexation to the lawyer is expense to the suitor. Under the fee system, this transformation is undergone by that portion of the vexation which in the first instance alights on the shoulders of the judge under every system, by that portion which alights upon the shoulders of the professional lawyer, the frequently indispensable and naturally treacherous assistant of the parties. But, under the fee system, the two avalanches, being connected from the first, roll on and accumulate together. pursuing the same object, co-operating, without any need of concert, from the beginning of the game to the end, the lawyers of both classes keep playing into each other's hands At the card-table, signs and tokens are necessary between the ostensible partners and the latent ones behind their backs · no such dangerous intercourse is necessary amongst the partners in the lottery of procedure.

Under any system of payment, pecuniary or non-pecuniary, by which the interest of the functionary were not placed in a state of opposition to his duty, the zeal by which the martyr to professional duty will never cease to be instigated to heap thorns upon thorns on his self-devoted head, will find a constant moderator in the probity, the honour, and the indolence of the judge under the fee system it finds ostensible checks, of which the efficiency is destroyed, by spurs, not the less sensible for being invisible

Such being the mischiefs of which vexation from the delivery of evidence is composed, or of which it is liable to be productive — such the mischiefs to which exclusion of the evidence presents itself as a remedy, — does not the nature of things ever admit any cheaper remedy? This will be the subject of inquiry in a separate chapter,* in which, in this point of view, the three kindred diseases, vexation, expense, and delay, all considered as attached to evidence, are considered together. In the case of these political, as in the case of physiological diseases, to find the best remedy, we must understand the causes.

§ 4. *Arrangements of English law connected with this subject.*

Towards this subject what is the aspect of English law? The answer may be contained in a line or two, or require a volume What on this ground has been done by English law? By design, nothing. but by accident, and ithout thought, much more than can here s brought to view.

By design, by design towards such an end, how should anything have been done? On this subject, had anything been done, it would have belonged to the system of procedure: and, except here and there in patches, the system of procedure has never been the work of the legislator What has been done, has been the work of the judicial authority. But to avert vexation is one of the ends of justice, and the ends of judicature, instead of coinciding, have been at variance with those ends Vexation is inseparably connected with expense and the ends of judicature have been, not to save, but (for the sake, and in proportion to the amount, of the profit obtainable from it) to embrace every occasion for the augmentation of, expense

Under the head, for example, of vexation to individuals (whether strangers or parties) in the character of witnesses, — ordinary vexation, in respect of journeys to and from, attendance and demurrage what on this head has been done?

By design, as already observed, nothing. by accident, more or less — here one thing, there another

What in this way has been done at all, has been done by the limits, the topographical limits, that have taken place in regard to fields of judicature But, in the tracing out these limits, nothing of design has had any share: boundaries have formed themselves here, as boundaries formed themselves after the deluge as shores grew up against seas May it happen to a man to have so many hundred miles to travel for the delivery of his evidence, or only so many miles? It depends upon the local jurisdiction of the court and thence upon the court in which the cause originated, or in which it is to be tried. Did it originate in Westminster Hall, three hundred and upwards may be the number of miles In a court of quarter-sessions, for the county of Rutland for example, not so many as twenty miles .

Three hundred and upwards, or only twenty, — if the delivery of the evidence be altogether free as well as voluntary, there is no vexation in the case if obligatory, then it is that vexation mixes with it Delivery of testimony, is it obligatory? Yes and no. yes in a hundred cases, no in a hundred others. To give a picture of the law on this one head, that is, of the clouds of uncertainty in which it is involved, would require a volume. 1 In causes non-criminal, obligatory at one stage, unobligatory at another obligatory if the persons capable of yielding testimony are known, unobligatory for want of their being known. 2. In criminal causes, — in felonies, obligatory obligatory as well at the first stage as afterwards 3 In misdemeanours, if prosecuted by indictment; — obligatory, if known, and living within the jurisdiction of the court (unless, to avoid the vexation, their device be to travel a few miles, or as many steps, to escape from it;) unobligatory, for want of their being known, unless some jus-

* *Infrà*, Chap. VII. *Remedies succedaneous to Exclusion.*

tice of the peace, under the spur of that zeal which has become a monopoly in the hands of unlearned judges, acting by custom, without (which is as much as to say against) law, has, by the terrors of undefined and uncognizable authority, contrived to wring the secret from the reluctant breast. 4. In the same misdemeanours, if prosecuted by information —— but here, however abruptly, the theme must end. 5. Then again comes the Tweed. Think you that a judge, standing on one side of that river, speaking to a witness on the other, could command his evidence? No more than if it were the Styx.* 6. Is it, again, for plaintiff, or for defendant, that a man's testimony is needed? Here comes another ocean of distinctions and deficiences. Fancy not, that because a man's evidence is necessary to save your life from unjust punishment, you can have (unless it be here and there by accident) any better security for it than that humanity, which, if it be to be found in individual bosoms, is not to be found in the bosom of the law.†

The best method of supplying all these deficiences, belongs to the science of judicial procedure at large. In the existing system, how was it possible they should have been supplied? To have supplied them, the objects of its regard must have been the ends of justice.

On the score of the vexation of which the disclosure would be productive to the individual whose condition in life was the subject of inquiry, — the party calling for the disclosure having no other interest in it than what he had taken upon himself to give to himself by laying a wager, and when consequently there is no gain to justice, to outweigh the vexation thus produced, — the court of King's Bench, with indisputable propriety, forbade the extraction of the evidence.

On the score of vexation to the public at large, by the disclosure of facts comprisable under the denomination of secrets of state, no decision appears to have been ever pronounced. Why? Because no known case ever presented itself, in which a decision to that effect was called for on that ground. In this instance, as in every other, it depends upon chance to open the mouth of jurisprudence.‡

In both houses of parliament, exclusions are, in every day's practice, put, on this ground, upon communications that otherwise would be made.

Where the vexation in question is outweighed, outweighed by the profit to justice attendant on the execution given to some article or other of the substantive branch of the law; in this case, the exclusion put upon evidence, the allowance given to the plea of vexation in the character of a ground or justificative cause of such exclusion, will be found under the head of cases where exclusion on the score of vexation is improper, and the allowance ranked among the errors by which English jurisprudence is defiled.

CHAPTER III.

EXCLUSION ON THE GROUND OF EXPENSE, IN WHAT CASES PROPER.

Of the category of expense, though the mischief of it be but a modification of that of vexation, a separate consideration requires to be made.

There are but two cases in which expense, expense attendant on the delivery of evidence, is capable of forming a rational and legitimate ground for the exclusion of that same evidence.

One is, the case in which, not being defrayed by the party by whom it is called for, it must, if delivered at all (which is as much as to say not excluded,) fall without compensation upon some third person. The other is, where, though it were to fall upon that

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* But see 45 Geo. III. c. 92, § 3. — *Ed.*

† See Hawkins, iv. 448.

‡ As to the courts of judicature, should it happen to any one of them ever to be called upon to speak upon that ground, it would pretend, as usual, to declare the law; it would in fact have law to make. On this occasion, as on every other, with a leaf taken out of Lord Mansfield's book, it need never be at a loss.

Whatever it would be contrary to "*sound policy*" to do, ought not to be done. Such was the law which, on one occasion the learned lord, with the mute concurrence of his three colleagues, took upon him to make. But can there be anything so contrary to sound policy, as that, by such authority, laws of such latitude, laws involving an uncontrouled dispensing power exercisable over all other laws, should be suffered to be made? 'In one scale weigh the benefit — in the other weigh the price. More law, law covering a greater extent in the field of legislation, is thus made by a single judge, in a quarter of a minute, and at the expense of a couple of words, than the legislature would make in a century, by statutes upon statutes, after committees upon committees.

[Mr. Bentham seems to have overlooked one remarkable case, in which a witness was forbidden to disclose something which the judge thought proper to consider, or to pretend to consider, as a state secret. I allude to the case of Plunkett *v.* Cobbett, in which Lord Ellenborough refused to suffer a witness, who was a member of parliament, to be examined concerning words spoken in parliament: and this by reason of his duty, and in particular of his oath, by which he was bound not to reveal the counsels of the nation.—*Phillips on Evidence* (edit. 1820,) 185.

To support this inference, the two following falsehoods must have been taken for true:— 1. That words spoken in parliament were state secrets; 2. That in no case ought state secrets to be revealed.—*Editor.*]

one of the parties who is in the wrong, the quantity of vexation attendant on it in his instance would be too great to be defensible on the score of punishment

In each of these cases, supposing them really exemplified, the propriety of the exclusion presents itself as unquestionable

The load of rubbish has been improperly deposited as before Penalty five shillings For the mere purpose of levying this penalty, would you put an innocent bystander to an expense of two voyages between London and the East Indies? would you even subject the delinquent himself to any such expense?

All reason, therefore, for exclusion on the ground of expense is taken away—all reason and all pretence, when any person, who conceives himself to have need of the evidence, takes upon himself the expense

But evidence, and evidence the delivery of which would be attended with considerable expense, exists on both sides On one side, there exists ability as well as desire to defray the expense of his own evidence: on the other side, there exists inclination only, ability not What in this case is to be done?

The knot is a Gordian one what presents itself as capable of being done towards untying or cutting it, will be found under another head.*

Expense is to be considered at two periods 1. When the disbursement is to be made, or at any rate undertaken for, 2 At the conclusion of the cause, when the time comes for definitive justice to be done

Even though, in the rubbish case, the expense of fetching over the witness from the East Indies should have been defrayed by the plaintiff in the first instance, would you, in case of conviction, saddle the defendant, guilty as he is, with the burthen of reimbursing this expense? No, verily, if guided by the rules of humanity and rational justice Yes, if guided by principles such as those of English law Whether a man shall have his costs or not—whether the party who prevails shall receive reimbursement at the expense of the loser, depends upon a thousand capricious and inconsistent rules but it is only in here and there an instance, that this reimbursement is refused on the ground of the excess of the burthen imposed on the loser, in comparison with the value of the benefit pursued

It remains to bring to view what has been done by English law under this head.

As it is with vexation at large, so is it with that particular modification of it which is produced by forced expense By the same causes, by the same accidents, by which bounds have been set to the vexation by reason of attendance, bounds are also set to the expense I speak of the expense of journeys to and from, and demurrage in the neighbourhood of, the seat of judicature items which, when added to the fees of the persons employed in the collection of the evidence, compose in general, wherever the evidence is delivered *viva voce*, the whole, or nearly the whole, of the expense attending it

By these bounds—the bounds by which the territorial field of jurisdiction of the court stands limited—limits are thus far set to the expense to which the party or any other person shall be subjected by reason of the expense of the journey, in the instance of any one witness From beyond these bounds, no man can for that purpose be obliged to come and therefore, unless by the consent of a willing witness, no mass of expense exceeding the expense of such longest journey, can be imposed upon any one who is not disposed to bear it Every witness, and thence the testimony of every witness, who, were his testimony to be delivered, would have to come from the greater distance, stands negatively excluded, *i. e.* it is not compellable

Thus much then is done, is actually done, though without design, in English law (viz. by general arrangements,) towards the limitation of the expense of evidence

But in no instance is any exclusion put upon a lot of evidence, on the mere ground of the inordinateness of expense, understand, of the mass of expense of which the delivery of the evidence would be productive in that individual cause

In the first instance, each party bears of course the burthen of that part of the aggregate mass of expense which consists in the money disbursed by himself, on the occasion of whatever steps he takes in the institution and prosecution of his own claim—(claim, on the part of the plaintiff, to see the obligation imposed upon the defendant—on the part of the defendant, to see himself exonerated from it) When the cause has received its ultimate decision in any court, then comes the question, whether, by him who in that court has gained the cause, anything, and what, shall be received from the losing party, on the score of satisfaction for the disbursements made by him?

Deficiency, inconsistency, uncertainty, all at the highest pitch, are the result of those learned labours, the picture of which fills a volume of near seven hundred pages

To a set of arrangements on such a subject, would it be possible to give the opposite qualities? In so large a compass, scarcely—in a twentieth part of it, with ease.

In regard to the plaintiff, one question is, whether he be king or no. for, if the suit be called a criminal one, the plaintiff is king,

* In case of pecuniary inability of defendant to produce his evidence, power to plaintiff to call for a decision notwithstanding, on condition of defraying the expense of defendant's evidence Defendant punishable, in case of *mali fide* invocation. See Chap. VII. *Remedies succedaneous to Exclusion.*

whatever else he may be. In this case, the answer is clear. Be the suit ever so unjust, and the expense which the innocent defendant has been put to in defending himself against it ever so heavy, he receives no indemnity; for the power of heaping oppression in this way on innocent men in the character of defendants, is among the king's prerogatives. Therefore, to prove that an innocent defendant ought to be thus oppressed, you want no other postulate, than that John-a-Nokes is king: than which nothing is more easy: after which, you may write Q. E. D.

The rule is indeed scrawled over by exceptions: yet not so, but that the ground predominates.

Again. Be the delinquency of the defendant ever so enormous, the expense of prosecution ever so great, reimbursement is not to be thought of. Why not? Because, to receive money under the name of costs is "beneath the royal dignity."* Call it costs, he disdains to receive it back, though he is so much out of pocket: that is, the law servants of the real king disdain to see either their royal master receive it, or the John-a-Nokes, who really disbursed the money, and whom they have set a strutting under the king's name. Call it costs, he disdains receiving it, though it be a hundred pounds (it is frequently much more;) call it a fine, he is ready to pocket it, though it be a shilling: the elephant disdains the cannon, but is ready to pick up the pin. Rendered splendid by this its destination, many a shilling, bating official clipping, finds its way, and by itself, into the real and royal privy purse.†

Indications may be found to show that, in England, lawyers have had it in their heads to set bounds to the excess of vexation and expense. In their heads, at times, yes: in their hearts, scarce ever. Bounds to the excess of vexation and expense from all causes put together, natural and fictitious, yes: not to this, an article of natural expense, taken by itself.

Under the direction of lawyers, statute law has, in some instances, interposed in some such view: but how? By refusing, to the party injured, the reimbursement of his share of the costs of suit; and thereby doing much more than refusing him any redress at all for the injury, where the value of the injury is judged not to exceed a certain amount.‡ And what amount? A sum, which, if annual, would have constituted an independent provision for a parliamentary elector.

But, in this case, no separate account is taken of that part of the expense which is occasioned by the production of evidence; not to speak of what may have been occasioned by the production of this or that particular article of evidence.

In the equity courts, jurisprudential law has explained itself in the same way. For any sum below a certain amount, no redress is given in these courts. Why? Because it would be beneath their dignity. And to what

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* The iniquity of this rule has forced the judges to take upon themselves the responsibility of allowing to the prosecutor a sum of money under the name of expenses:[a] this, however, they do or leave undone as they please: consequently the most frivolous reasons frequently suffice for leaving it undone. It is asserted in the eighty-fourth number of the Edinburgh Review, p. 403, that, in a recent case, a judge refused to allow the prosecutor his expenses, because one of the witnesses for the prosecution offended him by his demeanour.—*Editor.*

[a] The Editor of the original edition is here mistaken. The judges never took upon themselves the responsibility of allowing any expenses. Hale (2.282) complained of the want of power in the judges to allow such expenses, as a great defect in our judicial system. The 25 Geo. II. c. 36 allowed certain expenses to the prosecutor, and the 27 Geo. II. c. 3 did the same to the witnesses for the crown; but a condition precedent was, that the prisoner should be convicted. This unjust provision was repealed by the 18 Geo. III. c. 19, which allows the expenses whether the prisoner is convicted or acquitted. The 58 Geo. III. c. 70 was also passed for the purpose of regulating the expenses of prosecutors and witnesses. But as none of these acts extended to misdemeanours, they were all repealed by the 7 Geo. IV. c. 64, which grants expenses in all cases of felony, and in certain cases of misdemeanour. The judges have undoubtedly a discretion, and very properly so; for it now and then happens, that a witness swears falsely, keeps back the truth, or wilfully prevaricates. Sometimes a witness has had some participation in the crime of the prisoner, as where he has purchased the stolen property of him under suspicious circumstances. In all such cases it is usual to disallow the expenses. It may be doubted if the case referred to in the Edinburgh Review ever happened. If a witness misconducts himself in the box,—presents himself in a state of intoxication.—makes use of indecent expressions, or otherwise insults the court, he is punished as for contempt of court, by the disallowance of his expenses; but this would in no way affect any *other* witness, or the prosecutor, unless they were also guilty of similar improprieties.—*Ed.*

† The following is another exception to the reimbursement of expenses:—

"When a party," says Phillips,[b] "after obtaining leave by consent, examines witnesses abroad on depositions, he will not be entitled to any allowance, in the taxation of costs, for the expense of taking the depositions, although he may proceed in the action.[c] The same rule prevails in the Court of Chancery: if a party applies to that court for a commission to examine witnesses, he must pay the expenses."

‡ Hullocke on Costs, pp. 35–39. Tidd, 975. 58 Geo. III. c. 30.—*Ed.*

[b] Vol. i. p. 14.

[c] "Stephens *v.* Crichton, 2 East, 259. Taylor *v.* R. Exch. As. Co. 8 East, 393."

amount? £10; a sum, in those days, equal at least to the expense of two years' subsistence of an average individual of any of those classes of which nine-tenths of the body of the people are composed Outlawry was thus pronounced upon the great body of the people Outlawry and to what end? To maintain the dignity of the judge! The dignity of an equity judge consists, in what? In refusing to do justice Dignity, forsooth? What has dignity to do in this case? The fees on the less valuable, would they have been worth less than the fees to the same amount on the more valuable, cause?—would Vespasian had found them beneath his dignity? But pride, in these instances, blinded the eyes of avarice Humanity? No such motive was so much as dreamed of

At common law, to a cause in which it is settled that either nothing shall be given to the plaintiff, or, if anything, one shilling, a more than ordinary degree of importance is not unfrequently ascribed and the question in dispute argued with great ceremony So different, on the head of dignity, are the notions that prevail on the one side, and on the other side, of a twelve-foot passage

Suppose any reason, grounded in utility, for the denial of justice in all pecuniary demands under £10, and conceive what a character you are giving of an equity suit! Think of the virulence of that disease, to which, in the judgment of the inoculators, denial of justice, and in a great majority of the cases that would otherwise have occurred, is an eligible remedy!

Along with the vexation, the expense of evidence has, in the same lumping style, undergone a remedy by exclusion, in another way; viz by barring it out *

* A case that happened within these fifty years[a] will serve at once to show the demand for a discretionary remedial power to be exercised by the judge, and the obstinacy of English law.

Action in the King's Bench at Westminster two of plaintiff's witnesses, a captain and first lieutenant of a French merchantman, brought over from France. these two witnesses, if the affidavit of the real plaintiff (a Frenchman) was to be believed, had been appointed each of them as supercargo to a French East-Indiaman, which appointment they had both foregone, and he, as he believed, would have to indemnify them for the loss. Profits a stated allowance, five per cent on the voyage outward, ditto on the homeward, besides provisions and other advantages Value of each cargo, say £50,000· this gives loss to each above £5,000. to both £10,000

The appointment, if real, was probably made only to give colour to the demand: for what power was there capable of stopping them? But, if the loss was not really sustained, that, or a greater, might, in that same shape, come to be sustained. The cause was an insurance cause: the value at stake might therefore have been sufficient to cover even so great a loss. But suppose the value at stake no more than a few pounds: shall it be in the power of a man, in the character of plaintiff, to subject his adversary, as it were in a parenthesis, to a loss of £10,000, in addition to (suppose) £5, the amount of the satisfaction due?

The master, the subordinate judge by whom all questions concerning costs are determined, and (as it is very fit they should be) without a jury, disallowed this claim of indemnity: but what he did allow was, the expense attached to the voyage and journey and demurrage of these two witnesses to and fro between France and England.

Reference made by the court (Lord Mansfield the chief justice) to a rule spoken of as established, viz. that contingent damages (meaning damages occasioned to a witness by the obligation of delivering his testimony) could not be allowed for. certificate from the master, that such application had frequently been made, and always without success

The precedent, said Lord Mansfield, would be a dangerous one since thus, with or without collusion with the witnesses, a plaintiff might, on the occasion of the most trifling claim, load his adversary with a burthen to an unlimited and intolerable amount. But even where contingent (*i e* consequential) damages are out of the question, how excessive and disproportionate may be the burthen thus imposed in the shape of ordinary charges.

What a dilemma! Injustice by denial of justice for want of evidence; or still worse injustice, by vexation and expense on the score of evidence. Is there no middle course? We shall see.

This dilemma,—is it the work of nature?—Now and then, and to a certain degree, yes: but much more frequently, and in a much greater degree, the work of learned art—one of the host of mischiefs produced by the rule by which, and especially at the outset of the cause, the parties stand excluded from the presence of the judge

[a] Thelusson *v.* Staples, 20 G. 3. Dougl. 438, in Hullock, 438.

CHAPTER IV.

EXCLUSION ON THE GROUND OF DELAY, IN WHAT CASES PROPER.

A LOT of evidence being proposed,—the delay in question in the character of a ground of exclusion, is that which might in some cases happen to be produced by a determination to give admission to that evidence The question for decision then is —of the two mischiefs, the two opposite, and, as it were, rival, mischiefs and injustices, which is the greater?—the injustice attached to the misdecision or danger of misdecision that would be produced by the exclusion of the evidence? or the collateral injustice attached to the quantum of delay (of extra delay, it must here be understood) that must be incurred, if, antecedently to the decision, that quantity of time be allowed, which is understood to be necessary to the production of the evidence?

Were all the material evidence forthcoming

which the case has happened to furnish, a decision might be pronounced to-morrow. But, of this existing and obtainable stock, a part, more or less material, exists at the antipodes. Shall the decision wait till a correspondence can be had with the antipodes for that purpose?

The cause having but one party on each side — the cause being, in that respect, and in that sense, a simple one,—the proposition for the exclusion, if any such proposition come at all, must come either from the party who conceives himself to stand in need of the evidence (say the plaintiff,) or from the opposite party. From the party whose wish it is to see the evidence delivered, no such proposition can come: since he has but to forbear calling for the evidence, and the exclusion thus attaches upon it silently and of course.

If, in this simple case, a demand be made for an exclusion to be put upon the evidence — a demand having for its ground the delay that would be necessary for the production of it, — it is from the opposite side (say the defendant's) that the demand must come. For anything I know, the evidence alleged by the plaintiff to exist, may or may not exist: the effect of it, if produced, may or may not be more or less material, more or less necessary, more or less conclusive. But the case is such, that, if the decision be not passed till the requisite time has been taken for the arrival of the evidence, added to what notice may be to be taken of it, the mischief resulting to us from that delay will be greater than the mischief resulting to the plaintiff from the disallowance of his claim: at any rate, than whatever chance of such miscarriage may be the result of the non-production of that evidence.

Reverse the case, the mischief of the delay will be more sensible. It is the defendant that applies for the delay, to save the exclusion (the negative sort of exclusion) that, for want of it, would be put upon the evidence he has to produce. No, says the plaintiff; — the mischief from this delay would on my side be so great, that, in consideration of it, my petition is that the cause may go on in its natural course—that the delay prayed for may be refused: although of such refusal the sure consequence will be, that an exclusion will thus be put upon the article of evidence.

Again, let the cause be a complex one — complex in respect of its affording divers parties (say five) on a side: and first, say, on the plaintiff's. One plaintiff applies for the delay, as necessary to the delivery of the evidence: the other plaintiff opposes the delay; in other words, applies for the exclusion, the evidence not being, in his view of the matter, worth the purchase. To the present purpose, this third case differs from the first only in name. The parties stand on the same side of the cause, but, on this point at any rate, their interests are opposite. The plaintiff, by whom the application for delay is opposed, is to this purpose, as against his co-plaintiff, a defendant.

The two quantities here compared with one another, being both of them in their nature susceptible of variation upon a scale of almost indefinite length — on the one hand the materiality, the probative force, of the evidence, on the other hand the duration of the delay; the ratio of each to the other is of course susceptible of variation upon a correspondent scale.

If, however (as will frequently be the case,) the evidence in question be indispensably necessary to warrant a decision on that side, — the mischief of mere delay, that is, mere postponement of the decision on one side of other (abstraction made of the contingent mischiefs with which it may happen to it to be pregnant, viz. on the one side deperition of the matter of satisfaction, on the other side deperition of counter evidence,) can seldom be equal to the mischief of the exclusion. From the exclusion of the evidence, results in this case, by the supposition, and that as a necessary consequence, misdecision to the prejudice of that same side: and the mischief resulting from that misdecision, perpetual and irremediable: whereas from delay, considered in respect of that part of its mischief which is certain, no worse effect ensues than the temporary duration of that same mischief, which, in case of exclusion, is perpetual.

In respect of the evidence, the supposed temporary absence of which produces the demand for the delay, — what are the expectations entertained by the plaintiff (or the defendant, if the delay be prayed for on his side;) and what the grounds of them? What assurance has he that the witness cannot now be forthcoming? that he will be forthcoming within any reasonable space of time? that he knows anything about the matter, and that what he knows will, if truly reported by him, operate to the effect alleged, and with a sufficiently persuasive force? All these questions together constitute a sort of incidental cause, collateral indeed to the principal cause, but sometimes not inferior to it in importance, because the main cause itself may altogether turn upon it. All these questions, with others that might be added, constitute a complex question — a question of fact, which, like any other question of fact, must be tried by the light of its own evidence, — of such evidence as it happens to afford: direct evidence, circumstantial evidence, the evidence of the prosecutor if necessary, the evidence of any other individual as it may happen. The witness (understand, he in whose absence the demand for delay originates) was an inmate of the owner of the goods taken in the way of theft or robbery, — he was in the house at

the time: he was a lodger in the house of the individual killed, and of whose murder the defendant stands accused, — he was in the house at the time, or came in soon afterwards The question, whether the alleged witness was in a situation that would qualify him to give evidence, is a question of fact, to be tried, like any other question of fact, upon its own evidence. Does the main cause turn upon it? It is a question that requires to be examined into with the same care, and therefore with the assistance of the same securities for trustworthiness, as those which are looked upon as indispensable to the principal cause

Between delay for the sake of evidence, on the one hand, and exclusion of the evidence, for want of the requisite delay, on the other, the connexion will, after all, if carefully and honestly looked into, be found (like so many other of the evils with which the system of procedure is pregnant) in a much greater degree factitious than real Such will be the result presented by the chapter,* the business of which is to bring to view the arrangements capable of serving in lieu of absolute exclusion, in the character of remedies to vexation, expense, and delay †

The strongest case, in favour of the exclusion, is where imprisonment, itself tantamount in vexation to a severe punishment, is the lot of the defendant during the continuance of the delay Here, then, is punishment — a perfectly distinct and incontestable lot of punishment, inflicted inflicted, where perhaps it is undue, and, at any rate, before it is proved to be due

In this case, however, there is an evident medium between the continuance of this perhaps unjust punishment, and exclusion of the evidence — whence acquittal from all punishment. Bail him, if he can find bail if he cannot, it will in general be a further presumption of delinquency. if no bail, take other securities for appearance, of which many might be enumerated, if the present were a fit place for it in default of all such securities, discharge him out of prison, even without security But liberation from prison is one thing — definitive acquittal is another — because the plea is sufficient when applied to the one, it follows not that it must be so when applied to the other

At any rate, the question (it will be seen) turns still upon proportions The perhaps altogether undue or excessive vexation being a determinate quantity, the proportion will depend upon the quantity of the delay Admitting it to be better that a delinquent should go unpunished, than that a punishment should remain hanging over his head for years, — it follows not that the proposition would be true, if, instead of *years*, a man were to say *days* or *weeks*

All this while, an argument that pleads against the delay, and therefore in favour of the exclusion, ought not to be lost sight of The evidence, if produced, will tend to conviction will operate in disfavour of the defendant A result this, of which the probability at least must be assumed, to justify the delay, with the vexation thus attached to it. But the supposed probability, on what is the persuasion of it grounded? It is on the part of the plaintiff that the evidence is called for a considerable presumption this, but by no means a conclusive one

Expecting to see the defendant proved guilty, expecting to find the guilt established by this evidence, he applies accordingly for the delay necessary to the obtainment of this evidence on this supposition, indeed, it is a matter scarcely to be apprehended that it would be the endeavour or wish of the plaintiff to extend the quantity of delay for the purpose of vexation, — to extend it beyond the exigency of the case, for, the longer the delay continues, the longer the manifest object of the prosecution, the natural wish on the part of the plaintiff, continues unaccomplished

So much for ordinary probability But a case neither improbable, nor perhaps altogether without example, is this — The plaintiff has no expectation that the evidence he applies for will operate to the conviction of the accused he entertains no such persuasion or suspicion as that the accused is really guilty of the crime the object, the real object, of the application for delay, is not justice, but vexation the vexation of an individual, of whose innocence the accuser himself is conscious

The case is a possible one, though, if examples of it were to be looked for, happily for mankind they would be found (I believe) extremely rare But the case where, on the part of the plaintiff, an ill-grounded but sincere persuasion of the defendant's guilt, or an exaggerated estimation of it, has been productive of an ill-grounded prosecution, is much less rare

On the ground of that one of the evils opposite to the ends of justice which we are now considering, — in so far as evidence (*i. e.* an extra quantity of delay, considered as being necessary to the production of it) is the cause of the disease, and exclusion proposable as the cure, — English law, however heedless, is not quite so impotent, as on the ground of either of the two preceding ones.

* Chapter VII.

† Remedy against depeition of the evidence on the other side, — immediate collection of that same evidence.

Remedy against depeition of the means of satisfaction on the former side, — sequestration, or vadiation in this or that shape, whichsoever, being sufficiently efficient, may be least burthensome.

Delay? Oh yes: of that there is no want: but, for exclusion to be put upon evidence for the avoidance of preponderant delay, no tokens of any provision—no token of so much as a thought.

To the allegations on both sides, in general terms, respecting the general matters of fact on which depend the propriety or impropriety of excluding an article of evidence to save the delay that would be necessary to the production of it, the ears of the courts are open. But, as to any tolerable security for the truth of these allegations, on this occasion as on all others, learned judges know better than to suffer themselves ever to receive it.

Between every two operations, needful or needless, a determinate length of delay being fixed* by general rules—a length in most instances too great, in here and there an instance too scanty, — where, on the ground of the impracticability of causing the evidence to be forthcoming at the regular time, coupled with the probability of obtaining it at a more distant period of time, a further length of time is or is pretended to be needful, a special application is made to the court for this indulgence. In this case, if the materiality of the article of evidence in question be out of dispute, and yet the demand of the delay be resisted, the consequence of such resistance, if successful, is a virtual exclusion put upon the evidence; and this on the score of delay, *i. e.* of the undue delay that would be the necessary result, if the lot of evidence in question were to be received. It is in this way, and this way alone, that, on the ground of delay, *i. e.* of the mischief that may come to be the result of it, any exclusion can be put upon any article of evidence.

The question here concerned is of the number of those incidental questions, on which the fate of the cause is liable to be completely dependent: as completely as upon any evidence respecting the principal matter in dispute.

For the truth, correctness, and completeness, of the evidence on which the decision of this incidental point is founded, there is in every such case exactly the same demand for the best security that can be afforded (whatever that security may be,) as for the correctness and completeness of the evidence respecting the principal matter in dispute.

Note, that, independently of all ultimate loss by deperition of evidence, or of the matter of satisfaction, mere delay may, to a *malâ fide* defendant, be productive of certain gain, at the expense of an injured plaintiff, to an amount to which there is no certain limit. Sum in dispute £10,000; trial staved off till next assizes, six months distant; interest at five per cent.; sure profit £250: deducting only the expense of the business thus made, as the reward to the law partnership for their service, the price of the delay thus manufactured.

For grounding an application for delay on the score of the absence of a material witness, forms, every day in use, are given in the books of practice: the testimony of a witness (a single witness is sufficient,) delivered in the affidavit mode. Thus far, nothing particular; learned judges (as above mentioned) never suffering themselves to receive testimony in any but this worst of shapes. But the evidence received in this bad shape is hearsay evidence: supposed declarations, supposed to have been made extrajudicially, and even by persons undesignated,—by the common voucher, the French *On;* this supposed testimony thus transmitted to the court, through the pen of the affidavit-man's attorney, when the immediate testimony of these supposed extrajudicially-speaking witnesses might, for anything that appears, have been obtained—obtained with as little trouble, and without the expense. And, unless opposed on the other side (opposed by testimony, which, so far as the mode of delivery at least is concerned, cannot be of any better complexion,) the evidence is conclusive.†

Observe the form stated as being in common use in the King's Bench.‡ 1. "The deponent (as he is advised and believes) cannot safely proceed to the trial . . . without the testimony of" [the proposed witness.] No averment, even in the way of opinion, in general terms, that he *can* safely proceed *with* such testimony,—that he has any just ground to stand upon.

2. "In consequence of the notice of trial . . . he, this deponent, caused inquiry to be made," &c. (stating [says the form] the nature and result of the inquiry made after the witness, and the time when he is likely to attend.)

Here we see hearsay evidence of the second remove: the persons inquired of, if any such there were, not upon oath, not judicially examined, nor even, without examination, judicially deposing: the supposed inquirer again in the same case.

Such is the sort of evidence which, if the statement be correct, is habitually received,

* Book VIII. *Technical System;* Chap. X. *Sittings at Long Intervals.*

† What if, at what is called the trial, when proof came to be given of the matter of fact principally in question in the cause, other evidence in abundance (immediate *vivâ voce* evidence) being at command,—an advocate were to take upon him to produce, instead of it, this hearsay evidence in the affidavit mode? The thing is impossible: but supposing it done, the judge would suppose him out of his senses, or send him to his horn-book.

‡ Tidd's Practice, Forms, p. 196.

and (unless victoriously opposed by counter-evidence) habitually acted upon as conclusive by the King's Bench.

The Common Pleas seems not much more nice. The following extracts are from a learned practiser in that court,* who does not express indeed that it is exclusively, or more frequently, in use in that court, than in the King's Bench.

Here divers particulars respecting the nature and result of the inquiry (as above) are given . . . "He, this deponent [no intermediate inquirer here,] hath been [not said when] to the house of the said P W [the proposed witness] and was informed [not said by whom] that he was gone to Norwich [not said when,] and that he, this deponent, hath sent there [not said whom nor when] for the purpose of subpœnaing him, but that the said P W is gone from thence, as this deponent hath heard [not said from whom,] and verily believes to be true and that he, this deponent, cannot get any information where the said P W. is, but is informed [not said by whom, or when, or where, nor that he so much as believes the information to be true] that he will be at home in two months. . "

Can any danger attend the attempt, successful or unsuccessful, to stave off a just demand for an indefinite length of time, or for ever, by false representations thus conveyed?

The application may, it is true, be opposed but with what effect? Not a question can the opponent (the plaintiff) put to any one in this chain of witnesses. It may be a complete tissue of lies and nothing can he do that can contribute to the detection of any one of them. The defendant's attorney being the deponent, his client may have posted persons to give such false answers or statements (not that it is worth the while,) or the like friendly deception may have been put by the attorney upon the defendant, his client.

The least unpromising course seems to be to follow the precedent of the ingenious attorney, who, to combat the forged bond, forged the release. The plaintiff makes a counter-affidavit, saying nothing of the defendant's story (for, be it ever so false, what can he say of it to any purpose?) but telling a like story of his own, showing how he has an equally material witness now forthcoming, but whose testimony, were the required delay granted, would be lost.

If to a dishonest defence success may thus be given, defeat to a just demand, — so, on the other hand, may defeat be given to a just defence, success to an unjust demand, by the same system of — what shall we say? *Inquiry?* where not a question can be put? say at any rate *receipt of evidence.* Affidavit,† "that A B and C D are material witnesses for defendant in this cause, without whose evidence defendant cannot safely proceed to trial, as defendant is advised and verily believes," was held bad, "because the belief seemed to go through the whole, as well to A B and C D being material witnesses, as to the other necessary part of the affidavit, that the party cannot safely make defence without their testimony, the former part, respecting A B and C D being material witnesses, ought to be positively sworn, belief as to it is not sufficient, but as to the latter part it is."

"*Held bad*"—and certainly not without something like a pretext, at any rate. Possibly, in the way above suggested, evasion was designed but possibly, and much more probably, not. But to what use pretend to stop up this loop-hole, when so many doors are left wide open in so many other places?

To the materiality of the evidence, "*belief*" not sufficient, "*positive swearing*" necessary. Precious distinction! as if anything could ever be sworn to, howsoever positively, but belief; as if the materiality of an article of evidence were not a matter of opinion, and not only of opinion, but (for so it has been made by lawyers) a matter of law. What an indignation was once manifested at the presumption of a deponent, who took upon him to "swear the law!" Ignorant and presumptuous man! to pretend to know the law!

Held bad: and what was the consequence? Was the cause called on, without the defendant's material, and (if his statement were true) necessary, witness? and was the subjecting him to the obligation of complying with an unjust demand the ultimate result? Let us hope rather, though it is not said, that the badness of the expression was not so fatal but that opportunity was given to amend it, viz. by ulterior affidavits.

But the badness, the real badness, where is it? Not in the suitors, justly and unjustly suspected of evasion, but in the practice of the court, by which questions are never tried but upon evidence so bad, as to afford to insincerity a perpetual chance of success, without the smallest danger of punishment, or even of shame.

Suppose the maker of this "*bad*" affidavit present in court, answering upon oath, impromptu, instead of having employed, as many days as he thought fit, in studying means of evasion, with his attorney at his elbow. A word or two in the way of question, half a minute in the way of time, and the ambiguity would have vanished.

A case must not be omitted, — a case of prodigious extent in the field of law, — in

* Sellon's Crompton, i. 421.

† Sellon's Crompton, i. 419. Day *v.* Samson, Bar. 448.

which no competition takes place between the mischief of delay and the mischief of exclusion; but, the delay (with or without design) taking place, the exclusion follows without remedy — follows by act of law.

It results from the principle of *fixed times* with long intervals. The time for the trial is come: it has been fixed, as it is of course, by a blind rule. A witness, or an article of written evidence, that was to have been produced, fails of being produced. A few days, hours, or minutes more, the evidence would have been produced. But the time is past. It therefore cannot be produced. In the first place, suppose the failure on the plaintiff's side: what is the consequence? Misdecision, to the prejudice of that side. To the plaintiff, loss of the right in respect of punishment: to the malefactor (whatever may have been his guilt,) impunity; temporary or ultimate, according to circumstances.

In this case, the exclusion of the evidence, that is, the non-forthcomingness of it for want of the delay, may have been designed or undesigned: the work of man, or the work of adverse fortune But the mischief resulting from it, the misdecision, is the work, exclusively the work, of the man of law: the work of the technical system, with its fixed days and excessive intervals. Considered in respect of its duration, the exclusion may be distinguished into two periods. The first is not the work of the man of law: his is not the blame: accident, or unlicensed misbehaviour,* is the cause: but the second is his altogether. A slight evil he sees produced without his participation: this does not satisfy him; but, upon the mere ground of this slight evil, he inflicts another — in all cases a much greater, in some cases an infinitely greater, evil, of the same kind.

At the preappointed time, the evidence is not forthcoming: what, in point of reason and justice, is the practical result? Appoint for the production of it the earliest open day in which, according to probability, it can be forthcoming. No, says the man of law to himself: no purpose of mine will be answered at this rate.

In cases not criminal (*i. e.* where, be the case what it may, the species of suit belongs to that class,) if it be on the plaintiff's side that the failure takes place, the mischief is not irreparable. It depends upon him to suffer a nonsuit, and proceed anew, paying costs: whereupon, at the end of six or twelve months from that time, and at the expense of three or four or five score pounds, if the evidence has not perished in the meantime, he may take another chance.

If it be on the defendant's side, it may perhaps be allowed to him to take such other chance: but it depends not upon himself; and it must be at an increased expense. On the trial in question, the verdict must be against him — he in general paying the costs on both sides, — and, if he obtains the felicity of a new trial, it cannot be till after motion and argument thereupon.

In criminal cases opens a very different scene.

If it be on the defendant's side that the failure takes place, it seems rather difficult to pronounce, in every case, what may be the result. On an application made on the ground in question on that side, power for putting off the cause is not wanting; and in each instance the great probability seems to be, that, the judge being satisfied of the propriety of the application, due time would accordingly be given.

It is where the plaintiff's is the side on which the failure takes place, that the prejudice applies, and the mischief flows in consequence. Breaking out on this side, no mischief is ever to be repaired: and this is called *humanity* and *justice*.

At the preappointed hour, a witness who should have appeared, fails to appear: an article of written evidence which should have been produced, fails of being produced. Had the failure been foreseen, application for time might have been made, and time granted accordingly. The failure not having been foreseen, not having been foreseeable, no time is to be granted: the omission is fatal: the malefactor triumphs.*

Behold here another exemplification of the practice of deciding, and against the merits, on grounds foreign to the merits.

Behold here again the power of pardon thrown out of the window, like medals on a coronation day, to any one that will take it up: to any witness whose testimony is necessary: to the possessor, for the time being, of any piece of paper, the production of which is necessary: to any one who, by fraud or force, discoverable or undiscoverable, will manage so as to keep the man or the piece of paper out of the way for a few minutes.

All this is *in favorem vitæ*. No man's life shall be put twice in jeopardy. Hypocrites Say, why is man's life ever put once in jeopardy? Did ye ever, could ye ever, give any better reason for your human sacrifices, than used to be given in Mexico, and is now given in New Zealand? "Because it is what we do, and have been used to do, for so many hundred years?"

But the same hypocrisy reigns where there is no life in jeopardy. On the continent, *non*

* This can only occur of *necessity*, after the jury have been charged to try the indictment in question. Before the jury are actually charged, the court will, up to the very last moment, listen to any application to postpone the trial, either on the part of the prosecutor, or of the prisoner: and such applications are made every day.—*Ed.*

bis in idem is moreover a maxim of Rome-bred law: a maxim made indeed of stretching stuff, like all maxims of all lawyers

The malefactor in whose instance the witness or the bearer of a paper has fallen sick, or been drowned, or been made drunk, and so forgotten himself,—how much less guilty is he than if the man had come to his time? If the chance of triumph must be secured to every malefactor, let it at any rate be a fair chance let fortune judge, not fraud in fortune's name Admit dice and boxes among the furniture of the temple of justice but let the dice be fair, the boxes fairly handled, no loading or cogging, as at present.

CHAPTER V

EXCLUSION OF IRRELEVANT EVIDENCE, PROPER

Of the mischief liable to result from the admission of irrelevant evidence, no separate mention need be made be it what it may, it is resolvable *in toto* into the mischief producible by vexation, expense, and delay,

The difference between the ground of exclusion in the present case, and in those others, consists in this —in those three cases (*i e* in every case where the evidence is not irrelevant,) there is an option to make—there is a quantity of mischief, a weight in each scale there is something to lose by the proposed exclusion,—a chance in favour of justice, there is a disadvantage that must be incurred by the proposed exclusion,—a probability in favour of misdecision, or perhaps a certainty But in this case, in the case where the information proposed to be delivered in the character of evidence is irrelevant, there is nothing that can be lost by the proposed exclusion. not the least danger of misdecision is incurred by it

In this case, then, the inquiry is much more simple than in any one of those three others there, there are two quantities to weigh, two values to find. here, but one Suppose the proposed evidence irrelevant, exclusion is the indisputable consequence

Irrelevant evidence is evidence that bears no efficient relation to the fact which it is brought to prove evidence which proves nothing as well might one say, no evidence

Fit, unquestionably fit, to be excluded But to what purpose speak of it? Who is there to whom it could occur to propose the admission of any discourse coming under this description? Who is there, whose purpose could in any way be served by it?

To a party, plaintiff or defendant, acting in *bonâ fide*,— believing himself to have right on his side, and seeking nothing but the means of proving it,—there can be but one inducement for the demanding or delivering irrelevant evidence; viz the belief of its being relevant: add, material and needful, without which the relevancy of it would not help him.

False conceptions on this head are far from being unfrequent conceptions which, whatever ground there may have been for them in opinion, prove false in the result

By the force of prejudice, in a weak judgment, in a disorderly imagination, there is no saying what reverie may not be presented in the character of a lot of evidence If every such supposed or pretended article of information were liable to be obtruded upon the judge, and in any quantity, at the instance and at the pleasure of either party, and of each party, no power of exclusion on this ground being left to the judge,—it is easy to conceive how completely, in any cause, the justice of the case might by this means be overwhelmed

Prosecution for witchcraft oral evidence in support of the charge On the part of the defendant, no direct evidence, but the general proposition, the alleged improbability of the fact, in the character of circumstantial evidence * In reply, on the part of the plaintiff, to prove the probability, Glanville's History of Witchcraft, or any other article of the demonological library, proffered in evidence. Upon this invitation, shall it be the duty of the judge to take up the book on the spot, and, previously to his giving his decision in the cause, to read it from beginning to end? and so on with regard to every other article in that same library? If not, and if he should not think fit to read it, his reason for rejecting it would naturally be founded on some such ground as what is expressed by the above-mentioned clause In a reasonable mind (he would say) it does not appear to me that the contents of this book are of a nature to contribute anything, or at least anything worth regarding, toward the forming a persuasion affirming the existence of the alleged acts of witchcraft, charged by the plaintiff to have been committed by the defendant.

To a party acting *in malâ fide*, the inducements, constant and casual together, are equally obvious We have seen the mischiefs liable to result to the party in the right, from excessive loads of matter, relevant or irrelevant, thrown upon the mind of the judge: perplexity, deception, misdecision We have seen the mischief in the shape of vexation, expense, and delay, capable of being drawn down from the same source upon the party who has right upon his side: so many mischiefs, so many inducements, in the eyes of a malicious and unscrupulous adversary.

The following are natural exemplifications of irrelevant evidence:—

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* See Book V. *Circumstantial*, Chap. XVI. *Improbability*, &c.

1. Be the suit criminal or non-criminal, evidence against Tertius is relevant or irrelevant as against Reus, according as participation is or is not brought home to him. Will it be so, or not? Sometimes it will not be to be known, till the whole of it has been gone through: sometimes the fact of the participation may be proved or disproved in the first instance. The line of conduct by which a burthen, a legal obligation, criminal or non-criminal, is, or ought to be, imposed upon Tertius, is (we shall say) a chain of acts, the connexion of which with the conduct of Reus may be proved by some act antecedent to the very first link, subsequent to the last, or in concomitancy with any intermediate one. An example of the first-mentioned case, an order, of the next, an act of confirmation; of the last, extrajudicial discourse of a confessorial nature, in the way of conversation, acknowledging participation by any of those modes of behaviour which in a criminal case denominate a man an accessary, whether before the fact or after the fact.

What may have happened is, that, though Reus was in confederacy, all along, with Tertius, and though evidence sufficient for the proof of the confederacy exists, and can be produced, yet the nature of it cannot be understood till after the part acted by Tertius has been brought to view.

In all these cases, prove participation upon Reus, everything that has been done by Tertius is material: all evidence which contributes to proof of it is relevant. If no such participation be proved, all that was done by Tertius is, with regard to Reus, immaterial, all the evidence of it irrelevant.

If (as in case of an order, or formal act of ratification) it be agreed or established that no proof of participation, no other proof, can be given, than what is distinctly separate from the evidence of the principal course of action; if, at the same time, the proof of the act of participation be short, that of the principal course of action long; the proof, or what is given for proof, of the act of participation, should come first. Why? Because, failing this proof, evidence of the principal course of action falls into the category of irrelevant evidence, and the suit should of course be rid of it.

What has been done by English law in relation to irrelevant evidence, distributes itself naturally under two heads: what has been done for the exclusion of irrelevant matter, and what has been done for the accumulation of it.

First, as to the exclusion of it. In this respect, much depends upon the words in which the evidence is collected.

1. Collected *vivâ voce*, *coram judice et partibus*, all irrelevant matter, everything that appears to wander from the point, is nipped in the bud.

Accordingly, to the extent in which this mode (including its sub-modifications) is employed, irrelevancy, in the character of a source of vexation, expense, and delay, is scarce known: exclusion takes place *instanter*, and no mischief is produced on either side. None by the exclusion, because what is excluded is of no use: none by the irrelevant evidence, because, before it has time to produce any mischief, the door is shut against it.

In the following modes of collection, accordingly, the plague of irrelevancy is in a manner unknown: — 1. In the natural mode, as employed in causes tried in courts of conscience, and before justices of the peace out of sessions; 2. In the jury trial mode; 3. In preliminary examinations taken before a justice of the peace, or before a coroner; 4. In examinations before committees of inquiry, or commissioners of inquiry.

2. Irrelevant evidence is the peculiar growth of equity. In the language of that country, it is called *scandal and impertinence*. For the designation of matter to which nothing worse can be objected than that it is useless, the word *impertinence* seems to have been employed: when the irrelevancy is aggravated by injuriousness, the word *scandal*.

A consequence inseparable from the modes of collection there in use, is, that in this case the peccant matter, before it is turned out, must be let in. This circumstance we may be pretty well assured was not overlooked, when the mode of collection came to be chosen, in, by, and for, those courts. Nothing could be better adapted to the ends of judicature. Business made by the quantity of peccant matter let in; business made by the discussions relative to the exclusion of it: business made by admission in the first place; business made by exclusion in the second place.

The mischief swelled to such a height as to be past endurance the auditory nerves of the judge (of a judge who never heard anything about the matter) were continually wounded by it. it became necessary to apply a preventive remedy. Order that no *answer** be given in without having been signed, and thence manufactured and dressed up, by counsel: order that no interrogations be exhibited for the examination of witnesses, without having received the same security against scandal and impertinence. An additional load of vexation, expense, and delay, laid upon all causes, and the chance of misdecision increased by the sophistication of the evidence, for the adding of a sham security against the irrelevant matter that might come to be introduced in here and there a cause! As if the responsibility of the underling sort of lawyer whom

* Ready-written deposition of a defendant, as extracted by ready-written allegations and interrogations delivered on the part of the plaintiff.— See Book II. *Securities.*

the judge punishes every day without scruple, could receive any material addition from the responsibility of another sort of lawyer, whose situation is too near that of the judge to be exposed to punishment

Business made by letting in the irrelevancy, business made by tossing it about when in, and throwing it out, business made by stationing a set of porters whose constant employment is to keep it out Should irrelevancy creep in notwithstanding, does the responsibility amount to anything? Oh, no that would be contrary to all rule It is the lawyer that transgresses, it is the client that is punished for it

How irrelevancy is shut out, when it is men's wish to shut it out, has been seen already But what could be more adverse to the ends of judicature?

We come now to speak of the arrangements whereby the accumulation of the same valuable matter is compelled, or otherwise encouraged, in subservience to the same ends

1. Of one of the consequences of the exclusion put upon the most satisfactory kind of evidence, confessorial evidence, a momentary mention has been already made the time of the judge consumed, his faculties oppressed, by an inundation of inferior, of hearsay and other extraneous, evidence First sample of virtually irrelevant evidence artificially and habitually accumulated, — extraneous, *vice* confessorial at large

2. In this case, and from the rest of the matter belonging to this case, should be distinguished the more particular case where the use of the confessorial evidence is to serve for the authentication of an article of written evidence (contractual, or casual and informal.) a sort of evidence extractable from the party, without any additional vexation, expense, or delay, and not without a boundless mass of vexation, expense, and delay, from extraneous sources Second sample of virtually irrelevant evidence artificially accumulated,—extraneous evidence *vice* confessorial for the purpose of authentication

In a mass of assertive matter, whatsoever is false without conveying instruction by its falsity, is, on that account, whether relevant or irrelevant, at any rate superfluous and useless. The falsehoods of the thief, or other unlicensed malefactor, —such falsehoods, especially when drawn from him by interrogation, in court or out of court, are pregnant with instruction, useful instruction the fictions and other falsehoods of the lawyer, relevant or irrelevant, always superfluous and useless, barren of instruction, are pregnant with nothing but confusion and misconception, their intended fruit.

3. Of the nature of that sort of discourse which forms the matter of written pleadings, a slight sketch has been already given: of its inutility—of its repugnancy to the ends of justice—of its subserviency to the ends of judicature Third sample of virtually irrelevant evidence artificially accumulated, — matter of written pleadings, and more especially of that sort of written pleading which is called *special*

What! Pleading? the matter so carefully distinguished from evidence? Do you call pleading evidence?

It is, and it is not, evidence It is not, to any good purpose, it is, to a variety of bad ones It is not, for the purpose of giving termination, or at least any right termination, to the suit, it is, for the purpose of giving continuance to the suit It is not, for the purpose of grounding any right decision upon, and in favour of, the merits, it is, for the purpose of grounding wrong decisions on points foreign to the merits It is not, for the purpose of any decision, subservient to any of the ends of justice, because, being partly irrelevant and partly false, it is known to be unworthy of all regard, and accordingly no regard is ever paid to it it is, for the purpose of producing, without compensation, that vexation, expense, and delay, for which a compensation is afforded by genuine evidence it is, for producing that misdecision, the danger of which constitutes the characteristic mischief of false evidence

In lawyers' language, it is not evidence, because lawyers have settled with themselves not to give the name of evidence to any assertion, which, in case of mendacity, they are not prepared to punish It is evidence, because, with the exception of that accidental and adventitious property, viz that of subjecting the utterer to punishment in case of mendacity, it has all the characters of evidence

It is not evidence, for the purpose of subjecting to punishment the liar by whom it is delivered, it is evidence, for the purpose of subjecting to pillage the innocent suitor at whose expense it is delivered

4 Bills in equity may either be included under the last preceding head, or be considered as constituting a separate one

The matter of them may be considered as part of the matter of written pleading, inasmuch as it takes shelter, along with the rest, under the wing of the mendacity-licence

It may be considered as a separate article, in virtue of the multifariousness of its contents · in virtue of its containing (over and above the matter of assertion) matter of interrogation, and matter of surplusage, — general matter, which, if the appropriate matter happens to be more or less true, is still irrelevant.

From the rest of the irrelevant matter, which, whatever might be the consequence of omitting it, never is omitted, may be distinguished one never-omitted portion of scandal

and impertinence: impertinence, and that of a scandalous nature, regularly put in by the learned person whom the party is forced to pay for keeping out scandal and impertinence.

Another difference. In the sort of matter that is more apt to be presented by the word *pleading*—in what at common law goes by that name—a man puts in, or does not put in, lies, as he sees convenient: at any rate, the obligation of mendacity does not extend to any of the assertions appropriate to the individual suit. In the matter of a bill, one necessary part is appropriate matter, in respect of which matter the learned draughtsman is forced to tell lies, on pain of loss of cause to his client; this part is distinguished by the name of charging part; a chain of assertions, constituting the indispensable foundation of the corresponding chain of questions. What you do not know, and ask to know (ask of the defendant whom you suppose to know,) you must declare that you know, and pretend to tell the court how it is.

5. To the account of the difference in respect of the mode of collecting the evidence, as between common law and equity, must be set down an unknown mass of irrelevant or otherwise redundant matter, in such of the written instruments as have the name of evidence. The commissioner or examiner, the judge *ad hoc*, by whom the evidence is extracted in this shape, is paid according to the quantity. That in this state of things a portion of surplusage should in the aggregate mass of causes be generated (not to say in each particular cause,) follows as matter of course. It is equally obvious, that the quantity of it lies not within the reach of calculation; varying with individual circumstances, as well as with the idiosyncracy of the individual in each individual cause.

6. Indistinctness is the parent, not only of confusion, but of surplusage. Confusion generates business: surplusage is business ready generated. In the courts called ecclesiastical, the plaintiff's story, true or false, possesses at any rate that species and degree of distinctness which is produced by a division into numbered articles. The principle of distinctness thus infused into the charges, with the indirect questions virtually included in them, extends itself to the answers, and so on to any objections (or, as they are called, *exceptions*) which, on the score of insufficiency, or any other, may come to have been taken to the answer. In equity practice,—after the clouds of confusion that have been raised by an undivided bill, followed by an undivided answer, each with its train of surplusage,—two species of instruments (viz. the list of questions by which, under the name of *interrogatories*, testimony is extracted from extraneous witnesses, and the list of observations by which, under the name of *exceptions*, ulterior responses are called for at the hands of a defendant) have somehow or other been suffered to receive the benefit of this principle. To no lawyer by whom any such articulated instrument was ever drawn—to no professional lawyer (not to speak of judges,) could the distinctness and comparative perspicuity of the instrument thus divided, have ever been a secret: by no such lawyer could that confusion, which, in the undivided instruments, results from the non-application of that principle, have been unexperienced, have passed unperceived. It would therefore have long ago been applied to every such instrument, had distinctness been among the ends of judicature.

7. Of affidavit evidence, that worst sort of evidence, on which, and which alone, so many causes are tried—the only sort which a judge of the learned class ever receives for his own use,—mention has been made already. To point out how efficient, in the character of a cause of clearness, the same principle, articulate division, would be in this case, the slightest hint may (after what has been said already) suffice. In the case of a bill in equity, the line that separates question from question forms a sort of indirect principle of division, and thence of distinctness, however inadequate. In an affidavit, even this faint light is wanting. What can be more evident than the utility of affidavit evidence to the ends of judicature?

The confusion that pervades affidavit evidence is still more favourable to evasion; and thence (through the medium of deception) to misdecision; thence to vexation, expense, and delay, through the medium of irrelevancy. But its subserviency to the intermediate ends of technical judicature does not lessen its subserviency to these ultimate ends; nor therefore supersede the mention of it.

When, in a bill in equity, an answer, or a deposition, the adverse party has observed what to him appears to come under the denomination of scandal or impertinence,—he applies to the court, that the obnoxious instrument may be referred to the master (the subordinate judge of the court,) to report whether there be any matter of that description; and if yes, to cause it to be expunged: costs to be paid by the delinquent.

How useful an arrangement, if, in the *equity* (as the phrase is) of this equity practice, some master were employed, or some other connoisseur in scandal and impertinence, to look over the whole of the current mass of "*practical forms*" in this view. Ten volumes of this sort of matter lie before me, all in one modern publication, virtual folios, though nominal octavos.

Impertinence (to speak technically) he might find to constitute the ground of all of them; scandal, an appropriate sort of em-

broidery, in not a few · more particularly in those copious effusions of technical eloquence called *indictments* and *informations*. more particularly still where the effusion comes under the denomination of a *libel*, or (on that or any other score) comes under the denomination of a state or political offence.

On the occasion of a libel more particularly, *certain* scandal is (or at least used to be) regularly employed to encounter *problematical;* vicious or virtuous, the defendant's life, character, and behaviour, is or was aspersed Between the two scandals, observe the difference that which is *certainly* scandal, is uttered under a licence, and the author paid for it that which may either be scandal or useful truth, is uttered without the licence, and the author, guilty or not guilty, together with an indeterminate train of innocent men in the character of printers and venders, is made to pay for it

In the mean time, and until the *master* here spoken of shall have received the reference, and made his report, and that report been acted upon, and the expunction effected, — the way might be paved, at any rate, for such a reform, by a constitutional resolve I mean, among jurymen, but more especially special jurymen, and on the occasion of all those political offences of which the mischievousness is so problematical as it is commonly in the case of state libels —to lay it down to themselves as an inviolable rule, to pronounce a verdict of not guilty, if, among all these charges so coupled together in the conjunctive, there be a single one, which (whether capable of proof or not capable) is not fully proved Of what use is that man's conscience to him, who suffers an attorney-general, or any other lawyer at the bar, with or without the support of an imperious and brow-beating lawyer upon the bench, to force him to commit perjury?

CHAPTER VI

EXCLUSION OF THE EVIDENCE OF A CATHOLIC PRIEST, RESPECTING THE CONFESSIONS INTRUSTED TO HIM, PROPER.

Among the cases in which the exclusion of evidence presents itself as expedient, the case of catholic confession possesses a special claim to notice.*

In a political state, in which this most extensively adopted modification of the christian religion is established upon a footing either of equality or preference, the necessity of the exclusion demanded on this ground will probably appear too imperious to admit of dispute.

In taking a view of the reasons which plead in favour of it, let us therefore suppose the scene to lie in a country in which the catholic religion is barely tolerated in which the wish would be to see the number of its votaries decline, but without being accompanied with any intention to aim at its suppression by coercive methods

Any reasons which plead in favour of the exclusion in this case will, *à fortiori*, serve to justify the maintenance of it, in a country in which this religion is predominant or established

These reasons seem referable partly to the one, partly to the other, of two of the heads above mentioned —viz 1 Evidence (the aggregate mass of evidence) not lessened, and 2 Vexation, preponderant vexation

1 First reason in favour of the exclusion · mass of evidence not lessened by it

Suppose it an established, and thence a known rule of procedure, that a catholic priest is not exempted from the obligation of disclosing (if called upon in a judicial way, like any other witness) statements made to him in such his character, by a person appearing before him in the character of a penitent, in the catholic sense statements of such a nature, as would operate in the character of self-prejudicing (including self-criminative) evidence, if reported by such his confessor, in or for the use of a court of justice.

What would be the consequence?—That, of that quantity of confessorial evidence which is now delivered in secret for a purpose purely religious, a certain proportion (it is impossible to say what, but probably a very considerable one) would not be so delivered would be kept back, under the apprehension of its being made use of for a judicial purpose The rule would operate as a prohibition upon all such confessions for the spiritual purpose, as would be applicable to the temporal purpose and the penalty would be, whatever consequence of a penal or otherwise burthensome nature might be expected to flow from the decision which such testimony would warrant, and would therefore be calculated to draw forth.

So far as the prohibition thus applied had its natural effect—the effect of preventing the practice, —so far, the support afforded to the exclusion by the reason "mass of evidence not lessened," would extend So far as the prohibition failed of being followed by this effect, the reason operating in support of the exclusion would be to be sought for under another head. *vexation*, preponderant vexation.

Of this vexation, then, what would be the quality and the amount? It would present itself in a variety of shapes: —

1 I set out with the supposition, that, in the country in question, the catholic religion was meant to be tolerated. But with any

* For the Author's farther views on this subject, *vide supra*, Vol. VI. p. 98.

idea of toleration, a coercion of this nature is altogether inconsistent and incompatible. In the character of penitents, the people would be pressed with the whole weight of the penal branch of the law; inhibited from the exercise of this essential and indispensable article of their religion; prohibited, on pain of death, from the confession of all such misdeeds as, if judicially disclosed, would have the effect of drawing down upon them that punishment; and so, in the case of inferior misdeeds, combated by inferior punishments.

Such would be the consequence to penitents: to confessors, the consequences would be at least equally oppressive. To them, it would be a downright persecution: if any hardship, inflicted on a man on a religious account, be susceptible of that, now happily odious, name. To all individuals of that profession, it would be an order to violate what by them is numbered amongst the most sacred of religious duties. In this case, as in the case of all conflicts of this kind, some would stand firm under the persecution, others would sink under it. To the former, supposing arrangements on this head efficient and consistent, it would have the effect of imprisonment—a most severe imprisonment for life. As to those who sunk under it,—what proportion of the number would on this occasion be visited by the torments of a wounded conscience, and to what degree of intensity those torments would amount in the instance of each individual, are questions, the answer to which must on this occasion be referred by a non-catholic to the most competent judges amongst catholics: but a species of suffering, the estimation of which does not require any such appropriate and precise information, is the infamy that could not but attach itself to the violation of so important a professional as well as religious duty

The advantage gained by the coercion—gained in the shape of assistance to justice, would be casual, and even rare: the mischief produced by it, constant and all-extensive. Without reckoning the instances in which it happened to the apprehension to be realized, the alarm itself, intense and all-comprehensive as it would be, would be a most extensive as well as afflictive grievance.

But the vexation pointed to as above would not be the only price that would be to be paid for so inadequate an advantage. The advantages of a temporal nature, which, in the countries in which this religious practice is in use, flow from it at present, would in a great degree be lost: the loss of them would be as extensive as the good effects of the coercion in the character of an aid to justice.

To form any comparative estimate of the bad and good effects flowing from this institution, belongs not, even in a point of view purely emporal, to the design of this work. The basis of the inquiry is, that this institution is an essential feature of the catholic religion, and that the catholic religion is not to be suppressed by force.

If in some shapes the revelation of testimony thus obtained would be of use to justice, there are others in which the disclosures thus made are actually of use to justice, under the assurance of their never reaching the ears of the judge. Repentance, and consequent abstinence from future misdeeds of the like nature; repentance, followed even by satisfaction in some shape or other, satisfaction more or less adequate for the past: such are the well known consequences of the institution; though in a proportion which, besides being everywhere unascertainable, will in every country and in every age be variable, according to the degree and quality of the influence exercised over the people by the religious sanction in that form, and the complexion of the moral part of their character in other respects.

But, without any violation of this part of his religious duty, and even without having succeeded so far as to have produced in the breast of the misdoer any permanent and efficacious repentance, modes are not wanting in which it may be in the power, as it naturally will be in the inclination, of a conscientious and intelligent confessor, to furnish such information as shall render essential service to the interests of justice I mean, by ministering to the prevention of such individual misdeeds as, though meditated, are as yet at a stage short of consummation; or of such others as, though as yet not distinctly in contemplation, are in a way to present themselves to the same corrupted mind. Who the misdoer is, the confessor knows better than to disclose; as little will he give any such information as may lead to the arrestation of the delinquent, under circumstances likely to end in his being crushed by the afflictive hand of the law. But, without any such disclosure, he may disclose what shall be sufficient to prevent the consummation of the impending mischief. "At such or such an hour, go not, unless accompanied, to such or such a place: strengthen such or such a door: be careful to keep well fastened such or such a window."

Warnings of this kind, if I understand aright, have not unfrequently been given:—warnings, which might have been given, and would have been given in better times, might (had they been given) have operated as preventives to the most grievous public calamities. At the time of the religious wars in France, more than one of the fanatics, who, with different degrees of success, aimed a murderous hand at the person of the monarch, prepared themselves for the enterprise, according to the histories of the times, by previous confessions, in the course of which the

design was more or less disclosed. Without exposing the intended assassin, it might naturally have been in the power of the confessor to have frustrated his flagitious project without opportunity, the attempt would not have been made, and, without the attempt, the design would not have afforded evidence sufficient for the purpose of penal justice.

The discussion has been rendered the more particular, for the purpose of giving the clearer view of the essential differences by which this case stands distinguished from another, with which it might be liable to be confounded. I mean the case of those disclosures which may come to be made by an individual, criminal or non-criminal, to a law adviser, in the character of attorney or advocate, a topic which will come to be considered in its place *

CHAPTER VII

REMEDIES SUCCEDANEOUS TO THE EXCLUSION OF EVIDENCE

We have seen how easily it may happen that the evils opposite to the collateral ends of justice shall be greater than the evils opposite to the direct ends, that the vexation, expense, and delay, produced by the delivery of this or that lot of evidence, shall constitute a greater mass of evil than that of the undue decision or failure of justice that may take place for want of it: and this, even supposing the misdecision to be not merely the accidental or probable, but the necessary, result of the exclusion put upon the evidence. We have seen that, in this case, if there be no other resource, the propriety of the exclusion is a necessary result.

But, how necessary soever, it is manifestly an extreme and a most disastrous remedy. It is sitting down under the disease, to save the unpleasant consequences apprehended from the remedy. It is taking the course the patient would take, who should resolve to endure the torment of the stone, in order to save the pain and danger of the operation.

But as, under the pressure of that bodily affliction, a skilful physician will naturally look out with anxious diligence for whatever milder remedy presents any prospect of relief,—so, where vexation, expense, and delay, is the disease, a vigilant and honest legislator will never embrace exclusion and thence misdecision in the character of a remedy, without applying all his industry to the discovery of other remedies that may be applied without contravention of any of the ends of justice.

If the exclusion of evidence be proper and justifiable in any case, it can only be in default, or by reason of the insufficiency, of such milder remedies. The indication therefore of what presents itself in that character, is a task which seems indispensable to the present work.

The following short descriptions may serve, in the first instance, to afford a general conception of the principal arrangements that offer themselves to this view. Explanations, when they appear necessary, will follow. Let it not be regarded as an objection, if a set of arrangements presented here in the character of succedanea to a comparatively narrow abuse, exclusion of evidence, should be found to include the leading features of a system competent to the extirpation of the immense mountain of abuse, of which that inferior hill forms a part. Its utility with reference to that extraneous purpose, neither destroys nor impairs its utility with reference to the direct purpose of this work.

I. Against vexation, expense, and delay, taken together —

1. Anticipative survey of the contents of the budget of evidence on both sides.

2. Tribunals within reach —in which is included, limitation of the local extent of judicial districts, thence augmentation, or (according to what has been, or has not been, done before) restoration, or non-reduction, of their number: the county courts, and more especially the hundred courts, of former times in England.

3. Sittings of each uninterrupted. Exemplifications: the different courts of conscience scattered here and there over the face of the country, but more particularly and literally the London police offices † Also, the courts held to so many purposes by justices of peace, acting, not in general sessions, but in voluntary division meetings, or singly, at their own houses.

4. Meeting of the parties *coram judice*, at the outset of every cause, for the purpose of the above-mentioned anticipative survey, as well as for so many other purposes. Exemplifications — practice of the courts of conscience, and of the courts held by justices of the peace, as above.

5. Examination by epistolary correspondence, and, by that means, of persons resident at any magnitude of distance: whether within or without the effectual jurisdiction of the court in question, or the government under which it acts. This, in the case where examination *viâ voce* is barred by impracticability, physical or prudential.

II. Against expense, exclusively or more particularly —

(6) 1. Power to any party to insist upon the production of any evidence, notwithstand-

* *Vide infra*, Part IV. *Vexation*, Chap. V. § 2.

† By 2 & 3 Vict. c. 71, the magistrates are to sit in the police courts every day from ten till six.—*Ed.*

ing any preponderancy of expense, on condition of bearing the burthen of it definitively, as well as in the first instance. This includes the defraying the expense necessary to the production of evidence deemed necessary to the opposite party, in preference to the seeing a decision pronounced in favour of the adversary (say the defendant) on the ground of the inordinateness of such necessary expense.

(7) 2. Advertisement for assistance to justice for the expense of evidence. The need of such assistance to be certified by the judge, if he thinks fit, after hearing what, on the occasion of the anticipative survey, has been said on both sides.

(8) 3. Abolition of taxes upon justice.

III. Against delay: —

Against delay, in respect of the contingently consequent deperition of the matter of evidence: —

(9) 1. Prompt collection of forthcoming, without waiting for the unforthcoming, evidence.

Against delay in respect of the contingently consequent deperition of the matter of satisfaction: —

(10) 2. Provisional decision on either side: taking sufficient security for restitution *ad integrum*, in the event of a subsequent production of the as yet unforthcoming evidence.

(11) 3. Provisional sequestration of the matter of satisfaction, without ulterior decision at that time.

IV. Against vexation to the judicial breasts, and consequent delay, in the paramount appellate judicature of the House of Lords (a very particular case, peculiar to the British constitution)

(12) 1. Application of the principle of the Grenville Act to that upper house of parliament.

After this summary view, let us now descend to particulars.

I. Remedy the first: —Anticipative survey of the contents of the budget of evidence; viz. of the contents of it on both sides, and (when there are divers persons on the plaintiff's side, or on the defendant's side, or on both) on all sides.

That vexation, expense, and delay, may be saved, by putting an exclusion upon a lot of evidence, is manifest enough. Be the evidence ever so necessary to right decision, the production of it will always be attended with some portion (be it ever so small) of each of those collateral inconveniences. Exclude the evidence, you exclude right decision, you exclude justice; but, on the other hand, you exclude along with it those collateral, and minor, and (generally speaking) inferior, inconveniences.

Among the advantages resulting from the preparatory operation, one is obvious enough: the *exclusion* which it would, every now and then, enable the judge to put upon evidence that would otherwise have been to be received — upon evidence deemed irrelevant or superfluous; which is as much as to say, of such a nature, that, by the exclusion of it, no prejudice could come to the ends of justice.

But, on the present occasion, it is not in the character of a means of exclusion that this operation is proposed, but as a means of saving the judge from the necessity of putting exclusion upon evidence: from the necessity of an operation so adverse, or even fatal, to the direct ends of justice, in the case where the lot of evidence which but for that survey would have been to be excluded, was material; and still more, if it was absolutely necessary to enable the judge to pronounce such a decision as shall be conformable to those direct and principally-to-be-regarded ends. In this character, the use of the anticipative survey is not quite so obvious as in the other character just mentioned.

1. Under the blind arrangements made, on the ground here in question, by English jurisprudence (a limited allowance of time for the whole trial, including the production of all the evidence — a limited allowance of time, for a quantity of business that may be any number of times greater than the whole quantity of the business that can possibly be done in that time,) — an incident which, for want of such anticipative survey, must every now and then take place, is, that, in the confusion produced by this forced condensation, a quantity of evidence altogether indispensable shall stand excluded; while another mass, which upon the anticipative survey would have been seen to be superfluous, has been admitted. Introduce the anticipative survey, the superfluous evidence is excluded; and, by means of the room thus gained, the indispensable mass of evidence, the evidence necessary to the principal end of justice, is let in.

Of the blind fixation and limitation of the quantity of time allotted for the reception of a mass of evidence, the quantity of which, for the purpose of any general rule, is incapable of being foreknown, — of this imbecility or this fraud, the consequence is, an indiscriminating exclusion of an indeterminable proportion of the whole mass of the evidence which would otherwise have been delivered. Of the prevalence of this blind practice in the English system, an indication somewhat more in detail has been given in another place.* Rendering the practice on this head completely consistent with the ends of justice, is what could not be done without the abolition of those barricades, and the restitution

* Book VIII. *Technical System;* Chap. IX. *Blind Fixation of Times.*

of natural liberty. But, supposing them to remain, in the proposed anticipative survey may be seen the only remedy by which the venom of that abuse can be mitigated, and the mischief of it reduced.

English home-bred law, as also Rome-bred law (English as well as continental,) afford each of them a remarkable exemplification of a blind and indiscriminate exclusion put upon masses of evidence, in nature as well as quantity altogether indeterminate: English home-bred, by means of the limited and unextensible quantity of time allowed in most cases for the reception of the whole mass of evidence, Rome-bred, in consequence of the studied secrecy, by the operation of which the door is shut against all such counter-evidence, or other ulterior evidence, the demand for which would have been created and made known, had the mass of evidence adduced by each party been known in time to the other. These examples, while they bring to view the demand for the anticipative survey here proposed, will serve to show, at the same time, how exclusion of evidence is liable to be produced, not only without benefit, but without thought: and, while they show the use of this survey in other respects, will also show in what it has the effect of preserving from exclusion, evidence which would otherwise have been subjected to that fate *

The following would be the sort of anticipative survey which I would propose.—

Each party, in the presence of the other or others, produces a list of the contents of his budget of proposed evidence: names and descriptions of the proposed witnesses, whence they or their testimony have to come, with the articles of real and written evidence (if any) which they will respectively have to produce, and the particular purposes for which each article of evidence is wanted. Each party, in a word, gives in, for the consideration of the judge and the opposite party or parties, the same sort of information (so far as evidence is concerned) that, under the existing system each party's attorney puts into the sort of document called a brief, for the instruction of the advocate.

Results of such a survey:—

1. All evidence which (supposing it to be true) will, in the opinion of the judge, be either irrelevant, or unnecessary, or unavailing, discarded beforehand: and the vexation, expense, and delay, attached to the production of it, saved.

2. Item, all evidence, from the production of which, though material and even necessary, a preponderant amount of vexation, expense, and delay, would be inseparable.

3. In the instance of each article, arrangements taken in concert, for the production of it in such time and manner as shall be attended with least delay, vexation, and expense.

It is only where the cause labours under a certain degree of complexity, that the demand for this sort of survey can have place. In the great majority of causes, this one meeting would serve for the termination as well as commencement of the cause: as it does in the English courts of conscience.

In some cases, neither the effect nor the substance of the evidence can be anticipated: the effect of an original, for example, from an alleged transcript: and the points to which it is possible for a witness to speak may often be foreknown with certainty, when the effect of his testimony can not reasonably be presumed.

Many are the cases in which the irrelevancy or inutility of one mass of evidence follows with certainty from the omission of another. Discard Titius, all testimonies respecting his character, all evidences which are wanted for no other purpose than to operate in opposition or support of his, become (whether irrelevant or no) useless.

Confront the anticipative survey with special pleading. The information which special pleading gives (or rather professes to give without giving,) and in the worst possible mode, and by a chain of communication purposely wire-drawn through a course of months or years,—that, and more, the anticipative survey gives, freely and honestly gives, in the course of a single meeting, commonly in fewer minutes than the other course would consume months. Special pleading brings forward the allegations, carefully keeping back the evidence (if any) from which they are to receive their support: the anticipative survey brings to view at the same time, the allegations, and either the evidence itself or the sources from which it is to come. Special pleading, giving (*i. e.* selling) encouragement, reward, to false allegations, to which,—exempting them from the punishment provided for allegations recognised in the character of evidence,—it has secured the effect of evidence. the anticipative survey, throwing the sunshine of cross-examination upon every syllable that is said,—call it allegation, call it evidence.

Meantime, this anticipative survey, what is it? Is it vision, imagination, innovation? Comes it from Formosa? from Utopia? No: not it indeed: nothing is there in the least new in it, but the name. You may see it, in every court where Justice is in honour, and, at the same time, permitted by Power to show her face. You may see it in every arbitration court, in every police office; in the court of every justice of the peace throughout the kingdom, acting out of the trammels of regular iniquity. You may see it in any court of

* See Part VI. *Disguised Exclusions*, Chap. III. *Exclusion put upon indeterminate portions of the matter of Evidence.*

conscience, as often as the nature of the cause admits of its containing a mass of evidentiary matter complex enough to afford a demand for any such distant scrutiny. You may see it in every counsel's, in every attorney's, brief: with no other difference than between complete, correct, and voluntarily or involuntarily honest, information, on the one hand, and, purposely incomplete, purposely incorrect, mutilated, garbled, sophisticated, on the other.

II. Remedy the second:—Tribunals within reach.

In other points of view, the importance of this remedy belongs not to the present purpose. Diminish in idea the importance of the matter in dispute in the cause; increase the distance of the spot from which a witness, or the bearer of an article of real or written evidence (who to this purpose may be called a witness,) has to come; increase, in like manner, the number of such witnesses;—you may always bring about a state of things in which the vexation, expense, and delay, attached to such conveyance, shall severally or jointly form a mass of collateral inconvenience preponderant over the evil opposite to the direct ends of justice in the case in question; over the evil of misdecision. But wherever this reversal of the more usual and natural proportion takes place, exclusion of the evidence (though misdecision follow) is the result authorized and required by a due regard to the aggregate of the ends of justice. But misdecision, especially when manifest, is a great and glaring evil: it is a lamentable resource. Diminish, on the other hand, the distance of the spot from whence the witness or witnesses have to come, in order to reach the seat of judicature, you may make sure of coming to a state of things in which the aggregate inconvenience of vexation, expense, and delay, by reason of attendance, can never be equal in weight to the evil of misdecision in any the least important cause.

The length to which, in point of prudential and even physical practicability, the application of this remedy can be carried, depends, it is manifest, upon the state of the population. Confront, on this ground, the state of London or Paris, with that of Siberia or the back settlements in America.

In default or aid of *vivâ voce* deposition and examination, comes naturally the epistolary mode, as mentioned elsewhere. Unfortunately, the same causes which render the establishment of tribunals within everybody's reach for *vivâ voce* deposition and mutual examination of the parties, impracticable, render the epistolary mode of communication unapt to be generally practicable.

But, in this same state of things, the substitution of professional agents, as under the technical system, would in general be not less impracticable; and, instead of assuaging the inconvenience, would be more apt to aggravate it.

The consequence is, that, in a thinly peopled country, for slight injuries (more precisely as to the degree it is impossible to speak) the nature of things admits not of a remedy. Within the bosom of each family, absolute power in the head; as between a member of one family and that of another, independence and anarchy: such is the state of things, unless in so far as it may be susceptible of relief from the occasional and rare visitations of delegated (yet to this purpose absolute) power from a distance.

In a system of abuse, particular abuses serve sometimes as palliatives, sometimes as covers and apparent justifications, to each other.

In the absence of tribunals within reach, may be seen the most plausible pretence for the expulsion of the parties from the presence of the judge.

Out of British ground, it would be difficult to form an idea of the pitch to which the grievance opposite to the arrangement now proposed has been raised in England. Value at stake, a few thousands of pounds, or a few shillings; station of the judge in the metropolis; abode of suitors at 350 miles distance.

Even in England, it is comparatively an innovation. In former times, each county, each hundred, had its court; not to speak of minor ones: and if for one sort of cause, why not for another? But the great judges, whose lips were close to the sovereign's ear, stole the sword from his side, and crushed their little rivals at a distance: the metropolitan courts swallowed up the country ones. By these and other devices, personal attendance being rendered intolerable to the parties,—admission of substitutes, under the name of attorneys, was prayed for, and granted, as an indulgence. Dependants, accomplices, and instruments of the judges,—these substitutes became the natural enemies, and (with their confederates the advocates, called serjeants and apprentices) the sure betrayers, of the parties their employers.

To these real grievances, circuit courts added a sham remedy: excess of delay, crowned by excess of precipitation. In each separate cause, six or twelve months consumed in the London offices, in doing worse than nothing; at each one of a given list of county towns, from one to four days employed in a year, in running causes against time: for any given number of causes, each of any given length, exactly at every place the same time.

III. Remedy the third:—Sittings uninterrupted.

This remedy corresponds to another article in the list of the devices of the technical system, viz. *fixed times with long intervals*;

and consists in the removal of that abuse. In other respects, the mischievousness of that abuse, the consequent importance of this remedy, are topics that belong not to the present head.*

What belongs to the present head, is to show how the evil attached to misdecision by reason of exclusion of evidence, and thence to exclusion of evidence, may be removed or lessened by these other means, viz by filling up the vast gulfs fixed at present between the to-day and the to-morrow, in the chronology of technical judicature

In Westminster Hall, as everybody knows or is supposed to know, there are exactly four days, and no more, in every year each day consisting of twenty-eight ordinary days, more or less Distance between to-day and to-morrow various: minimum, about one month, maximum, more than four calendar months

In the rest of England, certain northern counties excepted, there are, according to the same chronology, but two days in a year, viz in the juridical metropolis, the assize town of each county each such day consisting of two ordinary days, or thereabouts, distance between to-day and to-morrow, half a year

In three northern counties there is but one such day,† the length of it not differing, in any considerable degree, from that of a southern day distance between to-day and to-morrow, one whole year

To give a complete and accurate system of juridical chronology would be to give a complete institute of a separate branch of science, forming, as already observed, a twig of that branch of the *flash* language Illustration only being the object here, the above outline will be sufficiently full and accurate for the present purpose

Of these great gulfs between day and day, the effect in respect of exclusion of evidence is two-fold —1 To increase the evil of it, when it takes place, 2 And thereby the cogency of the demand for it

The plaintiff's right rests upon a deed To-day the original is not, could not have been, forthcoming to-morrow, at least for anything that is known to the contrary, it will or would be a transcript, a correct and complete transcript, is forthcoming now But, the original being in existence, the transcript, not being the best evidence, stands excluded, unless the defendant, by and with the advice of his learned assistants, thinks fit to admit it.

Observe now the difference between natural time, and juridical time.

The juridical to-morrow, is it the natural to-morrow? The delay, taken by itself, is scarce an object to either party no advantage worth stickling for to a *malâ fide* defendant and his learned accomplices. The expense though commonly an inferior, would indeed be something of an object more or less (understand the expense of a fresh hearing, with its fresh fees) But, forasmuch as in most cases the costs on both sides fall to the charge of him against whom the decision passes, the costs of the delay thus purchased would fall upon the purchaser and the amount of the respite being, by the supposition, no more than a natural day, it can scarce ever happen that the advantage thus to be purchased shall be adequate to the expense He will, therefore, of course, admit the transcript instead of the original in other words, not call for the putting upon the original that exclusion which he has a right to call for

The juridical to-morrow, on the other hand, is it so long to look for as this day six months? In the ordinary state of things, the exclusion of the inferior second-hand evidence will be rigorously exacted The injured plaintiff excepted, it is the interest of all parties that the application of the excluding rule be exacted without mercy It is the interest of the malefactor's learned accomplices of all classes, and they have taken care that it shall be his Costs of to day's fruitless hearing, so much revenge at any rate Half a year's interest upon the sum due: or, what comes to the same thing, upon a sum equal to the value of the service (in what shape soever) demanded by the plaintiff, at the charge of the defendant, at the hands of the judge. Half a year's interest upon the sum due. to this amount is the premium which the learned contrivers of the system have taken care to secure, for encouraging men to engage and persevere (in the teeth of conscience) in the defence of a bad cause a bounty, to the value of which, as any one may see, there are no limits Add to the above, the chance of saving the principal, by the depeition of the evidence in the course of this juridical day; or the certainty of it by withdrawing the matter of satisfaction, the defendant's property, out of the plaintiff's reach Add again two other chances, which, in a mass of cases covering a great exent of ground in the field of law, for the better encouragement of business-making injustice, the same learned wits have been ingenious enough to provide, and happy enough to preserve In many cases, upon the death of the malefactor, death of the suit, for the benefit of his representatives upon the death of the party injured, death of the suit, for the benefit of the malefactor himself.

Thus stands the premium in the south of England; and in the northern counties above mentioned, the value of it, as above mentioned, is exactly double.

Thus at common law: but in equity, it sets calculation at defiance.

Thus stand the interests of the defendant, dishonest or honest: thus stand the interests

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* See Book VIII. Chap. X.

† *Vide supra*, p. 51, Sub-note [a].—*Ed.*

of the defendant's honest or dishonest, but in both cases equally unpunishable and irreproachable, professional assistants and advisers.

But the interest of the injured plaintiff's assistants and advisers, which way do they point? The same way as those of their own client? No: but the same way, and with equal force, as those of his adversary's equally learned professional assistants and advisers.

In this state of things, is it in the nature of man — is it in the nature of the man of law, that the exertions made for the admission should be equally sincere, equally strenuous, with the exertions made for the exclusion, of the evidence?

In equity you have plaintiffs and defendants by dozens, scores, or even hundreds, on a side. Observe the consequence: *Mors Ricardi, vita Roberti;* from the mortality of the suitors, comes the mortality of the suit. One of the plaintiffs dying, the lawyers kill the suit: then comes a bill of reviver, to raise it like the phœnix from its ashes.*

IV. Remedy the fourth: — Meeting of the parties at the outset, in the presence of the judge.

This remedy corresponds to the first and fundamental article in the list of the devices of the technical system, viz. exclusion of the parties from the presence of the judge: and consists in the removal of that abuse. In other points of view, the mischievousness of that abuse, the importance of this remedy, belong not to the present purpose.

What belongs to the present purpose, is simply the importance of this meeting, and at this stage of the cause, to a preceding article in this list of remedies — the proposed anticipative survey of the contents, of the budget of evidence on both sides, nor to this operation in respect of every beneficial effect with which it is pregnant, but only in respect of the room it is capable of making for material evidence, by the exclusion of superfluous and less material evidence.

In regard to the matter of fact which constitutes the principal subject-matter in dispute, it may, in the instance of each one of the parties, have happened, or not have happened, to him, to have been in a situation enabling him to deliver evidence, direct or circumstantial, respecting it. But a matter to which it is scarce possible, in regard to either of them, that he should not be able to speak, in the way of evidence, — and to which, in most cases, he will be better able to speak than any one else, — is the result and particulars of his *information* and *expectations* relative to the quantity and quality of the mass, and of each article in the mass of the evidence which he looks upon himself as able (with the assistance of the arm of justice) to procure.†

Whether the correctness, or the completeness, of the information on this head be considered — whether in each instance the party be considered as honest or dishonest, sincere or insincere, — the importance of his presence will still be out of doubt. Honest, his own purpose — dishonest, the purpose of his injured adversary — can never be adequately answered by any person in his stead.

It is from himself, in most instances, that the information will have to come. From any other person, from any professional law-assistant of his, the information thus afforded would in all such instances be upon no better footing than second-hand evidence, derived, or pretended to have been derived, from the client: false perhaps in its origin, and without danger to the author of the falsehood; or, if true, truncated or perverted by the negligence or sinister interest of the lawyer through whose lips it would be to be delivered.

From the original source, the breast of the client, all pertinent questions that could be put on the other side would come accompanied with a reasonable expectation of their extracting (true or false) an instructive answer. Directed to the breast of the law-assistant, — if, on the part of the client, there were any deficiency in respect of the maximum of honesty and sincerity, all such expectation would in general be vain. Such and so much information as in the conception of the client it would be for his advantage to be handed in to the judge, — such and so much he would (in so far as it occurred to him) communicate to his professional substitute for that purpose: such and so much as in his conception threatened a contrary effect, such and so much, it would be equally his care not to communicate.

In lieu of original *viva voce* testimony, conceive the business of the proposed survey

* The multiplicity of parties is no fault of equity. There are no more parties than interests; and there ought not to be fewer. When the cause is in this way to a certain degree complex, common law knows not how to deal with it: — what is done (if anything be done) must be done by equity. But the greater quantity of natural and inevitable delay is afforded by the case, the greater the barbarity in thus making artificial delays to heap upon it.

† The persons and things he looks to as the sources of the evidence he expects to produce, are they at his command? In that case, he is already in a condition fully and determinately to give an inventory of the contents of his side of the budget of evidence. Are they, any of them, in any respect, out of his reach or knowledge? In that case, he stands in need of the arm of justice, to enable him, by means of the investigative process, to hunt out the sources from which (as far as it exists and is attainable) the evidence, the information he looks for, must be made to flow.

managed in the only way in which learned judges will allow themselves to manage by themselves any sort of evidence — by the affidavit testimony of the parties, their respective attorneys, or all together With the outside show of justice, the learned and venerable personages in question would as usual be delighted; with the inward fruit and effect, they would not, any more than usually, be afflicted.

On this, or any other occasion, affidavits from the defendants, lawyers or non-lawyers, would they be an adequate succedaneum to the presence of the deponents themselves? Yes, if, like the man, the paper could stand up and answer questions, could betray what it would wish to conceal, — by blushes, by hesitation, by evasive response, by self-detected or otherwise detected mendacity, or by silence

V. Remedy the fifth. — Examination in the epistolary mode.

This remedy has not its counterpart anywhere in the list of the engines of chicane.

The idea of this remedy is, on the contrary, drawn from that fountain, in other respects so rich in abuse, the practice of the courts of technical procedure

The mode here in question is the mode in which, in equity procedure, evidence is extracted from a defendant, by the *bill*, the *amendments* (if any) to the bill, and the *exceptions* (if any) taken to the answer

That this mode, if *substituted* to the best mode (examination *vivâ voce per partes et per judicem*) is not so favourable to the ends of justice, as the same mode *subjoined*, where the importance of the cause warrants so great an addition to the delay, vexation, and expense — subjoined, I say, to that *vivâ voce* mode — seems to be out of dispute.

But a case has been already mentioned (and that a case which, in so commercial a country as England, cannot but receive frequent exemplification,) in which *vivâ voce* examination will be in general not to be obtained, viz. where, at the time in question, the residence of the proposed witness is within the dominions of some foreign state In this case, if no assurance, regarded as sufficient, be given, that the proposed witness will, within a sufficiently short interval, be forthcoming in England (taking that for the proposed country,) in such manner that his testimony shall be delivered in the accustomed mode (regard being had to the nature of the suit,) — the effect of the expatriation is thereby to put an exclusion upon the testimony.

In this same sort of case, it will not unfrequently happen that the proposed witness, though at the time not resident within the jurisdiction of any English court, shall in effect be not the less subject to the power of it, as (for example) in virtue of some property there, which he is unable or unwilling to remove; or in virtue of any other bond of attachment, by which his affections are fastened to the spot.

In this case, give to the party who has need of the testimony the power of extracting the testimony of the proposed witness in this mode, you apply a remedy succedaneous to that of exclusion, you obtain a mass of evidence, which (by reason of the delay attached to the production, or to the chance of the production of it) it might otherwise have been necessary — prudentially, or even physically, necessary — to exclude.

Upon the face of it, this remedy is bad in the way of diet, good in the way of medicine: bad, by reason of the opportunity it allows for mendacity-serving premeditation and instruction, and of its depriving the cause of the circumstantial evidence afforded by deportment good, viz in cases where, premeditation being necessary to complete and correct response, examination *vivâ voce* is not of itself sufficient, and in the cases in which, by reason of distance from every judgment seat the power of which is applicable to this purpose, such examination is not to be had.

Pursuing no ends but those of judicature — blind, when not hostile, to all better ends, — the English technical system, where it does employ this remedy, employs it in the way of diet — refuses to employ it in the way of medicine.

In the room of the mode of examination better adapted (as above) to ordinary use, English equity, within the irregular and comparatively narrow field of its jurisdiction, employs this mode of examination in all cases. In lieu of that preferable mode of examination, where rendered impracticable by distance, it does not indeed reject altogether the assistance of this remedy, but, by useless clogs and conditions impairs the efficacy of it The defendant himself being the proposed witness — his own self-regarding testimony being to be extracted by the adversary, in the hope of its having the effect of self-prejudicing testimony, — a set of commissioners are to be sent to the antipodes, or found there, to apply to him, in the character of a security for veracity (by means of the ceremony of an oath,) that eventual punishment, to the application of which no such ceremony is (except thus by positive institution) necessary. From the plaintiff, while remaining such, no such testimony is permitted to be obtained, and from an extraneous witness, though in the same cause, testimony (if in that distant situation extracted at all) is not allowed to be extracted in that mode, is not allowed to be extracted but in another, the *vivâ voce* mode, *per judices ad hoc*, appointed on both sides, the parties not present (neither by themselves nor by their advocates;) nor in any mode can it at this distance be extracted but by consent of parties on both sides.

Out of the comparatively narrow field of equity jurisdiction (with the addition of the still narrower fields of ecclesiastical court and admiralty court jurisdiction,) the remedy, except in an extraordinary case presently to be mentioned, is alike unknown for diet and for medicine.

From the superior courts of common law, commissions for taking examinations of witnesses (extraneous witnesses only, not parties in the character of witnesses) have been known to be sent into foreign parts, in imitation of the commissions issued, also, at more early periods, and in more frequent instances, from the courts of equity, as above.* But this appears never yet to have been done, but by consent of both parties. Precious remedy! Good against *bonâ fide*, inapplicable against *malâ fide*, litigation! Inapplicable, where the disease cries aloud for remedy: good, where there is no disease, or next to none! But, in this case, the mode of examination, whether better or worse than epistolary, is not epistolary, but *vivâ voce*.

Neither by equity nor by common law is the remedy applied in any other than that class of causes indicated by the denomination of *civil*, synonymous in this case to non-criminal causes.

Such, according to a rough outline, are the distinctions themselves: *causa patet*, here as elsewhere.

When, to give the suitor a partial relief under the denial of justice produced in the practice of the common-law courts by the exclusion of both parties from the presence of the judge, equity came in and proffered her treacherous assistance,—it was on condition of paying her retainers to scribble questions instead of speaking them; and thus, instead of prompt and spoken answers, to extract studied answers, manufactured by others of her retainers, to be set to work on the other side. On what occasions was it that these pretended servants of justice were ready and desirous of lending to this purpose their dear-paid services? Not on the few occasions alone in which, on the part of the party in the right, and for the purposes of justice, there was a real need of it; but on all occasions in which, by the sale of their services, there was money to be got; that is, on all occasions whatever, that arose within the limits of that field, which, in the scramble for jurisdiction had fallen to their share.

VI. Remedy the sixth:—Remedy the first applying to expense alone. Power to either party to charge himself with the expense of an article of evidence, to the relief of a party on the other side.

The application of this remedy admits of two diversities. Forget not that, in both, the use of it is to serve in the character of a makeshift provision, the intention of which is to save justice from the danger which she cannot fail of incurring as often as the door is shut against needful evidence.

The first case is where, it being presupposed that the burthen of the evidence on both sides is to be made to rest on the shoulders of the party in whose disfavour the cause is decided, this burthen (as to such part of it as one of the parties has created) would, when compared to the value in dispute, be too heavy to be thrown on the other of the parties. Value in dispute, say £5: expense of necessary evidence on the plaintiff's side, say £500: expense of evidence on the defendant's side, not worth bringing to account. Under the natural arrangement respecting costs in ordinary cases, the plaintiff producing this expensive evidence, would, in case of success, be entitled to throw the burthen upon the defendant. But, rather than that any such disproportionate oppression should be inflicted, much better would it be that this thus inordinately expensive evidence should be excluded; although of such exclusion the consequence by the supposition would be, that, as to the subject-matter of the demand, the £5, the plaintiff would be without remedy.

But suppose the plaintiff to stand up and say, My honour, my interest, or, if so you will have it, my caprice, is (in a way which I do or do not choose to mention) in such sort concerned in the business, that, rather than not have the business settled, I am content, in the event of my gaining the suit, to remain charged with the burthen of this mass of evidence. The remedy here in question consists in the making it a matter of obligation, or of discretion, on the part of the judge, to accede to a proposition to the above effect.

The remaining case is of a nature not so apt to take place, nor, in respect of the matter of fact, so easy to establish.

The plaintiff having brought his action for the £5, as before, the defendant stands up and says, I have a good defence; the money is not due. But, to produce the evidence necessary to the proof of this my defence, an expense of not less than £500 would be indispensable: I have or have not the £500; but, whether I have or no, the hardship of being charged with such an expense would be extreme. A less evil would certainly be the payment of the £5 claimed, though not due: but persuaded as I am that nothing at all is due, even this would be no small hardship on me.

To apply the proposed remedy to this second

* If the cause of action has arisen in India, the superior courts may issue a commission to examine witnesses in India, without the consent of the parties. 13 Geo. III. c. 63. See above, p. 186. As to the equity courts, see 2 Maddock, 405.—*Ed.*

case, it would be necessary for the plaintiff on his part to stand up and say (reasons imaginable as before,) Rather than not have a decision in my favour on this my demand, I am content to relieve the defendant from this expense, and take it upon myself, enormous as it is, in the first instance Here is the money: let it be applied to the production of the evidence, in the keeping, and under the direction of the court.

Even here the disproportion is not too great to have been actually exemplified But, if it appears too great for probability, pare it down till you bring it within the pale

To pre-establish, in relation to the article of evidence in question, every circumstance necessary to give probability and rationality to the offer above exemplified, — the nature and effect of this distant evidence, the trustworthiness of it, the necessity of that expense to the obtaining it, and the assurance of its being obtained by means of that expense, — will be apt to be matter of no ordinary difficulty But cases where the necessary expense has been much greater, have been already examined, and, when the expense of a voyage round (or about half round) the world is considered, may easily be conceived and as to the probable nature and effect, and the trustworthiness, these are points continually exposed to uncertainty, and as continually calling for calculations, which by each suitor, on his own account, are as constantly made with more or less anxiety, ability, and exactness

Where the expense of producing the evidence rises to a certain pitch, the resource of epistolary examination will, in most cases, be apt to present itself as being upon the whole the more eligible remedy

The discussions necessary to the settling of the several points in question, as above, presuppose the establishment of the proposed anticipative survey, and help to exemplify the utility of it They are no other than such as, in every day's practice, come under discussion between client and attorney In the place where the scene lies, rests the only difference in the one case, the client's parlour, or the attorney's office, in the other case, the place of mutual rendezvous, the court of justice

Technical practice—English or continental, English home-bred or continental Rome-bred (it is but repetition to say,) knows of no such remedies — knows of no such temperaments. The pound of flesh on the one side, or the pound of flesh on the other such, when the flesh of suitors is concerned, is the alternative given by the man of law. In either case, the man of law makes equally sure of his share

VII. Remedy the seventh. — Remedy the second against expense alone Advertisement for pecuniary assistance for defraying the expense of evidence

If ever there can be a beneficial application of money, it is this To every man, be he who he may, what is more valuable, what more necessary, than justice? What is there that is valuable to a man, and of which the preservation depends not upon justice? By whom can property, reputation, condition in life, life itself, be retained — by whom can property, reputation, or condition of life, when ravished, be recovered, without justice?

Gratuitously bestowed, what can be more generously bestowed than assistance given to a man to enable him to call in to his assistance the hand of justice?

Gratuitously, or for a price, what assistance can be more innoxious, more secure against all abuse, than assistance lent to justice — lent under the direction of the judge?

On every occasion on which charity presents a demand, what nation so prompt, so ardent as the English, to pour the balm of relief into the bosom of distress?

The probability of the demand for an inordinately expensive mass of evidence — the nature, materiality, and necessity of the evidence so demanded, — the inability of the party to defray the expense, all these points have been established to the satisfaction of the judge, by the anticipative survey He gives a certificate, and (with it, and on the ground of it) an authority to solicit for this purpose, from the lovers of justice, contributions, to be lodged in the hands of the officers of the court.

The lawyer alone continues to uphold the scarecrow set up so many centuries ago to frighten away from this field the hand of charity For depriving the indigent of all chance for justice, what has been left undone that could be done? Claims that for indigence, for mere indigence, could not be prosecuted, have been forbidden, as if *in odium spoliati* * — are still forbidden — to be sold

Advertisement for subscriptions? Oh yes for relief of distress in other shapes, no rule of law forbids it But for distress (however exquisite) for lack of justice, advertisement would be useless subscription would be too dangerous Dangerous? Yes, dangerous. for has not the man of law contrived to convert it into a crime? Charity thus exercising itself, has it not, by the spell of jargon, been stamped with the name of *barretry*, or *maintenance*, or *champerty*, or some other stigma, on pretence of which, charity, or mutually beneficial traffic, may be alike converted into crimes? Perhaps yes, perhaps no: here, as elsewhere, authorities lean one way, authorities lean the other In waters thus troubled and thus deep, what is the wonder if men choose not to run the risk of being drowned?

* *In odium spoliatoris* is a common-place expression, employed among equity lawyers, to justify any exertion regarded as extraordinary, for the giving redress against fraud.

Forty years ago this abuse was denounced, in company with a kindred abuse, still more mischievous, because still more extensive.* Forty years hence the denunciation may be repeated, and with as little fruit. For, under the reign of jurisprudence, one generation witnesses the birth of an abuse, three or four more the maturity, and then perhaps comes the death.

As to the buying and selling of legal demands of all sorts, the only objection that could at any time have been made against it, is in this strain: judges are so weak, so dependent, so cowardly, so corrupt — feudal barons so profligate and so formidable, that, after buying a bad title for the purpose, by his own hands or by that of a retainer of his, a baron (it will frequently happen) will, by bribery or intimidation, engage the judges to give to this bad title the effect of a good one.

Supposing it good for anything, what an argument, to come from learned lips!

Supposing it at that time good for anything, what would it be worth at present? Between the present state of judicature in that respect, and the state of judicature as above delineated, is there any more resemblance than between the present state of judicature in England, and the present state of it in Otaheite? Three or four centuries ago, the benefit had danger mixed with it; therefore, now that the effects of the remedy would be all pure benefit, the proscription put upon it is to continue: such is the logic of jurisprudence.

Not that there ever was, or could have been, a time in which the reason was worth a straw. He who could thus convert a bad bought title into a good one, what should have hindered him from giving the same effect to a bad one of his own making? The purchase-money would have been so much saved, applicable to the purpose of bribing the judge, or suborning witnesses.

For restoring the indigent to a chance of justice, there is what is called a remedy, in the pauper acts. Like so many others, however, to which men of law have given a permit, it may be set down to the account of sham remedies. What it applies to, is that factitious part of the expense, which ought not to have been imposed upon the most opulent: what it does not apply to, is that part (that here in question included) which presses upon all ranks, being natural and inevitable.

VIII. Remedy the eighth: — Abolition of taxes upon justice.

In speaking of this or any other expedient for obtaining pecuniary supplies for the relief of this species of distress, it is impossible to avoid thinking of the factitious loads by which it has everywhere been aggravated. I speak not here of what has been done by the judge for his own profit; but of what has been done by the finance minister for his own use. The subject has elsewhere been treated pretty much at large. See "*Protest against Law Taxes*," (Vol. II. p. 573.) †

Upon evidence itself, the tax does not in every instance bear with any peculiar weight. But, being imposed in the preliminary proceedings rendered necessary to the introduction of evidence, and the subsequent proceedings necessary to the giving effect to evidence, the influence is the same as if the tax had been imposed directly upon the evidence.

Like most other taxes, it operates partly as a burthen, partly as a prohibition: as a burthen upon him who stands up for his right, notwithstanding the tax; as a prohibition upon him who (through utter inability, or in choosing the least evil) gives up his right: giving up a just debt or other demand, or submitting to an unjust one, or submitting to be punished for an offence never committed, by the coercive force of the tax.

A tax upon capital, when the amount is considerable, is regarded as a bad tax. Why? Because, for the sake of a present supply, it nips future prosperity in the bud. The force of the objection, it is evident, depends upon the quantum. The tax may be a very bad one, or it may be as tolerable as most others.

But a tax upon capital would be a blessing, in comparison with the taxes upon justice. It takes men, indeed, as it finds them; but it does not single out the distressed.

The existing taxes upon justice are a tax upon the distressed, falling almost always upon capital, carrying off sometimes this or that proportion of capital, and (by the help of those other taxes upon justice, which are imposed by lawyers for their own benefit, and sunk in the pockets of the collectors) in many instances the whole of it.

They fasten down, in a state of slavery under the rich, not those commonly understood by the name of poor — indigent persons of the labouring classes — but the indigent of all classes.

The tax on medicine, though equally bad in principle (and the only one that can be so,) is, in comparison, owing to its comparative lightness, probably much inferior in mischievousness. If it were possible that a return should be made of the number of persons killed by it in England, in a year, I should not expect to find it amount to more than a few hundreds.

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* See "*Defence of Usury*," in Vol. III.

† The reader will observe, that this work was written before the late repeal of the stamp duties on law proceedings [5 Geo. IV. c. 41,] which has been justly deemed one of the most meritorious acts of the present [1826] enlightened administration. The arguments in the text, however, are general, and apply equally to all nations.—*Editor.*

A law-suit is a perpetual blister upon the mind. If your wish be to do as much mischief as possible by another tax to the same amount as that of the impost upon justice (including that part which lawyers have imposed and collect for their own benefit,) get a return from the physicians and apothecaries all over England, of the patients under their care, and distribute among them an impost to an equal amount. Proportions are of course no more to be regarded in the one case than they are in the other but, lest the lawyer and his partner, the law-taxing financier, should leave you behind them, omit not to employ collectors to go about in cold nights to strip the last blanket from the beds of the most wretched of the patients

The medicine tax, if it kills men, suffers them to die at home The law-tax sends them to rot, broken-hearted, in jails.

Oh, but the necessities of the country are so great! they furnish us an excuse for bad taxes be the oppression of the tax more or less, it is too late to think about it. Notable excuse for barbarity and ignorance! Exactly the reverse the greater the aggregate pressure of the taxes, the more solicitous should be your study to choose the least oppressive

IX Remedy the ninth: — Remedy the first against delay and thence against intervening deperition of evidence, and of the matter of satisfaction — Collection of forthcoming evidence, without waiting for unforthcoming evidence, or for fixed days

Of those things which ought to be done, what is there that ought not to be done at the only time at which it can be done? Because one lot of evidence cannot yet be had, or because, though it might be had, it is not suffered to be got, is that a reason why another should be lost? In an exclusion thus indirectly put upon a lot of evidence, value unknown, is there anything like common honesty or common sense?

This remedy (so far as it extends) corresponds therefore to two articles in the list of the devices of the technical system, viz sittings at long intervals, and blind fixation of times; and is no more than a particular application of the remedy already proposed (under the head of sittings uninterrupted) for that barefaced and most pernicious abuse

The exclusion to which it is a remedy, is purely factitious — the work of the technical system, with its blind or too sharp-sighted arrangements. Six or twelve months must elapse, before any evidence can so much as begin to be collected What follows? That all the evidence which, having been obtainable within that time, is not obtainable after that time, stands excluded in the lump. Is it possible, that, in the mind that devised these arrangements, any the smallest spark of regard should have been felt for the ends of justice? any more effective feeling for the sufferings of the oppressed, than the wolf has for those of the lamb he slaughters? What is it that the man wanted to be informed of? Was it a secret to him that witnesses are men, or that men die?

Even now, in the eyes of an English lawyer, this abuse is the very summit of perfection. How should it be otherwise? It gives him holidays absolutely matchless holidays it subtracts nothing from the mass of fees. Subtracts? It adds to the mass it makes business it forms a capital article in the mass of advantage provided for the encouragement of *malâ fide* demands, and more especially *malâ fide* defences.

Provision being wanted for a new-born orphan, or information lodged for an offence, — what if a justice of the peace were to say, Come again this day six months then, and not till then, I receive your evidence? But when, from any one of those seats of natural justice, was anything heard thus monstrous? No, the licence to work iniquity descends not upon these unlearned judges not being granted by them, it has been neither granted to them, nor to their use

If, in the arrangement of terms and circuits, there be common sense or common honesty, give to diseased indigence, as well as oppressed and plundered innocence, the benefit of it Extend it from courts of justice to hospitals let no hospital be founded in future, without vacations of two months and four months for physicians, surgeons, and nurses. Men die for want of timely medicine but do not men also die for want of timely sustenance? For want of the substance which the client, by the advice and assistance of his lawyer, has lavished, and which the official lawyer, lest the amusements of his long vacation should be disturbed, refuses to restore, are not all jails for debt slaughter-houses, filled and emptied for their benefit?

Even courts of justice have not received the benefit of this arrangement to its full extent The reason has been already given. Against the depredations and violence of the unlicensed malefactor, neither the house, the pocket, nor the person of the lawyer are (happily for mankind) more secure than those of another man and were the matter of wealth to perish, so would the matter of fees Accordingly, instead of once or twice in the year, the Old Bailey sits eight times * and the sound of the word *vacation* is not so much as heard in Bow Street.

Equity, indeed, has her examinations *de bene esse*, and her examinations *in perpetuam*

* The Old Bailey Sessions were superseded by the 4 & 5 Will. IV. c. 36, which established the Central Criminal Court: the sittings are held twelve times a year. The chief metropolitan police court is in Bow Street.—*Ed.*

rei memoriam. For, equity finding more fees to collect than could be got in within the limits of the common-law harvest-time, her shops are never shut long together: moreover, her birth-place was on the continent, where men were cursed with no such *regalia beneficia** as terms and circuits.

But, to measure the ratio of this remedy to an adequate one, compare the scanty and irregular and undefined field of equity jurisdiction with the remainder of the field of law, criminal and non-criminal. Compare the examination of an equity examiner's dark closet with the examination of a police office: efficiency with efficiency, delay with delay, expense with expense.

As to common law; even those resources, miserable and treacherous as they are, are more than she has ever had a heart or a head to give herself. When she is in a mood to have them, she borrows them of equity: for now, the whole trade being consolidated into one vast firm, and all interests mixed together and rendered undistinguishable, shop and shop are upon the best terms imaginable.

On this head, equity has a whim or an artifice, in so general a view scarce worth mentioning, unless it were for curiosity's sake. If your witness is dying, or making off; if, in short, the evidence you depend upon is wanted at any of these odd times; in such case, although you are in the right, and found to be so, you must thus far pay the piper, as if the right were not on your side.

The same whim or the same artifice governed on the continent, as often as, in a suit not criminal, any one of the parties called for the testimony of an adversary.

X. Remedy the tenth:—Remedy the second against delay:—Provisional decision, without waiting for the best evidence.

When the original of a deed or other written document is so situated that the production of it cannot be effected without a more than ordinary degree of vexation, expense, and delay,—lodged in some place between this and the antipodes, in the hands of some possessor, who, proprietor or not, does or does not choose to part with it or to bring it;—where such is the situation, or supposed situation, of a supposed or alleged original, at the time that an alleged transcript, or sufficient extract or abstract, is ready to be produced;—a question may arise as between the two documents, the alleged original and alleged transcript (both certainly not being necessary, one perhaps sufficient,) which, if either of them, shall be admitted. Were both present, the admission of the transcript (unless it were for momentary provisional consultation, for the purpose or in the course of argument) would evidently be attended with some (howsoever little) danger, and with no use. A transcript, how little soever inferior in point of trustworthiness to the original, can never, so long as man is fallible, be considered as exactly upon a par with it. But the original is so circumstanced, that, rather than load the cause with the vexation, expense, and delay, attached to the production of it, it would be better to exclude it: nay, even although, to the prejudice of the side by which it should have been produced, misdecision were sure to follow. It ought therefore to stand excluded: and thereby the whole of the evidence from that source, were there no other remedy.

But the transcript,—although, in preference to or indiscriminately with the original, it ought not to be produced,—yet, rather than the evidence from that source should be altogether lost, and misdecision take place in consequence, might (if ordinarily well authenticated)—might, with much less danger than what is frequently incurred in practice, be (under the conditions above proposed) received instead of it. Nevertheless, mischief from misdecision ought at the same time (so far as is consistent with the regard due to the avoidance of preponderant collateral inconvenience in the shape of vexation, expense, and delay) to be obviated as effectually as possible. Accordingly, previously to execution, obligation (or at least liberty) ought to be in the hands of the judge, for taking from the party thus to be instated, sufficient security for the eventual reinstatement of the other party; in case that, within a time to be limited, the propriety of the opposite decision should have been made appear,—the authenticity of the transcript, or its correctness or completeness with relation to the point in question, having been disproved.

The character ascribed to the proposed arrangement (viz. that of a remedy succedaneous to the exclusion of evidence) belongs to it beyond dispute. Under English practice, but for this remedy, both would or might have been excluded—the original, and the transcript: the original, by reason of the preponderant inconvenience attending the production of it; the transcript, by reason of its being but a transcript, and the original still in existence, and the production of it, though prudentially, not physically impracticable. In virtue of this arrangement, neither

* The epithet given by Glanville, who wrote in Henry the Second's time, to the then new-invented grand assize: a sort of circuit, travelled once in seven years. In other words, a licence for injustice, renewable or not at that period: a remedy which, if worth anything at any time, would have been worth more before the flood than since. *Quære*, How did the business of justice go on before this grand improvement? *Answer:* As to times and places, at least, much less badly than at present: for, in those days, the metropolitan courts had not swallowed up the local ones.

stands excluded: the transcript is admitted absolutely and at the instant, the original left to be produced, eventually and if need be, at another time.

In English practice, the original being lost, —the previous existence of it, the subsequent depetition of it, and the authenticity of the alleged transcript, being proved by what is regarded as sufficient evidence, — the transcript is received instead of it. The alleged transcript received, when there exists no longer the original with which upon occasion it is capable of being compared! With how much more safety, when the original with which it may be compared is still in existence? when, in case of perjury, the witness swearing to the correctness of the transcript is capable of being detected, convicted, punished?

When received (if received at all) it is, in practice, received absolutely without any such conditions imposed, conditions, in case of misdecision on the ground of it, providing for the reparation of the injustice

XI Remedy the eleventh — Remedy the third against delay — Provisional sequestration

This is an arrangement of still more entire security, capable of being substituted, upon occasion, to those measures, which would be the natural result of unreserved admission of the evidence, and unreserved decision on the ground of it.

The party in whose behalf this makeshift evidence is produced, instead of the regular evidence from the same source, is (for instance) the plaintiff. the decision regularly called for by this evidence, would be, the putting that party in immediate possession of the subject-matter in dispute, on condition of finding security for eventual restitution in kind, or other adequate satisfaction, as proposed by the last preceding remedy But, the character or situation of the plaintiff is not (to the purpose here in question at least) altogether trustworthy the subject-matter is a female, whose honour and condition in life, in the character of daughter, ward, or wife, claimed as such by one or both the parties, is at stake, the subject-matter, though of the class of things, is an article susceptible of a *pretium affectionis*, and thence of damage not to be repaired by money. On any of these accounts (not to look for others,) it may be more advisable upon the whole, that, —until the authenticity of the supposed transcript can be put out of doubt (for example, by being sent to the original for reauthentication, under official or other altogether unsuspected care) — the subject-matter should either be suffered to remain in the hands of the defendant (he on his part finding security,) or be lodged in the hand of the official or other unsuspected third persons, satisfaction in the meantime being made to the plaintiff for the loss of possession sustained by him.

While the bill, without the benefit of which equity will not grant even her *de bene esse* examination, is scribbling by the plaintiff's lawyers, or an answer to it by the defendant's — while the examiner's clerk, closeted with the witness like a confessor with his penitent, is setting down what the witness says, between sleeping and waking, or what he does not say, regardless whether it be sense or nonsense, complete or incomplete, true or false, — all this while the defendant (if he be what defendants so often are) is making the best use of the time thus given him, eating the plaintiff's property, or sending or putting it out of reach, according to his humour and his circumstances

While the boy is running to the chandler's shop to buy the salt to lay upon the sparrow's tail (an instruction not grudged to infant bird-catchers,) the bird hops or flies off at leisure If it were in the nature of equity, English equity, to be sincere, she would find her emblem in this child But no the imputation would be unjust to her, if this lameness were to be ascribed to blindness

By preventing mischief, mischief in any of the shapes in which equity is at every man's service to prevent it, there would be nothing to be got By making a show, and that a false one, of being ready to prevent it, much is to be got, and is got The groom, who, having a common interest with the horse-stealer, waits till the steed is stolen, and then marches up to shut the stable door in ceremony, — he, and not the infant bird-catcher, is the true emblem of English equity

While the bill is preparing, to ground the writ *ne exeat regno*, the cuckoo swindler that should have been hedged in, is winging his way to the continent, laughing at or with the hedgers While the Injunction Bill, by which waste should have been stayed, is scribbling, the axe of the dissensor or malicious lifeholder is levelling to the ground the lofty oaks from which the venerable mansion has derived shelter and dignity from age to age While, in all the luxury of skins and parchment, the female orphan is dressing out to make her appearance in the character of a ward of the court, the sharper whom the charms of her person or her purse have laid at her feet, is clasping her in his arms, at the temple of the Caledonia hymen, laughing with her to think how the union of hearts has been facilitated by the incompleteness of the union between kingdoms

Malefactor, whoever you are, you deserve to be confined for idiocy, or your solicitor struck off the roll for ignorance, if ever it be your ill fate to see your schemes anticipated and frustrated by English equity.

Among the almost numberless uses of the

initial meeting of the parties in the presence of the judge, one is (as already intimated) the putting an instant stop to so sure a course for eluding the power of justice.

Is the party's solvency out of suspicion, out of danger? No use in conveying him to a jail, or to a spunging-house: as little in forcing him to beg or buy sureties for his eventual forthcomingness. Is his solvency a point too dubious or too complicated to be settled at the first examination? A guard placed over him in his own house would give it all the useful properties of a spunging-house without any of the pernicious: — as if a guard could not as well remain in charge of his person, as at present of his goods! Consign the defendant to either a jail or a spunging-house, for no better or other reason than that (without any doubt of his solvency) the plaintiff believes, or pretends to believe, that the money he claims of him is due! The reason were as good for hanging him.

The inquiry thus made, does his solvency prove dubious? Seizing his person affords no security. In jail, or in a spunging-house, his effects, for every purpose of removal or dissipation, are as much in his power as if he were at home. Secure the effects themselves, all removal, all dissipation is at end.

Of this same blind arrangement, of which, in some instances exclusion of necessary evidence, in other instances unnecessary vexation, expense, and delay, for the averting the mischief of such exclusion, is the result, — and which arrangement consists itself in the constant and inexorable establishment of factitious delay, without use or shadow of pretence, of which delay a frequent and natural result is deperition of evidence, — another fruit is the deperition of the matter of satisfaction, in the manner above delineated. To secure the subject-matter in dispute from perishing, or going into wrong hands, nothing can as yet be done, for want of evidence. Why? Because it is by evidence alone that the defendant's title to it can be made dubious, the plaintiff's probable: and, to this as to all other purposes, the receipt of evidence, instead of being brought forward as early as possible, is put off as long as possible! Why not brought forward as early as possible? Because (as there has so often been occasion to state) it was against the interest of the founders of the system, that any evidence fit to be acted upon should be brought forward at this early stage.

On all these several points, the interest of the founders of the system was in clear and diametrical opposition to that of the suitors, and more especially to that of the honest among suitors, which is as much as to say, to the ends of justice. It was the interest of these arbiters of human destiny, that as much human misery should be produced, as the sovereign and the people would bear to see produced: and as much misery as the sovereign and the people have borne to see produced has been produced accordingly. It was their interest that as little relief under this misery should be afforded, as the sovereign and the people would bear to see withholden; and as much relief as could be withholden, has thus been withholden accordingly.

What is, and ever has been, the interest of the people, taken in the aggregate, in their character of suitors, is, that as few of them as possible should go to jail; that as little as possible of the mass of property at the disposal of the judges should either perish, or be lost to the person intitled to receive it; and that, to avert as far as possible both these mischiefs, the defendant (in all cases where his solvency was exposed to doubt, or where in any other way the plaintiff stood exposed to the danger of suffering irreparable damage) should be brought into the presence of the judge, to have, for the benefit of all his creditors (and, above all, for his own benefit, and at his own request,) the state of his pecuniary circumstances laid open to the judge as early as possible.

Unfortunately, on these same subjects and occasions, what all along has been, and still continues to be, the interest of the judges, is, that on neither side (much less on both sides) should the suitors ever be suffered to come into their presence, when it is possible to prevent it: that, above all things, no such unpleasant company should be forced upon them at the outset of the cause: that, instead of this, as many individuals as possible should go to jail, and (unless when the jails were already so full as to hold no more) be kept there as long as possible: that, while the defendant is so lying in jail, the property which, by law and justice, ought to have been restored or transferred by him or from him to the use of the plaintiff, should remain at the disposal of him, the defendant, to be wasted or embezzled by him, to as large an amount as possible: that, while in those receptacles of infection debtors were rotting in body and mind, while oppressed debtors and injured creditors were dying broken-hearted — judges, the authors of this misery, with their dependants, protégés, and bottle companions, should have as much time to enjoy and amuse themselves in as possible: and that, lest business should be presented to them in any other than the most pleasant and least troublesome form, the fate of the wretches on both sides should never be disposed of by these its arbiters, on any other ground than that of a sort of evidence utterly unfit for the purpose, and universally acknowledged so to be.*

* What is perfectly known to all lawyers at present, and to all non-lawyers as soon as they

In complaining of this, as of any other branch of the system of abuse, it has been a practice among men of law to dispute the legality of it. Dispute the legality of a sort of practice persevered in by the superior courts in general, for centuries! Dispute as well the validity of an act of parliament. As if, while legislators connive or sleep, a law

please, is, that the practice of imprisonment for debt is the result of a traffick,[a] in which the judges of all the common law-courts took a share; and which consisted in selling (on pretences as notoriously false as any swindler was ever punished for) the liberty of the people in the character of defendants, to all persons who (with or without so much as the pretence of title) found their account in the purchase of it

It may be considered as a particular branch of the slave-trade: with this peculiarity, that the colour of the thing (the person converted into a thing) made no difference. Crowded jails matched with crowded ships. the long vacation, with the long passage.

Not to speak of former struggles; soon after the Restoration, the three great common-law courts in Westminster Hall became so many rival shops. Like other shops, they fought for custom: the liberty of the defendant was the *bonus* they each of them made itself master of, and offered as a lure to draw in purchasers. It became, consequently, in the hand of each, a weapon with which he fought his rivals.

It was the King's Bench that began. In criminal suits, of which alone it had been intended by the sovereign that it should have cognizance,[b] it had been in possession of the undisputed practice, and thence of the right, of enabling the plaintiff (the prosecutor) to consign the defendant (that is, anybody) to prison (a prison of its own) in the first instance, that is, without evidence. The Common Pleas, for which alone of the three courts the cognizance of civil suits had been intended, possessed no such right, unless in a particular and narrow description of causes.

The judges of the King's Bench formed a scheme for filching custom from their brethren of the Common Pleas. Encouragement was given to plaintiffs to bring false accusations against defendants: accusations, the falsehood of which was completely understood, as well by the judges by whom they were received, as by the plaintiffs by whom they were delivered On the ground of a false accusation of this sort, the defendant, as of course, went to jail in some cases— was supposed to be in jail in others. Being thus, or being supposed to be, in jail, he was at any rate in the power of the judges, to be dealt with as they pleased: being thus in their power, they suffered any other demand to be brought against him, though it were only of a civil nature. In what cases the man was really in their custody, and in what not, it is impossible for us now to know: it was never intended that we should. The mass of jargon called, in Westminster Hall, by the name of a *record*, was (as has been so often observed) a mass of jargon in which an indeterminate quantity of truth, in great part useless, was invariably intermixed with an indeterminate mass of falsehood, serving as a screen for whatever injustice it might be deemed profitable and safe to perpetrate When the man was not in jail, the bonus employed as above to draw custom into the King's Bench shop, was not made use of. what that shop got for itself, was nothing more than the possibility of selling to customers a branch of juridical service, of which, till then, a monopoly had been possessed by the Common Pleas. But, in the cases in question, the Common Pleas not being in the practice of sending a man to jail; the King's Bench, in so far as they took upon themselves to send a man to jail in these same cases, gave themselves thereby an advantage (and through themselves to their customer) in which their bretheren on the other side of the hall had as yet no share.

The success of *the king himself* (in his court at Westminster, where, as all the world knows, he is actually and constantly present) was prodigious. the distress and impoverishment of the king not himself, was proportionable: grass threatened to grow in the Common Pleas Truth being in equal detestation on all sides of the hall, and the practice of making use of her, either for offence or for defence, equally unknown; the king not himself, after lying a while in the state of the fallen angels, awoke, and, by the help of another falsehood, correctly moulded upon the foregoing one, stood upon his defence.

For details, this is not the place In substance, the story is of course told or alluded to in the institutional books and books of practice But in the Memoirs of the Life of the Lord Keeper Guilford (as related by his brother, natural and professional, the Honourable Roger North, one of His Majesty's counsel, learned in the law,) the whole war, with all its stratagems, is related in considerable detail, and pure of all disguise. The only interests professed to have ever come in view, are the interests of the lawyers—of the partnership in all its branches Of the interests of the suitors, no more account is taken, or mention made, than, at an auction of a West-India estate, of the interests of the negroes. For the ends or dictates of justice, no more regard is professed on either side, than on either side in the conferences reported by Thucydides between the Athenians and the Melians.

The honourable and learned author was completely in the secret: if any secret there could be said to be, in a business in which causes as well as effects, motives as well as measures, were so completely in the sunshine. It was under the conduct of his right honourable brother, then chief justice of the Common Pleas, that the defensive part of the warfare was carried on:[c] the success of it is matter of as undisguised a triumph as ever sat on the brow of a King's Bench or Old Bailey advocate, when relating how, with the aid of his science, a malefactor was rescued from condign punishment by a quibble.

[a] The practice to which this bears reference, has been radically altered by 1 & 2 Vict. c. 110. —*Ed.*

[b] For the indeterminateness of the distinction between *civil* and *criminal*, see above: meantime they may serve, like *x* and *y* in algebra, to designate quantities, of which, at the outset nothing more is known than that they are both undefined, and that they are supposed to be different from each other.

[c] *Vide supra*, p. 285, note +.—*Ed.*

were not exactly what the judges, for the time being, are pleased to make of it.

The cause of this paralogism must be looked for in a notion, entertained through prejudice, or affected from prudence, of the excellence of the law: of its subserviency to the ends of justice: whatever is not reason is not law. Whether the opposite inference would not be the more rational one, the reader is by this time in a way to judge.

The subject-matters of law are persons and things: the force of law is occupied in causing them to be forthcoming: both, incidentally, in the character of sources of evidence; both, ultimately (and, for precaution's sake, incidentally,) in the character of parcels of the matter of satisfaction: persons, besides (in cases of corporal punishment,) in the character of subject-matters of the punishment.

The operations, the object of which is to cause them to be forthcoming for the purpose of satisfaction or punishment, are, in the books of practice, ranged under the head of *execution*: by them is done, or pretended to be done, that which the decision, judgment, decree, commanded to be done.

In this part of the field of law, as in most others, the dictates of utility, as pointed out by the ends of justice, are plain and simple. General rule:—in no case to omit any operation by which the forthcomingness of the article can be made more sure. Exception, where the operation is either physically or prudentially impracticable; — prudentially, because the vexation and expense attached to the execution of the decision, would be a greater evil than that of its not being executed. Memento: — in the pursuit of this object, to take that course, in which the quantity of expense and vexation created shall be the least that can be.

Uncertain, confused, voluminous, and, by its very voluminousness, rendered defective (for the more abundant the swarm of absurd and pernicious distinctions and diversifications, the more abundant the defects;) fraudulent to creditors, oppressive to debtors, beneficial to lawyers — to lawyers of all classes, from the chancellor to the bailiff's follower, — and to none but lawyers: — such, in its bearings upon this part of the field of procedure, as upon every other, is the system still in force in England.*

To frame a system free from all these abuses, — a system in which the ends of justice and dictates of utility, as above indicated, shall be accomplished, and in the compass of from ten to fifty pages, would be an easy task: in from one hundred to five hundred pages, an impossible one.

* The distinction between *insolvency* and *bankruptcy*, is of a piece with the distinction between *realty* and *personalty*: each a source of fraud and vexation to the suitor; each a gold mine to the man of law. Precious distinction! a wall of paper to fraud, a wall of adamant to justice. For the purposes of fraud, every debtor is a bankrupt at pleasure: for (not to speak of sham-traders) who can prevent his being a real one? Every non-trader may be made a bankrupt, for the purpose of fraud; no such person can be made a bankrupt for the purposes of justice.

Ages ago, at the touch of the sceptre which sanctioned the laws of bankruptcy, all distinction between realty and personalty in the hands of the bankrupt vanished. On that ground, no hair-splitting as between person, lands, and goods — sometimes one to be had, sometimes another, sometimes all three (according to the sort of court resorted to, the sort of suit instituted, or process employed, — not to speak of other causes of variation, all equally foreign to the merits,) sometimes half of one, or one and a half: — distinctions, which are all kept up against the creditors of non-traders, and cherished with an affection proportioned to their absurdity, their mischievousness, and their consequent fruitfulness in made business.

Your debtor owes you two thousand pounds. Moveable or other personal property not worth recurring to: land or other real property worth a thousand pounds: his body out of the reach of justice. Of his thousand pounds you may have half, and but half: — Why? Answer: — Because, had you and he lived three or four hundred years ago, it might (unless he were an old man, or an old woman, or a young one, or a child, with a dozen or two of other exceptions, not one of them taken into account) it might have been of use to the purposes of national defence that your debtor should keep in his hands half the property, the whole of which should have been yours: keep it, lest the monarch should want men to attend him in his wars. Even in its prime, the reason was a foolish one: the fund bearing no sort of proportion to the purposes by which in pretension it was designed: and when creditor A had cut off his half, creditor B would come and halve that half, and so on, alphabet upon alphabet, in any number. But at each division the use of the lawyer's knife was to be bought, bought at his own price: and there lurks the real reason at the bottom of the ostensible one.

But a reason which at one time had a shadow of utility, though even that shadow is no more, is of the best and rarest sort. Expect not anything like it but on great occasions.

[a] *Vide supra*, p. 306, sub-note [b].

PART III.

VIEW OF THE CASES IN WHICH EVIDENCE HAS IMPROPERLY BEEN EXCLUDED ON THE GROUND OF DANGER OF DECEPTION.*

CHAPTER I

CASES ENUMERATED.

In regard to evidence, admission, non-exclusion (it has already been shown,) is the general rule. Evidence is the basis of justice: exclude evidence, you exclude justice.

The propriety of the general rule being so conspicuous — whatever be proposed in the character of an exception, the *onus probandi*, in respect of the propriety of it, lies upon the proposer of the exception — upon the exclusionist. In the last preceding Book, this task has been performed.

If, as above supposed, in the account stated in the preceding book, the entire list of the cases in which exclusion of evidence can be reconcilable to the ends of justice, is included; in all other cases in and for which it ever has been or can be proposed, it will be improper.

Having done with the cases in which it may be proper, the examination of the cases in which it cannot be proper will occupy the remaining part of this Book.

In technical jargon, the question as between admission, and non-admission, admission and exclusion, is clothed in different language. For admission, *competency* is the word — for exclusion, *incompetency*. Not only so, but incompetency finds another synonym, or at least a substitute, such as would not easily have been suspected; and this is *credibility*. An objection is made to the admission of the witness: a question is to be argued — The question is now as between competency and credibility, whether the objection goes to the competency of the witness, or only to his credibility. — If, being considered as applying itself to his competency, the objection is deemed well-grounded, exclusion is the consequence: if, as levelled at the same mark, the objection is considered as ill-grounded, as insufficient, admission is the consequence; the witness is to be heard, as if no objection had been adduced.

Objections to the competency being objections the effect of which is to operate the exclusion of the witness altogether, and objections to his credit having no such effect, it might seem that the latter class of objections have no effect at all: but that is not the case. The objection itself, being the allegation of a matter of fact, must be made good by evidence. If an objection is not good as an objection either to competency or to credibility, evidence in proof of the objection is not admitted to be produced. If it be allowed to be good as an objection to competency, the objection is allowed to be produced, and the witness not. If it be good as to credibility, but not as to competency, the witness, and the evidence of the objection to him, are allowed to be produced together.

1. Those who support the evidence against an objection to its competency, have seldom any unwillingness to have the same objection received in the character of an objection to credibility. Why? Because in this case the objection frequently amounts exactly to nothing at all. How so? Because it is so perfectly frivolous, that, in the scales of common sense (the false scales and weights of common law being put out of the way,) it would not weigh against the evidence to the value of a feather. The objection being good, is it good as against competency? the man is not so much as heard. Does it apply to credibility? he is not the less believed.

In effect, the difference amounts to diametrical opposition. In language, it is presented as but a sort of a hair-breadth difference, so minute, so microscopical, that by a high-seated eye it has happened to it to be overlooked. Like the difference between purport and tenor, it was that sort of difference to which a lawyer (if, with the reputation of a great orator, seated on a high and commanding station — in a word, a Mansfield) might, without shame, confess himself to have been scarcely sensible. In sound, the difference is like the famous one between *tweedle-dum* and *tweedle-dee:* nor, in effect, is there any greater difference than between justice and injustice — a difference which, to a learned eye, is too minute to have any claim to notice.

In practice, they had been confounded: so happily confounded, that, when a statute had required that a witness or witnesses should be *credible*, it was a matter of doubt whether credibility was or was not the same as competency. Instead of talking of credibility,

* For the Author's further remarks on this subject, see Vol. VI. p. 105, *et seq.*

speak of *inadmissibility*, non-admission, or exclusion; instead of competency, speak of *admissibility*, admission, and non-exclusion; you could then be understood without difficulty: the difficulty would then be in contriving how to misunderstand you. But, well suited as such clearness would have been to the purposes of common sense and common honesty, it would have been proportionably ill suited to the purposes of common law. The absurdity of the arrangement was in some measure hidden from view, by the cloud which hung over the language. Prevented from knowing so much as what it was that was done, non-lawyers were the more effectually prevented from seeing into the irrationality and mischievousness of what was done: and, upon this part of the ground as upon every other, the rubbish thrown up by the lawyers, while working and fighting in the dark, contributed its part to thicken the entrenchment which defends the garrison of the old castle of chicane.

Deception, and vexation, have already been mentioned as the two inconveniences, in the apprehension of which (in so far as any reason, or so much as the slightest colour of a reason, has ever been assigned or glanced at) the exclusionary system, in what cases soever it has been applied, has had its root.

Exclusions grounded on the consideration of vexation, form the matter of the next succeeding Part.

The present Part is appropriated to the consideration of those examples of exclusion, in which the fear of deception has been the ground, real or ostensible.

Incorrectness, and *incompleteness*. In these two expressions may be included all the properties, by means of which it can happen to the testimony of a witness to produce deception in the bosom of the judge.

If, in respect of either or both these qualities, there be any failure on the part of the witness, the root or cause of it will be to be found either in the will, or in the understanding; in the volitional, or the intellectual, branch of his mental frame. With relation to the result here in question, the state of those faculties respectively may be said to be an *unfit* one.

When, on the part of the testimony, incorrectness or incompleteness in any degree has its source in an unfit state of the will, *interest*, sinister interest is the cause of it: when in an unfit state of the understanding, *imbecility*.

Our business, at present, is to bring to view, not so much what ought to have been, as what has been, done and thought.

Topics different in appearance, though in effect coincident, have been, in the existing systems, substituted or added to the above. Qualities or acts considered as blemishes upon the moral character of the proposed witness, have, in a variety of instances, been considered as grounds of exclusion. For the denomination of all these, one word, *improbity*, may on occasion serve.

But *improbity*, on what score does it present itself, in reality or in appearance, as constituting a proper ground of exclusion? and what relation, if any, does improbity bear to interest?

One answer will serve for both these questions:—

Interest, when acting in such a direction and with such effect as to give birth to falsehood, may be termed *sinister* interest. The effect of improbity is to render a man, in proportion to the degree of it, more and more apt to be led into falsehood by the force of sinister interest.

Thus it is that improbity, considered as a ground of exclusion, coincides with, and is included in, the ground expressed by the word interest. Be it lying, be it what it will, no man does anything wrong, any more than right, without interest, without a motive. Suppose everything capable of acting in the character of a motive in a mendacity-prompting direction, out of the question, a man of the most profligate character will be no more likely to deliver false testimony, than an average man taken at large.

Under the head of improbity may be included, to the present purpose, that of religion. Improbity has been generally ascribed to a man on the supposition of his having no religion, or having a bad one. Religion has, accordingly, furnished pretences for refusing to hear evidence: with what reason, will be seen in its place. He who is considered as having no religion, no God, is termed an atheist; he whose religion is bad, whose God is considered as a bad one, whose notions concerning God are considered as bad notions, has been termed a cacotheist. Subordinate to the head religion, *atheism* and *cacotheism* may, accordingly, constitute two distinguishable heads.

Subordinate, in like manner, to the more extensive head of imbecility, we shall find three particular heads: infancy, dotage or superannuation, and insanity (including casual mental debility.)

By reason of infancy, and to the extent of the age denoted by that word, every man is kept in a state of relative imbecility. In the course of his life, every man is subject to have his intellectual faculties more or less disturbed and weakened by mental debility (whether caused by bodily debility or not;) and, towards the close of it, by dotage.

Putting together these several articles, we have eight general heads, under which the circumstances that have been employed as grounds or pretences for putting exclusion upon evidence may be ranked; viz.—

1. Interest. Sinister interest of all sorts without distinction.

2. Pecuniary interest.
3. Improbity at large.
4. Atheism.
5. Cacotheism.
6. Infancy. Imbecility in respect of infancy.
7. Insanity
8. Dotage.

In the former set of cases which have just been under our review, we have seen but little work, in the way of exclusion, for the providence of the legislator, and of that little, the greater part left everywhere undone In the set of cases now coming under review, we shall see nothing at all, in point of propriety, to be done in that same way by the providence of the legislator, and at the same time in point of fact we shall see him (or rather his substitute, his essentially and everlastingly incompetent substitute, the judge) at work everywhere, in all directions, and with a sort of activity as pernicious in effect as it is rash and unwarranted in principle

CHAPTER II

DANGER OF DECEPTION, NOT A PROPER GROUND FOR EXCLUSION OF EVIDENCE

§ 1. *Exclusion of evidence, no security against misdecision*

MISDECISION is the word to be used in this place, not *deception* Why? Because in misdecision consists the mischief, the only mischief Suppose deception, and yet no misdecision, there is no real mischief suppose misdecision, yet no deception, the mischief is as great as if deception had been the cause of it.

Deception supposes conception previous hearing, or what is equivalent The judge who should ascend the bench with a resolution never to hear anybody, would conduct himself badly enough, but in no case could it be said of him that he had been deceived Misdecision, as many instances of it as there were causes endeavoured to be brought before him: misdecision, in abundance, deception, none.

The first thing to be done then, is to show that, on whatever ground exclusion may be placed, it is not in the nature of it to afford any security against misdecision This accomplished (if it be accomplished,) the remainder of the book, were all minds upon a level with the highest, would be but *actum agere*. But the mind of the public is not so easily satisfied: prejudice is not eradicated upon such easy terms.

In every case, the evidence (whatever it be) which it is on any side proposed to produce, is either necessary, or less than necessary, to the decision prayed for on that side say (to take the clearest example,) the only evidence or not the only evidence, on that side.

1. In the first place, let it be necessary. Exclusion, if put upon necessary evidence, produces, if the evidence would have been true, a certainty of misdecision: deception, supposing it to have taken place, can do no worse. But no man surely will be found who will either think or say, that, of falsehood (supposing the evidence false,) deception will in any one instance be a certain consequence. To say this, would be as much as to say, every judge is a machine What, then, is the effect of exclusion? To produce, for fear of an uncertain mischief — to produce to a certainty, and in the first instance, the very mischief which it professes to avert. It is as if a copyist, considering that he now and then makes mistakes, should, for greater security against incorrectness, determine never to copy any more but in the dark

What, then, would the lawyer be with his exclusionary remedy, supposing he were sincere? He would be like the panic-struck bird, which, for fear of the serpent, flies into its mouth

What should we say of a lottery, at £20 a ticket, so many blanks to a prize, £20 the highest prize? — £20 paid to purchase a chance of £20? Among non-lawyers, where is the man to be found that would be weak enough to make such a lottery, weak enough to put into it if made? The learned judge who shuts the door against evidence, to save himself or Co from being deceived by it, makes exactly such a lottery, and buys tickets in it. He buys tickets in it but with whose money? Not with any of his own money, indeed. no, truly, he knows better things but with the money of suitors

Rapax owes you £20 that he borrowed of you Oculatus Suspectus was present at the transaction his evidence is the only proof you have of it If the judge refuses to hear Oculatus Suspectus, misdecision to your prejudice is the certain consequence, your money is gone

You borrowed £20 once of Rapax, he has abundant evidence of it but you paid him — Oculatus Suspectus saw you pay him: of this payment his testimony is the only evidence If the judge refuses to hear Oculatus Suspectus, misdecision to your prejudice is the certain consequence here, too, your £20 is gone.

On the other hand, suppose, in either case, Oculatus to be a false witness is deception on the part of the judge, is misdecision and wrongful disposal of the money, a certain consequence? Nothing like it. Every day, false testimony is delivered. every day, false testimony is detected

2 Next and lastly, let the evidence in question be less than necessary. Being not absolutely necessary, it must be because there is other evidence on that same side. In this case, though the evidence be excluded, misdecision is not the certain consequence.

But in this case, the party who adduces the

evidence having other evidence sufficient to warrant a decision in his favour, there is nothing gained by the exclusion. Excluding the evidence, you decide in favour of the party who produces it: what could you have done more, if you had admitted it?

Not that, in this case, the exclusion is merely nugatory. It imposes upon the party on whose side the evidence was produced, the additional delay, vexation, and expense, of procuring other evidence; and if these exceed his means, he loses his cause, and misdecision, or failure of justice, is the consequence.

In neither case, therefore, can the exclusionary system be conducive to the ends of justice.

Of the apprehended danger of misdecision from the receipt of evidence of a comparatively untrustworthy kind, what is the amount and value? In every case, either nothing or next to nothing. The legislator is sufficiently upon his guard against it; indeed, more than sufficiently: and so much more than sufficiently, as to prohibit the reception of it without knowing what it is. But being himself so much more than sufficiently upon his guard, what ground can he have for the apprehension that the judge, on his part, will be less than sufficiently upon his guard? The judge who, with such warning as may be given him by the legislator in the way of *instruction*, is not sufficiently proof against that deception against which the legislator has thus been so sufficiently upon his guard without warning, ought not to be deemed qualified for his office.

From the precautions taken by lawyers, who would not have supposed that the danger was all of it on one side?—that, while it is an event unhappily so frequent for false testimony to obtain a credit that is not its due, it was a misfortune that could never happen for true testimony to fail of obtaining the credit that is its due? Yet, in point of fact, who is it that can be assured, that in a case so open to general suspicion as most of those to which the exclusionary rules refer, it may not have happened as often to true evidence to be disbelieved, as to false evidence to be believed? Fortunately for mankind, the nature of things does not admit of any such drastic remedy against the former misfortune, as the quackery of lawyers has employed against the latter.

The witness in question, supposing him to have been admitted, would either have been disbelieved or believed. In the first case, the rule is superfluous and useless. All the use of it consists in warding off a danger, which, the event shews, would not have been realized.

Wherever the witness, if admitted, would have been believed, observe the consequence; observe the ground, in point of reason, upon which the law rests. The jury, who have seen the witness—who would have heard his whole story—who would have heard him cross-examined, and had the opportunity of cross-examining him themselves—who would have heard the other witnesses, if there were any—who would have seen who and what the defendant and the prosecutor are—and who would have observed the whole complexion of the case,—the jury, who would have had the benefit of the observations of the counsel and the judge, would have believed his relation to be true. The law, which has not seen the witness, which knows nothing of accused or prosecutor, which—in a word, knows nothing of the case, pronounces him unfit to be believed; and so unfit, and the danger of hearing him so great, that, rather than run the risk, it chooses, as the lesser evil, to license the commission of all sorts of offences in his presence. When I said the *law*, I might have said the *judge*—the single judge, to whose partial and hasty conception, hurried away and engrossed by some particular incident in the particular case before him, it first occurred to lay down such a rule.

All this while, the admission of a witness,—the disallowance of the rule which, on the ground of any supposed objection to his veracity, forbids him to be heard,—would not preclude the production of the ground of objection, whatever it may be; the record (for instance,) or other evidence, proving his having been convicted of a crime reputed infamous. Wherever the production of such ground of objection would have had the effect of preventing the jury from crediting his evidence, the rule is superfluous and useless. The only case where it has any effect is that in which, after hearing the objection against him, they were to be satisfied of its being insufficient and inconclusive, and to credit his testimony notwithstanding.

Against danger of misdecision, resulting from the admission of a lying witness, or rather of a witness disposed to lie, there are abundant remedies. There is the natural sagacity of the jury—there is the cultivated sagacity of the judge—there is the perhaps equally cultivated, and still more keenly sharpened, sagacity of the counsel for the defendant—there is, in penal cases (especially in cases of the most highly penal nature,) the candour of the counsel for the prosecution. For (though, in cases of guilt, the more flagrant the guilt, the greater the glory, and thence the greater the zeal of the defending counsel,) what counsel ever presses for a conviction, in a case any way serious, of a defendant of whose innocence he is himself assured? Besides all these securities, there is in this country, after all, the mercy (which in this case would be but the justice) of the crown.*

* The case of MacDaniel[a] and Egan, the treacherous thief-takers, or blood-conspirators,

[a] Leach, 44.—*Ed.*

Where is the consistency between this utter distrust of juries, and the implicit faith bestowed, with so much affectation, on the decisions they are permitted to give on such evidence as they are permitted to receive? When a parcel of people you know nothing of, except that they are housekeeping tradesmen, or something of that sort, are got together by hap-hazard, or by what ought to be hap-hazard, to the number of twelve, and shut up together in a place from which they cannot get out till the most obstinate among them has subdued the rest; political orthodoxy commands them to be looked upon as infallible I have no great opinion of human infallibility, and if it were necessary to believe in it, I would go to work by degrees, and begin with the Pope All I contend for (but this I do contend for) is, that these twelve men, whoever they are, that have heard what the witness had to say—heard him examined and cross-examined, and examined him themselves as long as any of them thought proper—are more likely to judge right as to whether he has spoken truth or no, than a judge, who lived centuries ago, who never set eyes on the man, nor ever heard a syllable from or about him in his life, is likely to judge right on the question whether the man would say true or no if he were to be heard If there be one business that belongs to a jury more particularly than another, it is, one should think, the judging of the probability of evidence if they are not fit to be trusted with this, not even with the benefit of the judge's assistance and advice, what is it they are fit to be trusted with? Better trust them with nothing at all, and do without them altogether

A question continually started to the jury by the judge is,—Do you believe this evidence?—and it happens but too often that the verdict declares the negative Indeed, little less of their attention is occupied in determining with themselves who is to be believed, than in drawing inferences from the evidence on which their belief has been bestowed In all these instances, false evidence is poured in upon them, without the smallest mark to distinguish it from the true. In all the cases of exclusion, the witness presents himself with a mark upon his forehead, pointing out the reason there is for looking upon his evidence as likely to prove false. If he did not, there would be no ground for shutting the door upon him *Habet fœnum in cornu* Are men more in danger of being deceived when they have warning given them, than when they have none?

But, when the testimony of a witness, being false, is not believed, the very falsehood itself is a source of instruction, and security against misdecision

Misdecision, be it never out of mind, is the only real evil, falsehood, unless in so far as it produces misdecision, none at all Yet, to no such object as misdecision is the eye ever directed by lawyers of no such word is any trace to be found in their books Falsehood is the great and only object of all fears What? would you lend an ear to falsehood? Why not, if from falsehood you can obtain a clue that guides to truth? Instruction? do you think to derive instruction from a liar? Why not, as well as from any other enemy?

In what other case can you be so sure of hearing falsehood, as when you have to take the examination of a notorious and professional malefactor, on the occasion of some offence of which he stands accused? Yet, the surer you are of hearing from him all such falsehoods as promise to suit his purpose, the more instructive and satisfactory, if pertinent, are all such truths as his propensity to falsehood has not enabled him to keep back

Be the deponent who he may, the thread of his testimony should all along be divided, by the eye of the judge's mind—carefully separated and divided, into two parts —that which runs in the presumable direction of his wishes, and that which runs in a direction counter to that of his wishes In the former part, so far as depends upon bias, upon interest, may be seen a sort of evidence less trustworthy than if he were indifferent, in the other, a sort of evidence more trustworthy

The severer the impending evil, on the score of punishment, or on any other, the stronger, of course, will be a man's wishes to avoid saying anything that may help to subject him to it, and the more depraved the

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will strikingly illustrate the difficulty of obtaining credence in a court of justice for a false story. The blood of the innocent was, in the estimation of these monsters in iniquity, a price not too great to be paid for the illicit gain. The reward was to be obtained at any price: but how was it to be obtained? Not even here by perjury; but by a course still more oblique, and which recommended itself to those veteran practitioners in criminal law as more feasible and more safe. The crime was first to be produced, in order to be related. An imaginary crime would not have served their purpose. The difficulty of framing a tale of this kind, which, though false, should stand the action of counter-interrogation and the other tests, and obtain credit as if it were true, was too formidable to be encountered. Their plan was, first to engage a man really to commit a crime, of the circumstances of which they were apprized: for the convenience of having memory to draw upon, and not mere imagination, in the picture which the prosecution of their scheme called upon them to give of it at the trial, in the character of witnesses. Those who were not to be withholden by any other consideration, were thus withholden from the engaging in a system of perjurious depredation by the thoroughly understood and continually contemplated difficulty and danger of the attempt.

disposition of the man, the stronger his propensity, on every occasion, to pursue, in word as well as deed, the course indicated by the wishes of the moment, in spite of all suggestions of ultimate interest and moral obligation. Both these considerations laid together, hence it is, that of one part of every malefactor's, of every liar's, evidence (viz. the part which tells against himself,) it may be said, and with unquestionable truth, the more determined the liar, the better the evidence. As to the ratio of the trustworthy part to the untrustworthy, it will depend upon the verity-insuring force of the scrutinizing operations to which it is subjected

Falsehood a certain cause of deception and misdecision? On the contrary, in how many cases is it a guide to truth, a security for rectitude of decision? In the very sort of case in which falsehood is most probable, deception, as a consequence of it, is least probable.

Falsehood, where wilful, forms a species, a most instructive and useful species, of evidence. It forms a particular modification of circumstantial evidence. Falsehood on any occasion is circumstantial evidence of criminality, of delinquency—of consciousness of misbehaviour, on either side of the cause, and in any shape.

When a person labouring under suspicion of a crime is in a course of examination, is it generally expected that all he says will be true? On the contrary,—the severer the punishment, and the stronger the persuasion of his guilt, the stronger is the persuasion, that, so far as what he has to say to any point will, if true, tend to his conviction (appearing to him, as it naturally will, to have that tendency,) whatever it may happen to him to say as to that part will not be true.

Accordingly, it is from that sort of source which, with the fullest and most universal assurance, is looked to as a source of false evidence, that whatever assertion operates in favour of one side of the cause (viz. to the prejudice of the interests and presumed wishes of him whose evidence it is) is regarded as the most satisfactory of all evidence: regarded, and by everybody: the very lawyers not excepted, who to guard themselves against deception, are so anxious to shut the door of judicature against any source of evidence to which it can by possibility happen to yield false evidence. But, forasmuch as the eyes of all mankind, judges themselves not excepted, are universally open to the falsity of false testimony, universally upon their guard against deception from the source that wears any appearance of yielding it,—how can it be, that, on the part of judges, deception by reason of that same evidence, deception from whatever false evidence flows from that source, should be the certain, or so much as the preponderantly probable, consequence?

Not that, even in the cases where falsehood itself is looked to as the most instructive source of information—not that, even in the case of persons thus circumstanced, of persons from whom falsehood is expected in a larger proportion than from any others,—not that, even from them, there seems reason to expect that falsehood should come in greater quantity than truth. Truth, even in these cases, will be the general rule—falsehood, but an exception. Take what false proposition you will, there will be three conditions incident to the utterance of it:—1. That it appear necessary to the accomplishment of the deponent's wishes (viz. for acquittal, if defendant, and so in other cases;) 2. That if it be not too palpably false to exclude a prospect of gaining credence; 3. That it be not of a sort to expose him to subsequent punishment too severe to be risked.

Symptoms of terror and confusion exhibited in deportment—non-responsion—indistinct and evasive responsion,—all these indications have, on the same sort of occasion, and in the same character of circumstantial evidence, their use, their universally felt and acknowledged use. yet (such is the instruction derivable from falsehood) responsion, direct responsion, is on the same occasions still pressed for; as being (though replete with falsehood, or rather for that very reason) pregnant with a sort and degree of instruction and satisfaction, over and above any instruction and satisfaction that is to be derived from those other sources, any or all of them put together. From manifest improbability on the face of it, from self-contradiction, from counter-evidence—from any of these sources, detection may flow: and then it is that (by operating as evidence of character, evidence much more conclusive than any extraneous testimony on that head,) the falsehood, as such, and recognised as such, affords its instruction, produces its effect in the character of circumstantial evidence.

The case here spoken of, is that of a person labouring under the suspicion of criminality, and on that score stationed, by an act of the judge, in the situation of defendant: the suit having punishment for its object, real or professed. In this case, where any objection has been made to the propriety of receiving evidence drawn from such a source, from the lips or pen of an individual placed in that distressing situation, it has been rested, not on the ground of danger of deception, but on a very different ground,—certainty of vexation on the part of the defendant, the proposed witness: of which in its place.

True it is, that it is only when either recognised, or at least suspected, to be what it is, that falsehood becomes thus instructive. becomes a fence against deception, instead of a source and cause of it. Equally true it is,

that it is morally impossible that, in any of the cases in which the door ever has been shut or been proposed to be shut against evidence in consideration of the danger of deception, the falsity of it (whatsoever falsity it may happen to it to contain) should fail of having been suspected

Thus it is, that exclusion can in no case, on any assignable ground, be put upon evidence, without wearing on the face of it a proof of its own injustice — a proof of the unsolidity of the ground

Will it be said that, though the ground of the exclusion be just, it may happen to the judge not to be apprized of the justice of it? Admitting the case to be realized, the utmost that it would prove would be, that the appropriate arrangements should in every case be taken for making sure that the judge shall be thus aware of it. What, then, on the principle of this observation, is the proper course? Not exclusion to be put upon the evidence, but *instruction* to be given to the judge But this is precisely the remedy which, as a succedaneum to be in all cases substituted to exclusion, it is the object of these pages to recommend.

The judge who, so much at his ease, pronounces a fact not true, because, the witness by whom the existence of it has been testified may find himself a gainer in the event of its being credited, or on this or that particular occasion has been known to have swerved from the path of probity — would this same judge, with equal readiness, pronounce the same judgment, were a fact of the same description to call for his decision for any personal purpose of his own? Not he, indeed Because a servant of his is believed by him to be addicted to lying, does he on that account lay down any such rule to himself, as never to put a question to that servant in relation to his own conduct, or to that of any other servant? Not he, indeed If it be his misfortune to have a child whose character is tainted with that vice, does he lay down any such rule in his dealings towards this wayward child? Not he, indeed The judge who, on the like hastily taken grounds, determines that the will of this or that testator shall be void, and that the augmentation or diminution intended to be made by it in regard to the share of this or that one of his children shall in consequence be without effect, — the same judge, if, with a view of making an augmentation or diminution to that same amount in regard to the share of one of his own children, he has to make inquiry into facts, — does he pay so much as the slightest regard to any of these exclusive rules? Not he, indeed.

Why this difference? Because, in regard to the conclusion he forms in his individual capacity, he is sincerely desirous that it be just and true: whereas, in regard to the conclusion he forms in his official capacity, he cares not a straw whether it be true or untrue. In this case, all his concern is that it be found justifiable; conformable to the standard, whether in the way of statute law or jurisprudential law, to which, by his superiors and the public, his decisions are expected and required to be found conformable.

§ 2 *Probable source of this branch of the exclusionary system — its inconsistencies.*

The closer we look into the origin of this system of exclusion, the more thoroughly we may be convinced of its hollowness and injustice

By whom have the exclusions been put? By the legislator, in the way of statute law? No, but by the judge, in the way of jurisprudential law.

If by the legislator, operating in the way of statute law, the ground for it, though still untenable, would not have been so completely hollow. To the legislator, in his situation, it might have been competent to say, — The judge, I fear, will not be sufficiently upon his guard against evidence thus circumstanced the safe course will be to exclude it; and so, excluded it shall be — I will not trust him with it Here, as already shown, there would have been shortsightedness, rashness, error inconsistency, however, there would have been none.

But from the judge, nothing could have been more inconsistent, nothing (on any other supposition than that of improbity) more absurd I will not trust myself with this evidence it will deceive me. I am not upon my guard against it Is such folly conceivable? Had it been prevalent, the practice of taking the examination of the defendant, on a capital or other criminal charge, never could have taken place. Yet, on the continent of Europe, in the seat of Rome-bred law, from which the doctrine of exclusion was probably imported into England, such examination was and is not only customary but indispensable

What then? Ought deafness, as well as blindness, to be among the attributes of Justice? Is the story of the Syrens not fable, but history? and is every man, every ruffian, that comes before you, a Syren? so that, wherever there is possibility of falsehood in evidence, there is no safety for you but in stopping up your ears? No, learned sir: no more than you — you who, if honest, can thus reason, are an Œdipus or an Ulysses. Such diffidence, — beyond that of the most inexperienced virgin, — is it credible, in the situation of him who never awakes in the morning but to see the fate of men lying at his feet?

Not qualified to judge of the veracity or correctness of a man speaking to a matter of

fact? What is it, then, that you are qualified for? Is not this your occupation? Day by day, on one occasion or other, is not this the occupation of every man that breathes?

But no; improbity, in some shape or other, presents to the difficulty a solution much more natural than is presented by the hypothesis of any such morbid diffidence. The origin of the exclusive system lies deep in the recesses of distant time: it dates in ages of barbarism — ages, in comparison with which the present, whatever may be the dream of vulgar prejudice, is the age of virtue.

Corruption as likely a cause as any—gross and determined partiality: whatsoever bond of connexion — sympathy, common interest, or bribery—may have been the cause. In judicature, corruption, in the worst cases, must have a pretence; and how many pretences have been acted upon, still more shallow and unplausible than this? Shallow as this is, the system of nullification stands not, in any part of it, upon any equally specious grounds.

Indolence, a cause at all times adequate to the effect—a cause still adequate to the production of it, even now that, on these higher seats, within the English pale at least, corruption even in its most refined shape may be pronounced rare, confined to cases of a particular sort; and in its grosser shapes probably without example.

This man, were I to hear him, would come out with a parcel of lies. It would be a plague to hear him: I have heard enough already: shut the door in his face.

As sheep follows sheep, judge, in the technical system, follows judge. Here, quoth judge B, is a man, who, on such or such a score, lies under a temptation to speak false. In this or that shape, in the situation he is in, he has an interest in the cause. Exactly in this sort of situation was a man whom my brother A (though it is so long ago, I remember it as if it had been but yesterday) would not hear. Exactly in the same situation? In respect of exposure to temptation, perhaps yes; but when brother A refused to hear the man, perhaps it was that he had already heard witnesses to the same fact till he was tired, and on the same side.

Suppose a riper age: history of judicial transactions brought to light in bits and scraps at the command of booksellers (no thanks to legislators or to lawyers.) Of the cause of suspicion, a short indication; but, as to the absence or presence of other evidence to the same or a different fact on the same side, a man might be a much better reporter than reporters commonly are (or at least used to be,) without thinking of it.*

The grounds of suspicion in evidence may be ranked under four causes:—

1. The fact spoken to—not the fact itself which is in question, but a fact supposed to be connected with it—so connected with it, that the existence of the evidentiary fact affords a reason for inferring the existence of the fact thus evidenced to. This is circumstantial evidence, considered as contradistinguished from direct.

2. The information in question not delivered immediately from the source of the information (the person, the thing, or the script, from which it is derived.) This is transmitted evidence, considered as contradistinguished from immediate: hearsay evidence, transcriptitious evidence, in their infinitely diversifiable degrees of remoteness from the source.

3. The evidence in question not collected or delivered in the best mode—not delivered under the influence of those securities for trustworthiness, which are commonly, and might be generally, employed for securing the correctness and completeness of the mass of information: sanction of an oath, examination, cross-examination, fixation by writing, and so forth. In this rank are, in their own nature, and without the default of any person, all casually-written documents, such as letters and memorandums; and, by the default of the legislator or the judge, all evidence collected in any mode inferior in efficiency, from a source from which evidence might, without preponderant collateral inconvenience in the shape of expense, vexation, and delay, be collected in the best shape. Examples:— affidavit evidence; nakedly assertive discourse (as in unsworn pleadings;) and evidence collected *per judicem solum, sine partibus.*

4. The person who is the source of the information, exposed to some assignable cause of suspicion, affecting the trustworthiness of his statements.

Here, then, are four causes of weakness in the evidence, of which the one here in question is but one. In the other three cases, either no exclusion at all is put upon the evidence (as in the case of circumstantial evidence in general;) or an exclusion is put in

* It seems much more probable, that the exclusion of evidence originated in the ignorance of an uncivilized age, than in the sinister interest of the judge. In a rude state of society, where the art of extracting truth from the lips of a witness is not understood, and where testimonies are counted, not weighed, it seems to have been the universal practice to strike out of the account the testimony of all witnesses who were considered to be under the influence of any mendacity-promoting cause. Exclusionary rules of evidence have nowhere been carried so far as under the systems of procedure which have been the least fettered with technicalities. Take, for instance the Hindoo law of evidence. See *Mill's History of British India*, book ii. chap. iv.—*Editor.*

some instances, not put in others, according to a system of infinitely diversified and inconsistent rules (as in the case of the different modifications of unoriginal and casually-written evidence above mentioned,) or the weakness of the evidence in the state in which it is delivered, or offered to be delivered, is the act and deed of the exclusionist himself he himself bespeaking it in a weak and bad shape, refusing to receive it in a better shape, —even when, in the best possible shape, it would be received with less collateral inconvenience, as above

This same psychological epicure, the delicacy of whose palate refuses all aliment that, in its unconcocted state, presents a suspicion of any the slightest taint, will not suffer it to be served up to any table of his own, for his own use, unless, by cooks from his own kitchen, it has been brought, by a process of *mortification*, into a sort of carrion state

A degree of ridicule attaches itself to the labour of him who perseveres in combating with the arm of reason a practice in the production of which improbity and imbecility took undistinguishable parts, and in which, as soon almost as the idea is started, any one, whose eyes are not determinedly closed, may see that reason had never any share

Witnesses, each of them with a mark of suspicion stamped upon his forehead, present themselves to the English exclusionist for admittance. Blindfolded by a bandage borrowed certainly not from justice, but from knavery or prejudice, some of them he rejects, in consideration, as he says, of the mark; and in regard to those, the objection, in the jargon of English jurisprudence, goes to the *competency* others of them he admits, notwithstanding the mark, and as to these, the objection goes only to the *credit* in plain English, amounts to nothing—produces no effect at all

The whole assemblage of suspicious characters being thus distinguished into two groups, whose lot is so different, the elect and the reprobate,—a requisition that would be to be made (if reason had any share in the concern,) is, that some sign should be shown, by which it might be made to appear that, in the least reprobate of the reprobate, the force of the cause of suspicion is greater than in any of the elect. or, if this be too much to require, that, at the least, in an average man of the reprobate, the force of that same cause was greater than in an average man of the elect

Such criterion, then, is it anywhere to be found? So far from it, that, on the contrary, instances will be found, instances to an indefinite extent, in which, where the force of the cause of suspicion is at its maximum, or but a hair's-breadth below it, the proposed witness is admitted notwithstanding,—admitted into the class of competent witnesses: where that same force is at its minimum, a quantity purely ideal, utterly incapable of ever having any the smallest effect in practice, the witness is shut out.*

The shape in which it may happen to testimony to be collected, has just been mentioned as one among the sources of the weakness to which evidence is subject On this ground an argument may be built by the exclusionists let us hear it

In Rome-bred procedure, the means of detecting or preventing mendacity are so perfectly insignificant, that it would be dangerous in the highest degree to admit evidence from any but the purest and most unsuspected source Parties not admitted. no questions asked but in a whispering room, as between confessor and penitent, by the judge· no counter-interrogation (for the cross-examination of Rome-bred law is an abuse of words, the penner of the counter-interrogations knowing nothing of the answers to the interrogations) no counter-evidence, for we keep the evidence as close as possible, lest there should be any Not a creature to hear the evidence, but one who cares not a straw whether it be true or false Thus circumstanced, the evidence is true or untrue, pure or impure, according to the source from which it flows Under such a system, ought anything under the degree of angelic purity ever to be heard?

Answer No, most certainly Accordingly, until the time comes when angels can be subpœna'd, under such a system there is but one proper course, which is, to exclude everybody. That done, if you think it better to receive evidence than to decide without evidence, you will admit the evidence in a shape in which it is fit to be received

The argument, such as it is, serves, in the manner we have seen, to justify the application of the exclusionary system to the cases in which the evidence is collected in the Roman mode It will operate still more strongly in favour of the application of it to evidence received in the English affidavit mode

Be this as it may,—certain it is, that, under the Rome-bred system (upon the continent, understand,) the exclusionary system has been carried to still greater lengths than under the English, and accordingly, under the former, compared with the latter, if the mischief be greater, the inconsistency is less

The rules of evidence are the same in equity as in law So it has been said, and always without exception, any number of times over, by chancellor after chancellor. It is not true, but, so far as it is true, in point of consistency at least, so much the worse. The worse the mode of collection, the more select ought to be the evidence. There ought to be gradations upon gradations—valves be-

* See the following Chapters.

hind valves. One exclusionary system, for evidence in causes tried by or before a jury; another, for causes tried in equity; another, for causes tried by learned common-law judges, upon affidavit evidence. Single-refined might do for the jury box; none but double-refined ought ever to be received into an examiner's office; none but treble-refined ever handed up to the bench.

Thus stands it in point of consistency: how in point of fact? In the shape of affidavit evidence, everything is good, from everybody: from plaintiffs, from defendants, from felons, from perjurers. Present your evidence to a learned judge, he cares not where it comes from, so it come in a bad shape—in a shape in which it is filable and filed;—*anglicè*, in a shape in which fees are paid upon it.

CHAPTER III.

IMPROPRIETY OF EXCLUSION ON THE GROUND OF INTEREST.

§. 1. *Interest in general, not a proper ground of exclusion.*

SEEING that deception is so far from being a certain, so far from being even a preponderantly probable, consequence of falsity in evidence, even when the existence of the falsity is certain,—it seems almost a superfluous task to show, that to regard any of those circumstances which have been held as grounds of exclusion, as being, in any state of things whatever, to a certainty productive of falsehood in the evidence, is a presumption altogether unwarrantable.

The impropriety of it will appear in a clearer and stronger light, when we come to view, one by one, the several alleged causes of exclusion, for security against deception, the several circumstances, of which, falsity in the evidence has been regarded as the necessary, or at least preponderantly probable, result.

To begin with the article of *interest*. I say here, not sinister interest, but *interest* without addition: for such is the expression employed in the books of English jurisprudence.

On this occasion, as on every other, to understand what *interest* means, we must look to motives: to understand what motive means, we must look to pain and pleasure, to fear and hope; fear, the expectation of pain or of loss of pleasure—hope, the expectation of pleasure or of exemption from pain. The causes of physical motion and rest, are attraction, impulse, and so forth: the causes of psychological motion and rest, are motives. Action, or (in opposition to action) rest,—action, whether positive or negative,—action without motive, without interest, is an effect without a cause.

It is not out of every sort of pleasure, out of every sort of pain, that a motive, an interest, is (at least in a sense applicable to the present purpose) capable of arising. Some pleasures, some pains, are of too ethereal and perishable a nature to excite an interest, to operate in the character of a motive.

The pleasures and pains which present themselves as capable of acting in that character, have, in another work,* been reduced to a certain number of heads.

In the estimation of vulgar prejudice, there is a natural alliance between improbity and intelligence, between probity and imbecility. In the estimate of discernment, they are differently grouped: improbity and hebetude—probity and intelligence.

Ignoramus has, for the purpose of this topic, composed his system of psychology. What is it? A counterpart to the learned Plowden's system of mineralogical chemistry: equal as touching its simplicity—equal as touching its truth. Two parent metals, sulphur and mercury: the mother, sulphur; the father, mercury. Are they in good health? they beget the noble metals: are they in bad health? they beget the base. *Fortes creantur fortibus et bonis.*

With minds of every class the mind of the lawyer has to deal. Of the structure of the human mind what does the lawyer know? Exactly what the grub knows of the bud it preys upon. By tradition, by a blind and rickety kind of experience, by something resembling instinct, he knows by what sophisms the minds of jurymen are poisoned; by what jargon their understandings are bewildered; how, by a name of reproach, the man who asks for the execution of the laws, and the formation of good ones, is painted as an enemy,—the judge who by quibbles paralyzes the laws which exist, and strains every nerve to prevent their improvement, is pointed out as an idol to be stuffed with adoration and with offerings.

In the view taken of the subject by the man of law,—to judge of trustworthiness, or at least, of fitness to be heard, *interest* or *no interest* is (flagrant and stigmatized improbity apart) the only question. Men at large are not under the action of anything that can with propriety be expressed by the name of interest; therefore they are to be admitted. Is a man exposed to the action of anything that can be designated by that invidious name? So sure as he is, so sure will his testimony be false. Enough: all scrutiny is unnecessary: shut the door in his face.

Sinister interest—the term and the distinction are alike unknown to them. Sinister interest? Everything that can be called interest is to their eyes sinister.

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* *Springs of Action* Table. (Vol. I. p. 195.)

Sinister interest, a term so well known to moralists and politicians, is altogether unknown to lawyers, who have at least equal need of it.

What, then? Is it that there are certain sorts of interests that are always sinister interests, while there are other sorts, which, if language, like heraldry, were made by analogy instead of by accident, would be called dexter interests? No, truly. No sort of interest that is not capable of being a sinister interest — no sort of interest that is not capable of being a dexter interest Acting in a direction to draw a man's conduct aside from the path of probity, any sort of interest may be a sinister interest. acting in a direction to confine a man's conduct within the path of probity, every sort of interest is a dexter interest The modification of probity here in question is veracity. Any interest acting in a direction to draw his conduct aside from the line of veracity, is a sinister interest, — say, in this case, a mendacity-prompting or instigating interest every interest acting in a direction to confine his discourse, his conduct, his deportment, within the path of truth, of verity, of veracity, is a dexter interest, — say, in this case, a veracity-securing interest.

Man in general not interested, devoid of interest? His testimony not exposed to the action of interest? Say rather (for so you must say if you would say true,) *no* man, no man's testimony, that is not exposed to the action of interest.

Well. and that interest a sinister one? Not it, indeed. So far from it, there is no man whose testimony is not exposed to the action of, is not acted upon by, at least *three* regular and standing, commonly *four*, forces of this kind — all tending to confine his conduct within the path of probity, his discourse and deportment within the path of veracity and truth.

1. Motive belonging to the physical sanction. — Aversion to labour love of ease trouble of inventing and uttering a false statement, which, to answer its purpose, must be so elaborated and dished up as to pass for true.

2. Motive belonging to the political sanction: — Fear of legal punishment, viz if it be a case in which (as in general) punishment stands annexed by the legislator or the judge to false and mendacious testimony

3. Motive belonging to the moral, or say popular, sanction — Fear of shame, in case of detection or unremoved suspicion.

4. Motive belonging to the religious sanction: — Fear of supernatural punishment, in this world or in the world to come

Of these four motives, the three first have more or less influence on every human mind, the last, probably, on most minds.

On most minds, did I say? On all without exception, if the English lawyer is to be believed: for, by a contrivance of his own, he has shut the door against all witnesses on whose hearts motives of this class fail of exerting their due influence.*

In the above list we may see the regular forces which are upon duty on all occasions to guard the heart and the tongue against the seductions to mendacity But, in addition to these, there may be, by accident, any number of others, acting as auxiliaries in their support. No sort of motive (even these tutelary ones not excepted) to which it may not happen to act in the direction of a seductive one — no motive, over and above these tutelary ones, to which it may not happen to act also in the direction of a tutelary one For what motive is there to which it has not happened, does not continually happen, to be employed in stimulating men to actions of all sorts, good and bad, in the way of reward? in restraining them from actions of all sorts, in the way of punishment?†

Between two opposite propositions, both of them absurd in theory, because both of them notoriously false in fact, the choice is not an easy one But if a choice were unavoidable, the absurdity would be less gross to say, No man who is exposed to the action of interest will speak false, — than to say, No man who is exposed to the action of interest will speak true Of a man's, of every man's, being subjected to the action of divers mendacity-restraining motives, you may be always sure of his being subjected to the action of any mendacity-promoting motives, you cannot be always sure

But suppose you were sure. Does it follow, because there is a motive of some sort prompting a man to lie, that for that reason he will lie? That there is danger in such a case, is not to be disputed but does the danger approach to certainty? This will not be contended If it did, instead of shutting the door against some witnesses, you ought not to open it to any An interest of a certain kind acts upon a man in a direction opposite to the path of duty but will he obey the impulse? That will depend upon the forces tending to confine him to that path — upon the prevalence of the one set of opposite forces or the other All bodies on or about the earth tend to the centre of the earth; yet all bodies are not there. All mountains have a tendency to fall into a level with the plains; yet, notwithstanding, there are mountains. All waters seek a level; yet, notwithstanding, there are waves.

In a machine, motion or rest will depend upon the proportion between the sum of the

* *Vide infrà*, Chap. V.

† See Book I. *Theoretic Grounds*, Chap. XI, *Moral Causes of Correctness and Completeness in Testimony.* (Vol. VI. p. 256.)

impelling and the sum of the restraining forces: in the human mind the result will be the same. Everything depends upon proportions; and of any proportions in the case, the man of law takes no more thought than the machine does.

Upon the proportion between the impelling and the restraining forces it depends, whether the waggon moves or no, and at what rate it moves: upon the proportion between the mendacity-promoting and the mendacity-restraining forces it depends, whether any mendacity be produced or no, and in what degree and quantity. Any interest, interest of any sort and quantity, sufficient to produce mendacity? As rational would it be to say, any horse or dog, or flea, put to a waggon, is sufficient to move it: to move it, and set it a-running at the pace of a mail-coach.

In the human mind there is a force to which there is nothing exactly correspondent in the machine—the force of *sensibility*: of sensibility with reference to the action of the various sorts of pains and pleasures, and their respective sources, in the character of motives.

Take what everybody understands, money: for precision's sake, take at once £10; the £10 of the day, whatever be the ratio of it to the £10 of yesterday: to the present purpose, depreciation will not affect it. This £10, will its action be the same in the bosom of Crœsus as of Irus? in the bosom of Diogenes, as in that of Catiline? No man will fancy any such thing for a moment: no man, unless, peradventure, it have happened to him to have been stultified by legal science.

In each individual instance, whether mendacity (temptation presenting itself) shall be produced or no, will depend upon four distinguishable quantities: quantities above indicated. On the one side—1. Sum of the mendacity-promoting motives; 2. The patient's sensibility to ditto. On the other side, 3. Sum of the mendacity-restraining motives, regularly acting and occasional; 4. Patient's sensibility to ditto. Upon these several quantities: consequently upon the ratio or proportion of the sum of the quantities on the one side to that of the quantities on the other. Of the proportion, the exclusionist knows not anything: he knows not any of the quantities; he will not suffer himself to know anything: he regards mendacity as certain; he excludes the evidence.

Of none of these several quantities can anything be known or conjectured, without examination and sifting of the evidence. Nothing can be known without experiment: and he will not suffer experiment to be made.

It is in psychology as in ship-building and navigation. Suppose the ship's way to depend upon the joint action of six influencing circumstances—six jointly acting, but mutually conflicting, causes: and these, each of them, say (for supposition's sake) of equal force. If, in the investigations and reasonings on this subject, so much as one of the six be omitted, error is the inevitable consequence: the forms of mathematical language, instead of a check to the error, will operate but as a cloak to it. The vessel will be in one part of the world, while the Lagranges and the Eulers are proving it to be in another.

In this respect, what course of ratiocination has been pursued by lawyers, debating on the ground of established systems? Of the whole catalogue of motives, each capable of acting upon the will with the most efficient—all consequently with a practically equal, force, they have taken observation of perhaps one, perhaps two; while on each side, or (what is worse) on one side only, the will of the patient has been acted upon by perhaps twice or thrice the number. What, in consequence, has been the justness of the conclusion? Much about what it would be in navigation, if calculations made for a submarine vessel, or an air-balloon, were to be applied to a ship of ordinary make and size: or as if, in calculating the course of an ordinary vessel, no account were taken of the depth of water drawn by her, or of the position of her sails.

In this state of the progress made by lawyers in the theory of psychology, no wonder if we should find the theory and practice on the subject of evidence in no better plight than navigation was among the most polished nations of Europe, when the scene of it was confined to the Mediterranean, and when, dreading to lose sight of land, the navigator crept along the shore.

Between these two otherwise resembling cases, there is, however, one very material and lamentable difference. In navigation, ignorance, deficient in adequate power, erred by over-caution and timidity: in jurisprudence, ignorance, supersaturated with power, is driven aground continually by hastiness and rashness.

It would be tedious, and surely by this time superfluous, to pursue absurdity on this ground through all its mazes.

No presumption so slender, which is not, under some established system, taken for conclusive: if fact, notorious or proveable fact, run counter, it makes no difference. Mendacity is presumed from affection—from bare wishes: wishes themselves are presumed from situations, from relations. Brother will be for brother, master for servant, servant for master, and so on. What? when you see them fighting with one another every day? Is it for his excessive fondness for Abel, that Cain would have been excluded by you? No matter: it makes no difference.

Among the causes of exclusion in Scotch jurisprudence, imported or not from the con-

tinent, is this: if a man applies to either party, tendering his testimony *

Observe, first the absurdity of this exclusion, and then the mischievousness of it

Absurdity What? On the north side of the Tweed, does no such affection exist in any human bosom as the love of justice? In a legal bosom, it seems, no, any more than on the south side To the man born blind, all colours are alike unknown but was ever blind man found absurd enough to deny, or thoughtless enough to forget, the existence of colours?

Mischievousness Mischief the first A man saw you robbed, beaten, left for dead him, you, for your part, did not see, you were too much engaged To him, you, on your part, cannot apply to testify what he saw, for you know not that he saw anything to yourself, he, on his part, must not Did you proffer that testimony of yours to the plaintiff? asks the advocate on the other side Yes, I did Oh! then, away with you, tell it anywhere else you will, you must not tell it here so sure as you opened your mouth, so sure you would be perjured

Mischief the second Directions to worthless witnesses to all who, in the school of technical jurisprudence, have learnt to hate justice: to all who are in fact (if any such there be) as worthless as the man of law supposes every man to be If you see any man barbarously injured, and, to earn a bribe or save the trouble of testifying, you desire he should be without remedy, go and offer him your service. If you see a man purloining public money, making laws for honour, breaking them for profit, don't stand upon rules of evidence established for the plain purpose of giving impunity to malefactors, don't shrink under a plea that will ruin you with every man who has any regard for justice, go to the prosecutor at once, and force upon him your evidence the more obtrusive your address, the surer you may make yourself of destroying the competency, and, if that won't do, the credibility, of your evidence

To this rule, such is its absurdity, it can hardly have happened to be frequently acted upon but, like every other absurd and mischievous rule of which the system is composed, it lies in readiness, well adapted to serve a cause too desperate to be served by less vile means — perfectly adapted to afford to long-robed iniquity the necessary pretence.

In this example, we may see a specimen of the sort of evidence on the ground of which the technical lawyer builds a pretence for the exclusion of other evidence. In partial affection, say rather in preferable regard, he sees evidence, and that conclusive evidence, of perjury, as if to wish well to your friend, and to perjure yourself for him, were inseparable In the mere act of saying, I saw so and so, and am ready to testify what I saw, they see evidence of partial affection — *Scoto-jurgonicè*, partial counsel as if it were impossible without injustice to wish to declare to justice what he saw

Compare Scotch and English judicial science In Scotland, for informing the conscience of learned judges, no spontaneous witnesses receivable In England, for informing consciences of the same learned texture, no witnesses receivable but willing ones † Such is the metamorphosis undergone by learned Justice in her passage from one side to the other of the Tweed Between *willing* and *spontaneous* there is certainly some difference the expression has carefully preserved it Let jurisprudence make the most of it there is not an atom to be lost

Observe, on this ground as on so many others, the consistency of the men of law, and especially English law Delinquency, according to them, is not ever to be presumed Yet, as often as, on the ground of danger of deception through falsehood, they exclude evidence, what is it they do but presume delinquency? What is it, as often as on this ground they exclude testimony that would otherwise be received by them in the character of evidence, — what is it they do but presume perjury? Actual perjury, no, because their providence has prevented it actual perjury, no more than actual murder, when, the pistol or gun having been fired, a tutelary hand has just had time to beat down the guilty hand in the act of pulling the trigger actual perjury not committed, but the state of the mind exactly as if it had

Perjury presumed, not indeed for the punishing of the presumed perjurer, but for the inflicting punishment, or (if that be not the word) vexation, on an innocent and injured man vexation to an unlimited extent

Suppose the excluded testimony necessary to save the life of a man capitally prosecuted, as for murder here, one man being presumed an intended perjurer, another man suffers death ‡

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* Erskine. Macdowal, vol II — [Two institutional writers of the middle of the eighteenth century. If the doctrine was ever fully admitted, it has for sometime past been in desuetude. — *Ed.*]

† For their own use, English judges, learned ones at least (as has been so often mentioned,) receive no testimony but in the affidavit shape. But no man can be compelled to give his testimony in this shape The appropriate summons, the *subpanâ ad testificandum*, applies not to this shape.

‡ A man who had an estate *pur auter vie*, the *auter vie* being the life of one on trial for a capital crime, — would his testimony, in English

§ 2. *Peculiar impropriety of exclusion on the ground of pecuniary interest; and absurdities of English law under this head.*

If, on the ground of interest generally considered—if, on the ground of any other species of interest in particular—the unreasonableness of exclusion is demonstrable,—it is in the instance of pecuniary interest that it is most palpable. In the case of any other species of interest—the interest not having any palpable physical cause, the quantity of which might serve as an index and measure of its force,—the strength of it where it is strong, the weakness of it where it is weak, is not so universally manifest and incontestable. Suppose, for example, it be contended that enmity, known enmity, is a reasonable ground of exclusion. Enmity, like any other passion, is variable *ad infinitum* in degree; capable of existing in any the lowest degree, as well as in the highest. But the force of enmity, as of almost every other passion except the love of money, can no otherwise be measured than by its effects—so that if in this or that instance no visible effects have followed from it, the only proof of which the existence and action of it is susceptible is wanting to the case. In the instance of pecuniary interest, the argument stands upon a very different footing. Without reckoning the variations in degree, resulting from the variations in the degree of opulence of which the pecuniary circumstances of the party are susceptible,—the degrees of which the force of pecuniary interest is susceptible are not only prodigiously numerous, but also, in the lowest degrees, susceptible of an existence as palpable and ponderable as in the highest. As a thousand pounds, applied in the shape of reward, will be recognised as acting on the mind in the character of a lot of pecuniary interest, with a force proportioned to its amount,—so in like manner will a shilling, a penny, or a farthing. The legislator, and the administrator, the great dealers in this species of ware, can as well cut out in pennyworths' and farthings' worths the portion of pecuniary interest which they may be minded to create, as in hundred pounds' worths and thousand pounds' worths; and how questionable soever, or even hopeless, the influence of this species of interest may be, when broken down into these minute and almost impalpable lots, yet the existence of it in this case is not less manifest and indisputable than in the other.

Thus it is that, in the instance of pecuniary interest, the impropriety of the exclusion is exposed to view by a circumstance which has no place in any other. Generally speaking, no other species of interest appears so much as to exist, but in cases in which it acts, not with considerable force only, but with effect. It is not seen to exist, but where it is seen to act; nor is seen to act, but where it is seen to triumph. Far otherwise is it with pecuniary interest. The portions in which it is seen to exist are in many instances so minute, that in those instances the notion of its prevalence is too palpably absurd to be embraced, or so much as pretended to be embraced, by anybody. Who, for instance, speaking of the people of England, would take upon himself to maintain, with a grave face, that the majority of them would be ready, upon all occasions, each of them to perjure himself for the value of a farthing? Propositions, however, far beyond this in extravagance, have been implicitly assumed by many a decision that, on this ground, has issued from English benches. An interest, corresponding to some minute fraction of a farthing, has in many instances been assumed as a legitimate cause for the exclusion of a witness, on the sole ground of the pecuniary interest generated by that cause.

In vain would it be to say, that this is among the cases in which we cannot draw the line; and that, therefore, in order to shut out the evidence in the cases in which the sinister influence exerted on it by this species of interest would be operative, and productive of the apprehended ill effect, we must be content to shut it out in many instances in which, manifestly enough, it cannot be operative. The very impossibility of drawing a line, a proper line, anywhere, is an argument, and that of itself a conclusive one, against the exclusionary principle. A line of this sort (it must be confessed) would, in whatsoever place drawn, be an improper one. But, by the principle of exclusion, a line of this sort is not only drawn, but drawn at the very worst place possible. There is an impropriety in drawing the line, for example, at the sum of forty shillings; and in laying down any such proposition as that which is implicitly contained in the Court of Conscience Acts, that a man is not to be trusted to give his evidence in a case where he has a sum of

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law, be admitted at the instance of the prisoner?[1] I leave the question, a maiden one, for the solace of future contingent quibblers. But this I know, that if I were a judge, and it were a way with me upon the bench to do a kindness to a friend's friend, the man should be hanged or not, as I pleased. Hang or not hang, I should be sure, not only of my job, but of my praise. Loading the gallows, I should have praise for my justice; exonerating it, for my humanity: the job should determine which.

But be this as it may, in the case of interest, pecuniary interest; in the case of improbity, as evidenced by felony and conviction thereof, there could be no doubt.

[1] In criminal cases, any person's testimony is admitted on behalf of a prisoner, excepting the wife or husband, as the case may be.—*Ed.*

money to that amount at stake upon the result of it.* There is an impropriety Why? In the first place, because (setting aside all such inscrutable circumstances as those which consist of psychological idiosyncrasies, affecting the sensibility of the individual in question to the respective action of the improbity-and-mendacity-restraining motives,) there are some incomes to which four hundred pounds are not more than forty shillings to others In the next place, because, even supposing it clear, in the instance of any particular individual, antecedently to experience, that forty shillings would constitute a temptation sufficiently strong to engage him in the path of perjury, — supposing it possible, I say, to find sufficient reason for predicating this of a sum of forty shillings,—it would not be possible to find sufficient reason for refusing to predicate it of a sum of thirty-nine shillings But, by the line of exclusion drawn where it is drawn, this effect is predicated, not only of a sum of forty shillings or of a sum of thirty-nine shillings, but of a sum less, and much less, than the thirty-ninth or fortieth part of the smallest piece of base metal that ever came out of a mint and this by a sweeping and unbending rule, by which people of all degrees of opulence as well as indigence, the Crœsuses as well as the Iruses, the Diveses as well as the Lazaruses, are excluded in the lump

The force with which a motive of a pecuniary kind acts upon the mind of a given individual, will be in the ratio of the sum in question to his pecuniary circumstances In England, two individuals may be found, one of them belonging to the most numerous class, the income of one of whom is to that of the other as 500 to 1 All other circumstances set aside, the force with which a given sum acts upon the mind of one of these individuals, will be but one five hundredth part of the force with which it acts upon the mind of the other Yet (supposing this rule to be observed) if, on account of his being acted upon by the prospect of gaining in this way a given sum, the testimony of the poorer of the two individuals in question is to be rejected, so must that of the richer The same effect, and that a certain one, is to be ascribed for this purpose to two forces, of which the one is in truth but the five hundredth part of the other

In Great Britain, an estate of the value of 20,000 guineas a-year, or thereabouts, has been known to be at stake upon the event of a single cause: value, at thirty years' purchase, 600,000 guineas A guinea contains a little more than 1000 farthings this same sum, then, applied to persons whose incomes stand at different points in the scale, from the highest to the lowest, is capable of acting on them respectively with 1000 different degrees of force. 600,000 being the number of guineas, multiplying the 600,000 by the 1000, here then are 600,000,000 different degrees of force with which the mind of man is capable of being acted upon by this one motive called pecuniary interest, to which by this rule one and the same degree of force (and that in every case an irresistible one) is ascribed

Thus different are the degrees of force with which this one, among so many causes of falsehood (checked by the action of so many counter causes — of so many causes of truth,) tends to the production of its effect degrees, which, by the identity of the denomination given to them, viz *pecuniary interest*, are represented as being the same From the mere consideration of this diversity, it must be sufficiently evident, that, in a vast number of the instances in which this cause of falsehood has place, its influence must, practically speaking, be equal to 0 — not capable of surmounting the mere *vis inertiæ* of the human mind, supposing this cause of action to stand alone, unopposed by any other whereas the whole force of the standing causes of truth is what it has to encounter in every instance, without reckoning the force of such of the causes of truth, the action of which is but occasional Yet this is the cause, and indeed stands at the head of the list of the causes, the force of which is, by the rule which assumes it for a ground of peremptory exclusion, regarded as being in every instance infinite and irresistible certain, at least, of preponderating over the sum of all other forces — of all causes of truth — to which it can happen to stand opposed to it

If there were any sort of witnesses imaginable, against whom it were prudence to shut the door, the sort of witnesses against which the law is so decided to shut the door, are precisely those to whom it may be thrown open with least danger All witnesses being exposed to seductive influence, all witnesses being dangerous, those will be least dangerous against whom men are most upon their guard such are those, on whose foreheads the force of the seduction is written down in figures A cloud involves the workings of friendship, a cloud involves the workings of enmity, a cloud involves the workings of love the existence of the passion, the force of its action, everything is involved in darkness No juryman, no stranger, scarcely even the closest intimate, can form any estimate of the degree of the enmity, the friendship, or the love experience may have shown him no such enmity, no such friendship, no such love. But every man knows what ten shillings is, what twenty shillings is, and what is the difference every man knows the value — every man feels the power, of money. Every

* Many of these local acts now give jurisdiction to the extent of £5.—*Ed.*

man knows that allowances are to be made for it. Few men are disposed to make less allowance than truth requires, for the force of its action on other people. Few men are disposed to set the incorruptibility of other men at too high a rate, or the force of corruption at too low a one: few men there are in whom suspicions thus grounded are in any danger of not being carried up to the full limits of the truth; few in whom they are not much more apt to be carried beyond the truth than to fall short of it.

Of the force of money, on whatever occasion acting, the judge sitting on his bench is fully aware and acutely sensible. Agreed: but is there any other human being to whom that force is a secret? Sits there that old woman anywhere (not to confine ourselves to benches) who, on hearing a report made to her by another old woman, forgets to ask herself in what way and degree (if in any) the reporting old woman may have to gain or lose by the credit given or not given to her report?

What? can the man of law be sincere in thinking that no sort of men understand either the value of money, or the influence of it upon testimony, but himself?

In this case, therefore, the advantage expected from exclusion of evidence, in the character of a security against deception and consequent misdecision, is more plainly ideal than in any other: the reason in favour of the exclusion more palpably frivolous. And yet it is to this modification of interest, that exclusion on the score of interest is in a manner confined by English jurisprudence.

In the eyes of the English lawyer, one thing, and one thing only, has a value: that thing is money.

On the will of man, if you believe the English lawyer, one thing, and one thing only, has influence: that thing is money. Such is his system of psychological dynamics.

If you will believe the man of law, there is no such thing as the fear of God; no such thing as regard for reputation; no such thing as fear of legal punishment; no such thing as ambition; no such thing as the love of power; no such thing as filial, no such thing as parental, affection; no such thing as party attachment; no such thing as party enmity, no such thing as public spirit, patriotism, or general benevolence; no such thing as compassion; no such thing as gratitude; no such thing as revenge. Or (what comes to the same thing,) — weighed against the interest produced by the value of a farthing, the utmost mass of interest producible from the action of all those affections put together, vanishes in the scale.

Add self-preservation, if you please — self-preservation from whatever be the worst of evils, death not excepted, — the farthing will still be heaviest. "A pin a day is a groat a year." Instead of the farthing, put in a pin, the result will be still the same.*

Romance! romance! True; but it is the romance of real life. The picture here drawn of the human mind is romantic enough, no doubt; but as to the account here given of that picture, nothing was ever more strictly true. Such are the decisions of the sage of law; such his every day's practice; such his opinions, such his thoughts: unless, on learned benches, decision and practice run on without thought.

For a farthing — for the chance of gaining the incommensurable fraction of a farthing, no man upon earth, no Englishman at least, that would not perjure himself. This in Westminster Hall is science: this in Westminster Hall is law. According to the prints of the day, £180,000 was the value of the property left by the late Duke of Bridgewater. For a fraction of a farthing, Aristides, with the duke's property in his pocket, would have perjured himself.

One decision I meet with, that would be amusing enough, if to a lover of mankind there could be anything amusing in injustice. A man is turned out of court for a liar, not for any interest that he has, but for one which he supposed himself to have, the case being otherwise. Instead of turning the man out of court, might not the judge have contented himself with setting him right? Would not the judge's opinion have done as well as a *release*?† The pleasant part of the story is, that the fact on which the exclusion is grounded could not have been true. For, before the witness could be turned out of court for supposing himself to have an interest, he must have been informed of his having none: consequently, at the time when he was turned out, he must have ceased to suppose that he had any.

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* Under jurisprudential law, in cases in which a penalty is given to the poor of the parish, and thence in exoneration of the rateable inhabitants, the evidence of a parishioner could not be heard to convict a man of an offence subjecting him to a penalty of five shillings thus applicable. Instead of five shillings, say one shilling: examples might be found: — poor's share, sixpence. Take a parishioner of Marylebone, and compute how much more or less than that of a pin the value of his share of the one shilling or the five shillings would be.

Comes a statute to remedy this: and, under the auspices of learned gentlemen, instead of confining the remedy, as might have been, to the individual parish in which in the individual case the evidence had been lost, actually extends it to all the parishes in all England. O heroic probity! O portentous reach of thought! Thus is jurisprudence mended! thus statute books filled!

† Peake, 128. *Vide infrà*, Chap. VII. *Restoratives to Competency.*

Another offence for which I find a man pronounced a liar, seems to make no bad match with the foregoing: it was for being a man of honour. "Oh ho! you are a man of honour, are you? Out with you, then—you have no business here." Being asked whether he did not look upon himself as bound in honour to pay costs for the party who called him, supposing him to lose the cause, and whether such was not his intention,—his answer was in the affirmative, and he was rejected. It was taken for granted that he would be a liar. Why? Because he had shown he would not be one. If instead of saying yes, he had said no, who could have refused to believe him? and what would have become of the pretence?

By the supposition, the witness is a man of super-ordinary probity: moral obligation, naked moral obligation, has on him the force of law. What is the conclusion of the exclusionist? That this man of uncommonly nice honour will be sure to perjure himself, to save himself from incurring a loss which he cannot be compelled to take upon himself.*

To observe, in an instructive point of view, the cases where the exclusionist runs a tilt, as here, against a phantom of pecuniary interest—contrast them with the cases to be next mentioned, in which, notwithstanding its being pregnant with that same interest in its most palpable shape, he gives his permit to the evidence.

§ 3 *Exceptions to the exclusionary rule in English law—Reasons of the exceptions, subversive of the general rule*

What has happened in this instance, and what, in this as well as so many other instances, is the best thing that could happen to the laws of our jurisprudential Solons,—they are contradicted, contradicted by themselves, and at every turn. Exceptions, self-contradictions, spring up everywhere under their feet: exceptions, and, as far as they extend, all reasonable. Reasonable, and why? Because, the rule itself being fundamentally absurd, everything must be reasonable which goes to narrow its extent.

In considering the exceptions as reasonable, understand the *practice*, viz. the act of admission, and no more: for as to the reasons on which it has been built, they may be reasonable, or absurd in any degree, the practice is what it is.

Before I enter upon the consideration of the particular exceptive rules, each characterized and supported by its appropriate reason, it becomes necessary to explain what sort of a thing it is, which, under the name of a reason, one meets with in the books of English common law.

Common-law reasons may be distinguished, in the first place, into technical reasons and vulgar reasons. By technical reasons are

* Both these extravagancies have been set aside by later decisions. A witness cannot now, according to Phillipps, be excluded on account of his believing himself to be interested, nor on account of his considering himself bound in honour to pay the costs. See Phillipps (edit. 1822,) i. 50, 51. The former point, however, seems to be still doubtful. See Phillipps, note (1) to p. 52.

Another of the absurdities of English law, in respect to the exclusion grounded on pecuniary interest, is very well exposed in the following passage, extracted from a review of the *Traités des Preuves Judiciaires*, in the 79th Number of the Edinburgh Review:—

"Take as an example the case of forgery. Unless the crime has been committed in the presence of witnesses, it can only be *proved* (in the proper sense of the word) by the individual whose name is said to have been forged. Yet that person is the only one whom the law of England prohibits from proving the fact;[a] a strange prohibition, for which some very strong reason will naturally be sought. The reason to be found in *the books* is this, that the party has an interest in pronouncing that paper forged, for the enforcement of which he may be sued if it is genuine. and this would be true, if the event of the criminal inquiry were admitted to affect his interest, when the holder proceeds in a civil suit to enforce the supposed obligation. But it is also an indisputable rule, that the issue of the trial for forgery, whether condemnation or discharge, is not permitted to have the least effect upon this liability: the criminal may be convicted, and yet the party whose name appears to the instrument may be fixed with the debt in a civil proceeding, or he may be acquitted, and yet the genuineness of the handwriting may hereafter be questioned, and its falsehood established.—How, then, can the anomaly of this exclusion be explained? It seems that legal antiquarians have preserved the tradition of a practice which is said to have prevailed in former times,—when a person was convicted of forgery, the forged instrument was *damned*, *i. e.* delivered up to be destroyed in open court. The practice, if it ever existed, now lives but in the memory of the learned, the disabling consequences, however, survive it to this hour. The trial proceeds in the presence of the person whose name is said to have been forged, who alone knows the fact, and has no motive for misrepresenting it. His statement would at once convict the pursuer [*qu.* prisoner?] if guilty, or, if innocent, relieve him from the charge. But the law declares him incompetent; and he is condemned to sit by, a silent spectator, hearing the case imperfectly pieced out by the opinions and surmises of other persons, on the speculative question, whether or not the handwriting is his. And this speculation, incapable under any circumstances of satisfying a reasonable mind, decides upon the life of a fellow-citizen, in a system which habitually boasts of requiring always the very best evidence that the nature of the case can admit!"—*Editor.*

[a] The 9 Geo. IV. c. 32, declares, that no person shall be deemed an incompetent witness in support of any prosecution for forgery, by reason of any interest he may have in respect of the forged document.—*Ed.*

meant reasons that have nothing to do with utility. *Technical*, as applied to reasons, is an appellative invented by English lawyers, to denote such modes of speaking as would not pass for reasons upon anybody but themselves: reasons peculiar to the art, the science, the profession. By a *reason*, speaking with reference to a law or rule of law, an unlearned man would be apt to understand, a consideration the tendency of which is to prove the law or rule of law to be conformable to the principle of utility; *i. e.* productive of more good than evil. These vulgar or popular reasons a learned man will sometimes condescend to take up when they happen to fall in his way; but the favourite, the privileged, reasons, are of course the professional, the scientific, the transcendental — in a word, the technical, reasons, as above described.

Leaving the scientific reasons to scientific men, as not being fit to be spoken of under the name of reasons by vulgar lips, I confine the application of the word *reasons*, when employed without any such additament, to such reasons of the vulgar cast, as, on the occasion in question, have been honoured by the adoption given to them by scientific pens.

A great book, according to the Greek proverb, is a great evil. A law, besides what belongs to it as a book, is at any rate an evil, great or little. To form a tolerably correct judgment concerning any law, in respect of the question whether the good or the evil tendencies of it predominate — in a word, to form his judgment on the question on which side the balance is, every legislator and writer on legislation who understands his business, proceeds in his accounts as a merchant does in his. He has a debtor side as well as a creditor, and neglects not any more to make his entries on one side than on the other.

In the books of English lawyers, the ways of speaking which one meets with under the name of reasons, are confined for the most part to one side. Such is the case in particular with the reasons corresponding to the several particular rules by which so many groups of exceptions have been attached to the general rule of exclusion on the score of pecuniary interest. To the rule itself, no reason at all appears ever to have been annexed: the utility of it has been established by assertion and assumption, without so much as an attempt to find a reason for it. To the exception has been attached a reason, such as it is; a reason, of course, in favour of the exceptive rule — a reason on that one side. The reason having been thus exhibited, its conclusiveness has been presumed as a matter of course. No marks are discoverable, on this ground at least, of any such suspicion, as that, in the account-book kept by a legislator (supposing him to keep any,) there should be two sides.

On the present occasion, in presenting a sample of learned reason on this ground, I shall confine myself to the case of an extraneous witness. The case in which the pecuniary interest at stake is that which a man possesses in the character of a party in the cause, plaintiff or defendant, is reserved for another place;* for, in this latter case, jurisprudence, and more particularly English jurisprudence, will be found variegated by inconsistencies, for which, in the situation of an extraneous witness, there is no place.

In point of propriety, the exclusion stands in both cases on nearly the same ground. If there be any difference it is this, — viz. that, sum for sum, the exclusion is more plainly useless in the case of the party than in the case of the extraneous witness. Why? Because the interest by which the will is acted upon in a sinister direction, is, in the case of a party, more conspicuously painted upon the face of the situation in which he stands. Deceptions therefore so much the less probable: the mind of the judge, be he who he may, is so much the less in danger of not being sufficiently forewarned against it.

I. Exception the first. — Interest against interest.

Unless the rule, out of which the exception is taken, be supposed to be bad *in toto*, the reason of the exception (if it has any) supposes all other circumstances equal, and the quantity of money creative of the interest the same on both sides. Against the truth of this supposition, there is exactly infinity to one. The number of possible ratios is infinite: of these the ratio of equality is one. Of the proportion between interest and interest, the exception takes no cognizance: no mention of it is made.†

II. Exception the second — The interest contingent.‡

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* Part V. *Double Account.*

† It must be acknowledged, that, in many of the cases in which this exception has been allowed, it has been, from the nature of the case, unquestionably certain that the interest, at least the pecuniary interest, was equal on both sides; thus, the accepter of a bill of exchange is an admissible witness in an action by indorser against drawer, to prove that he had no effects of the drawer's in his hands; because, whichever way the suit may be decided, he is equally liable. On the other hand, there are many cases in which the interest is not really, but only nominally, the same on both sides. Thus, a pauper is a good witness for either parish, in a settlement case: why? because (we are told) it is the same thing to him whether he has a settlement in one parish or in another: true, it may be the same thing; but it may also be a very different thing, since different parishes give very different allowances to their poor. — *Editor.*

‡ Lord Chief-Justice Parker rejected the evidence in favour of a hundred, of a hundredor who was so poor as not to be called upon to pay taxes, on the ground of the possibility of his one day becoming rich. 10 Mod. 150. — *Ed.*

The assumptions here are two —1 That in human affairs, at least in human affairs of this stamp, a line is already drawn between certainty and contingency, 2 That no contingent interest can be equal to any certain one Whence came this postulate? From Euclid? from Price?—from the Stock Exchange?—from Lloyd's Coffeehouse?

The postulate once admitted, demonstrations follow in any quantity, and to any effect

1 That,—in the case above alluded to, of the duke with his £180,000 a-year, his title to the whole of it being contested, the duke at the point of death, his only son called on his part as a witness, the estate unsettled, son and father upon the terms that all fathers and all sons ought to be,—the son would be a good witness Why? Because his interest is not vested, is not certain, is no better than contingent *Secus*, if the estate be in settlement, sixpence a-year settled on the son, the father in full vigour, the son in a galloping consumption, father and son like Henry II and his sons for here *le interest del fitz est certain, et nemy contingent* *

Can it be necessary to observe, that in human affairs, in matters of gain and loss especially —more particularly in matters of gain and loss that depend upon law, —the difference between contingency and certainty is but in name?—that what is called a *certainty* (for even death itself is contingent as to time) is but a *contingency*, in which the ratio expressive of the degree of probability is more or less greater than in the other case? Can it be necessary to observe, that there is not that contingent sum for which the exact equivalent, in a sum called by everybody a *certain* one, is not to be found? The lawyer, by whose decrees the operations of the money market are governed and perplexed—are they all a secret to him? What charity boy, what beggar-boy, was ever at a loss to know that the toss-up of a halfpenny was worth a farthing? Alas! When will the wisdom of the sages of the law rise to a level with that of babes and sucklings?

Observe what the £180,000 a-year loses in value, by being contingent instead of certain The proportional number of fathers by whom their only children are disinherited is —what shall we say? say one out of a thousand say even one out of a hundred and eighty The value of the £180,000 is reduced, by this circumstance, to what?—to £179,000

Great debates, in the days of the schoolmen, concerning the comparative value, in point of interest, of a possible Angelship and a present Mouseship Mr. Justice would be clearly for the mouse.

2. Keeper and concubine keeper rich as a Jew, fond as the Jew in the Harlot's Progress concubine at high allowance keeper's whole property at stake upon the cause Concubine a good witness

3 Defendant a *feme sole*, maid or widow, her whole property at stake, as before, she the heiress of our duke, witness courting her in marriage, and the day fixed —a better witness need not be desired I know how worthless a thing a woman is, in the eye of a true English lawyer how incapable of creating an *interest*, how incapable of exercising any influence, right or wrong, on man's affections it was my care, therefore, to clothe her, to *invest* her, with a fee simple

4 The duke's daughter seduced suppose, as Clarisse was by Lovelace she wanting a day of being of age *Per porte action versus seducer* case, trespass *per quod servitium amisit* stockings remaining unmended, which *fille* should have mended while in childbed damages laid at £10 000 *Fille* good witness Why? Because no interest What matters it to her whether she be thought to have been defiled without consent, or to have delivered herself as Potiphar's wife would have done to Joseph?

Secus, the day past, and *fille* of age *Action per pier ne gist*,† *quia nul droit* because no right *per faire fille* mend stockings *issint*, no damages *al pier* Action *per fille ne gist*, *quia nul seduction*, *fille ne estant dans age* et *uncore fille* bad evidence *quia nemo debet esse testis en son cause demesne*

III Exception the third—But here a difficulty occurs A reason, to be susceptible of correct scrutiny —a reason, like any other proposition, should have for its vehicle some determinate and complete grammatical sentence But among the words, or assemblages of words, which on this ground assume the guise and port of reasons, no such propositions, no such sentences, are to be found What is found, consists of here and there a catchword or two, out of which, if others were added to them, reasons of some sort or other might peradventure be composed Take, for example, the words *necessity, course of trade* The matter of Gibbon's book has been not unaptly stated to be not history, but allusions to history, the sort of matter here in question may, in like manner, be said to consist not of reasons, but of allusions to reasons

1. Jeweller delivers jewels to his journeyman to deliver them over to a customer journeyman steals them Thief good witness

* 1 Salk. 283.—*Ed.*

† This action, however, can be maintained, whether the daughter is of full age or not. In the case of Bennett *v* Allcot, Mr Justice Buller said—"Here instances of actual service are proved, and therefore it is immaterial whether she were of age or not." 2 T. R. 168.—*Ed.*

to prove delivery. Why? Because, in speaking of the transaction, occasion may be taken to use the words *course of trade*. Trade is certainly a good thing: but *quære*, what can it be the better for a sort of evidence which in each instance will most probably, if not certainly, give the goods away from the right owner to a thief?

Secus if the jeweller himself had delivered them:* for, this is not *in the course of trade*. No shopkeeper was ever known to serve a customer with his own hands.

Observe the difference: in case of mendacity, the jeweller has no interest to serve but that of gaining the value of the jewels; the journeyman has that same value to gain, and his life to save. But in the English lawyer's price-book, life is worth nothing, reputation worth as little, except when money is to be got by parting with it.

2. Action for the price of goods sold by factorage. factor paid at 5 per cent. Question about the price agreed on, whether £10,000 or £11,000: if £11,000, factor gets £50, which, if £10,000, he does not get. Factor a good witness. Why? Because here too you may say *course of trade*. Had the factor delivered £50 worth of his own goods with his own hands, there being nobody else to prove it, he would have lost the money; for here you cannot say *course of trade*.

If, in the one case, the profit from perjury, supposing perjury, is no greater than in the other,—how much greater the mischief! how much greater the loss! To gain his £50, the factor must, in the first case, have inflicted on the party injured a loss of twenty times as much.

In a case of this sort (and there are plenty of them) some, instead of course of trade, say *necessity*. The one word is as good as the other. any other as good as either of them. Approve the exception, you must first have condemned the rule.

With reference to what event can it be *necessary* to admit a species of evidence which is more likely to be productive of injustice than justice? for such (as we have seen) is the fundamental proposition, which, in point of reason, forms the necessary and only basis of the rule. With reference to what desirable end? To the avoidance of injustice? To say so, would be a contradiction in terms.

In these three words, *course of trade*, may be seen a complete confutation of the rule; a complete disavowal of the principle of it; a complete certificate of the non-existence of that danger which constitutes the sole reason of the rule.

Course of trade!—and of what trade? Of every branch of trade, from the highest to the lowest: course of dealing—of dealings of all sorts—of every day's dealings between man and man. The persons exposed to the action of this sinister interest—of this interest, which, sinister as it is, pecuniary as it is, as well as so much beyond pecuniary, forms no bar to their testimony,—are persons of the lowest, as well as most numerous order, servants and day-labourers; while the interest, the pecuniary interest, of itself, rises to any magnitude. And with this example not only before your eyes but in your mouths, you take upon you to deprive justice of the light of evidence, on pretence of interest!

IV. Exception the fourth:—Interest created by a wager. a wager laid by the witness on the event of the cause.

Reason for the exception: A man ought not to have it in his power to deprive another of the benefit of his testimony.†

What! not to deprive him of a sort of testimony which, in your view of the matter, is sure to be stained by perjury, and to produce misdecision and injustice? One thing on one occasion, another thing on another occasion One individual must not have it in his power to deprive another of the benefit of his testimony. How often do they not, these lawyers, give that same power to individuals in other instances!—how often do they not execute it themselves!

Blessed law! A law authorizing parties to hire witnesses, and witnesses to be hired—a law establishing a market overt for hired witnesses—effect given to the practice, and nothing said against it!

Wagering thus employed is subornation; not yet simple subornation, but subornation double distilled. Subornation simply distilled is £100 promised by plaintiff to witness, to be received if plaintiff gains the cause. A wager of £100 between plaintiff and witness, plaintiff laying that he loses the cause, witness that he gains it, acts with double the force.‡ In the case of the simple loser,

* 1 Phil. 64.—*Ed.*

† The principle laid down in Barlow *v.* Vowell, Skin. 586, and the celebrated case of Bent *v.* Baker, 3 T. R. 27, was, that where a person makes himself a party in interest *after* a plaintiff or defendant has an interest in his testimony, he may not by this deprive the parties of the benefit of his evidence.—*Ed.*

‡ If the remark were worth insisting on, it acts with more than double the force; the suffering from a given sum lost being so much greater than the enjoyment from the same sum gained. What if the £100 lost were the witness's all: he could lose no more; his suffering from loss could not be increased. Supposing it so much gained, the gain would be capable of being doubled and doubled, and so on *ad infinitum*; and still the enjoyment limited enough, as, by universal confession, all human enjoyments are. Laws are in force reprobating simple gaming, and empowering the loser to recover back money thus lost. How innocent is simple gaming, in comparison with such wagering!

though plaintiff should lose the cause, witness will indeed gain nothing, but neither will he lose. In the case of the wager, plaintiff losing the cause, witness will not only gain nothing, but he will forfeit as much as in the other case he would have gained

V. Exception the fifth —

After observing the cases in which the excluding rules have been broken through, for reasons proper in themselves, but yet no otherwise proper than on the supposition of the impropriety of the rule, — it may be curious enough to observe a case in which the rule is broken through on the ground of a circumstance out of which nothing like a reason can be made, or is so much as attempted to be made

A time there was, when the witness was not exposed to the action of the sinister interest, to the action of which he is exposed, now that he is called upon to speak Well, and what then? What follows? That at that time, had he been examined, the cause which exists for suspecting him would not at that time have existed but, for not existing then, does it exist the less at present?

Question A man who at the time of his examination has an interest in the cause, — is he an admissible witness, he having had no interest at the time of the supposed fact? Decision in the affirmative * Because he was under no temptation when he had not to speak, therefore, when he is to speak, knowing him to be under temptation, you are to suppose him not to be so Just as if a pilot were to say in a storm, the vessel among the breakers, Sit still, there is no danger Why so? Because yesterday it was a dead calm

VI Exception the sixth *Voire dire* † Truth expected, in spite of interest

One point of practice more may put a finish to this exclusionary rule, and the deviations from it When a witness produced against you has an interest in the business (meaning always a pecuniary interest,) and you cannot get other evidence of it, or do not care to be at the expense, you address yourself to the witness himself, and ask him whether he has or no if he speaks truth, he is turned out, if he perjures himself, he is heard This operation is called examining a witness upon the *voire dire*. *Voire dire* is, in law French, to tell the truth and the examination is called *voire dire*, because upon this occasion the witness is called upon, and expected, to tell the truth, no such requisition being made, nor result expected, in other cases.

The practice, and the name found for it are not ill matched Speak the truth indeed? So, on this occasion he is to speak truth, is he? What is it, then, that he is to speak on other occasions?

On the exclusionary principle, no supposition was ever more completely *felo de se* If the man has no interest, they make sure in the first place that he will not speak the truth, and, though he have an interest, still they expect him to speak the truth

On the principle of universal admission, nothing would be more consistent, nothing more rational, than the practice If the situation the witness stands in exposes him to the action of a mendacity-promoting interest, he will speak under a bias the judge should know of it, that he may put himself on his guard Mendacious it may happen to him to be respecting this collateral fact, as well as the principal one, but mendacious he cannot be in both facts, without exposing himself to double danger Bad as a passport to (*jargonicè* say) *competency*, the examination is good as affording a clue to *credibility*

In a modern book which lies before me, the practice of examination on *a voire dire* is spoken of as being at present out of use. How the practice itself can be out of use, I do not very well conceive I can conceive the phrase to be out of use — and if it be, so much the better A man might look a good while, even in the vocabulary of English law, before he would find so silly a one Come, my honest friend, I am going to put some questions to you To the first of them, the court expects you to speak truth to the others, as you please †

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* Modern Equity Digest, tit. Evidence, from 2 Vesey jun. 634.

"Witness to a will, not interested at the execution or death of the testator, is competent, though interested at his examination, Brograve & Winder, July 1795. 2 Vesey jun. 634."

† 1 Phil. 23, 123, 254.—*Ed.*

† The above-enumerated exceptions are but specimens

In Serjeant Hawkins's Crown Law (c. 46, § 24,) stands the following passage, word for word:—

"It seems an uncontested rule, in all cases whatsoever, that it is a good exception against a witness that he is either to be a gainer or a loser by the event of the cause, whether such advantage be direct and immediate, or consequential only"

Observe well, *in all cases whatsoever* Immediately after, comes the collection of cases, thirty-five in number, in nineteen of which, the evidence of an interested witness has been adjudged or recognised at common law to be inadmissible (including a few in which the door has been opened by special provision in a statute:) in the other sixteen it has been adjudged or recognised to be admissible. In this place, therefore, the true construction of *all* is *half*, the cases unconformable to the rule being, within two or three, as numerous as the cases conformable to it. Would any one wish to pick out the admissible cases from the inadmissible ones, without looking at the book? The surest way would be to draw them like blanks and prizes out of a wheel: human reason, if unsophisticated, would only lessen, instead of increasing the chance of guessing right. Behold a sample: —

We have now seen that, if it were in the nature of pecuniarily-interested evidence to give birth to any such systematical plan of legal depredation as upon a partial and hasty

Bad, or excluded witnesses.	*Good, or admitted witnesses.*
1. The informer, on a penal statute giving to the informer the whole or a part of the penalty. Reason:—"For he is directly interested in the event."	1. "Persons who by several statutes are entitled to rewards on conviction of offenders." (*Quære:*—are they less interested, or less directly interested, in the event?)
2. In perjury. The party injured, the prosecution being grounded on the statute. Reason:—Because the statute gives him ten pounds.[a]	2. In perjury also. The party injured, the prosecution being grounded on the common law. (*Quære:*—do not the statutes give ten pounds and a great deal more, to the witnesses above spoken of?)
3. In the case of embezzlement of naval stores; the prosecution being on the statute 17 Geo. II. c. 40, which inflicts a penalty with the mulcty to the informer, or corporeal punishment without the penalty, at the discretion of the judge. The witness bad, if he is ingenuous, and owns he has an expectation of the informer's share. (Compare this with No. 1 of the good cases, where the earning of the reward depends upon himself, the judge not having it in his power to deprive him of it, as here.)	3. In the same case as on the other side—the witness good if he is disingenuous, and will not own that he entertains an expectation of the informer's share.
4. In forgery, in relation to a bond, the person whose name is forged to a bond, and who offers to prove that the name signed is not his signature.[b]	1. The same person, when he has got a release from him to whom the bond purports to be payable.

Quære. Which is the most probable supposition;—That, to gain a hundred pounds, D should seek to deprive another of a hundred pounds, and no more? or that, to gain the same sum, W the witness, of whom it appears that he has been trusted with that sum, should seek to deprive another of it, and of his life into the bargain? That D should be guilty of a momentary, and general, and constructive falsehood, without oath; or W of an express and circumstantial train of falsehood, upon oath?

Quære, What inducement could the man imposed upon by the bond have to let off W, the man whose name is to it, but for W's assuring him that it was a forged one, and that he would give such evidence as would convict D? And *quære*, What could be W's inducement to give such assurance, but the expectation of saving himself from the payment of the bond? *Quære*, Therefore, how is the interest destroyed by the manœuvre?

[To the above exceptions to the rule excluding interested evidence, add this most remarkable one. "If a witness is sworn, and proves an instrument, however formal the proof may be, on the part of the plaintiff, he is to be considered a witness for all purposes, although he may be substantially the real defendant in the suit, and the defendant on the record a mere nominal party." Phillipps, i. 260.—*Editor.*]

It was at one time my intention to have given in one view, column by the side of column, the whole number of cases in which, on the score of interest (pecuniary interest,) witnesses had, in virtue of the general rule, been excluded; and the cases of exception, in which, notwithstanding the general rule, witnesses equally exposed to the temptation of the same sort of interest had been admitted.

On a nearer approach, this intention has been given up. Argumentation on the question how the law ought to be, is of itself sufficiently voluminous, without being encumbered with an additional load of argumentation on the question how the law is, or rather ought to be deemed reputed, conjectured to be.

The use of such a table would not have been very considerable. In a general view, the results of the inquiry, on the head of exclusions on the ground of danger of deception, are two:—1. That in no instance ought it to take place; but that a general statute ought to be made, abolishing it in all cases. 2. That such is the inconsistency of the course of decision under jurisprudential law, that (unless it be in the particular cases in which, notwithstanding interest, evidence has been admitted) the judge is in every case at perfect liberty to exclude the witness or admit him, as he thinks fit: that, decide as he may, he has no blame to apprehend; and that between the general principle of *stare decisis* and the pursuit of the ends of justice, in each particular case he has his choice of praise: the praise of zeal for the law, in the one case; the praise of zeal for justice in the other.

On the other hand, the embarrassment attending the construction of such a table would have been enormous. Suppose it copied, with acknowledgment, from the existing digests and indexes. Then comes the question—Who are you?—what sort of a lawyer are you, who put your trust in indexes? Nor would even this plan have

[a] In prosecutions in which the expense to the prosecutor is more than ten pounds,[1] what chance would the law have of producing any effect, if the injured party were not impelled to prosecute by a motive stronger than what can possibly be afforded by the chance of acquiring ten pounds? especially when the acquisition is dependent upon the success of a suit at law:—and such a suit!

[b] He is now made a competent witness, by the 9 Geo. IV. c. 32.—*Ed.*

[1] By the 5 Eliz. c. 9, besides being sentenced to six months imprisonment, a convicted perjurer forfeited £20, one moiety of which went to the king, and the other to the person aggrieved by the perjury. The 2 Geo. II. c. 25, inflicts the punishment of transportation, or imprisonment for seven years, with hard labour.—*Ed.*

view might seem the inevitable consequence, the cases in which (notwithstanding the influence of the principle of exclusion) this seemingly dangerous species of evidence is actually admitted, are of sufficient extent to have long ago let in the mischief in full force At the same time, a matter of fact universally notorious is, that no symptoms of the prevalence of any such mischief have ever manifested themselves

So far is the public from ever having been laid under contribution by a system of depredation grounded on mendacity, as in the case supposed, — so far has been the practice of laying individuals under contribution in this way, by false evidence, from being realized to such a degree as to have become a prevalent practice, — that even the rewards offered to informers—the standing invitations by which men are called upon, at all times, to lay offenders under contribution, without prejudice to truth, and to the great benefit of justice, — are not excepted to an extent sufficient to give to the laws thus endeavoured to be supported, the degree of efficacy which the interest of the public in that behalf renders so desirable

Men are not so forward as could be wished to dig for emolument in the mine of litigation, even by the invitation, and under the full protection of the law Can it be looked upon with reason as a mischief seriously to be apprehended, that men should be more forward than at present to embark in the same intricate adventure, with the reproach of mendacity and injustice pressing all the while upon their consciences, and with the fear of punishment and infamy before their eyes?

CHAPTER IV

IMPROPRIETY OF EXCLUSION ON THE GROUND OF IMPROBITY

§ 1. *Convicted perjury an improper ground of exclusion*

THIRD general cause of exclusion on the score of deception, — *improbity*

Interest is not in any shape a proper ground of exclusion. Improbity, in whatever shape or degree, is still farther from being a proper ground of exclusion

Entire assurance of mendacity neither ought to be, nor is, received as a ground for the exclusion of the assuredly mendacious testimony. So far from it, that, on the contrary, that sort of evidence which is most assuredly mendacious is (when applied in the manner that all mankind are in the habit of applying it) regarded even by lawyers as the "best evidence"

Evidence in which both causes of suspicion are united, and each in the highest degree, is received in every day's practice, to the great advantage of, and without any prejudice, or so much as suspicion of prejudice, to justice: and this where, in case of deception, the mischief would be at its highest pitch

These several propositions either have been, or, it is hoped, will be, established by sufficient proofs

Let us begin with perjury In perjury may be seen by far the strongest case the case in which the pretence for exclusion on the score of security against deception wears the fairest outside

Perjury is a particular modification of improbity, but a modification particularly appropriate to the present purpose Improbity at large, according as it is more or less frequently displayed, indicates an habitual, or at least frequent, prevalence of the force of the improbity-promoting over that of the tutelary or improbity-restraining motives: a force impelling the individual into this or that line of immorality and misconduct, according to the nature of the seducing motive or motives acting in each individual case Perjury, in addition to the prevalence of the ordinary motives on some individual occasion or occasions, indicates the particular species of delinquency into which the individual has thus been impelled, viz mendacity the very species by which the most plausible of all pretences for exclusion on the ground of improbity is afforded In any other case, the argument for the exclusion is no more than this He has violated the obligations of morality in some sorts of ways, therefore it is more or less probable that he will, upon occasion, violate them in this sort of way In the case of mendacity it runs thus He has violated the obligations of morality not only in other sorts of ways, but in this very sort of way, on former occasions, therefore it is more or less probable that so he will on the occasion now in hand *

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been altogether free from embarrassment and dissertation. Index would not always agree with index: a choice would then be to be made; and then would come, as candidates for admission, the reasons for such choice.

2. Suppose the obligation submitted to, of taking on myself, in each instance, the responsibility of the short statement given of the case. Thus, then, the reader finds himself plunged in the ocean of jurisprudential law, composed, in every part of it, of uncertainties. The reader being set down in this labyrinth, the business of the author is, by dissertations upon dissertations, to make him a clue for it. The words put by one reporter into the mouths of the judges, agree not with the words of another reporter; and when they do, they are still but the words of a reporter, not the words of a judge; no judge is bound by them

* Mendacity, on this occasion, is the only proper subject of regard: the ceremony, without which the most pernicious exercise of mendacity

For suspicion, a most perfectly proper ground: for rejection, none whatever. Reasons: those already mentioned; to which may be added those which follow.

1. In this line of delinquency, beyond most, if not all others, the scale is lengthy, the degrees are numerous: the highest degree upon a level with murder; the lowest, that sort of conduct (shall it be called misconduct?) which is openly and habitually practised by English jurymen; — countenanced, approved, recommended by English judges.

To all these different levels the eye of judicial suspicion has the power of adjusting itself. Exclusion knows no gradations. blind and brainless, it has but one alternative; — shut or open, like a valve; up or down, like a steam-engine.

Instead of conniving at the exclusionary system, long ago would the legislator everywhere, if wisdom had been as easily displayed as power exercised, have exhibited a scale of this sort, for judicial suspicion to guide itself by. An attempt of this sort will be found in an ensuing book.

2. When the door of the witness-box is shut against a proposed witness on this score, it is generally on the ground of some single transgression of this sort. But a single transgression of this sort, — what does it prove? The violated ceremony apart (a concomitant purely accidental, having no connexion other than accidental with the nature of the mendacity, nor with its pernicious consequences,) the conviction proves no more than this,—viz. that on one assignable occasion the convict has been known to fall into that sort of transgression, which every human adult must also have fallen into, more times than one, on occasions assignable or unassignable.

"I said," says the Psalmist — "I said in my wrath, all men are liars." It was in his wrath that the observation came from him; but he need not have wished to retract it in his coolest moments. From a single lie told in the course of ever so long a life, a man may, without any grammatical impropriety, be denominated a liar. But, admitting that in this sense the being a liar is what, without exception, might be predicated of every human being that ever arrived at man's estate, the truth of the proposition would not be incompatible with a probability on the side of veracity, to the amount, on each given occasion, of many millions to one. And, upon the whole, he who considers how few in comparison are the occasions in which any advantage (howsoever impure, and overbalanced by ultimate disadvantage) is to be gained by falsehood, will, I imagine, join with me in the opinion, that, from the mouth of the most egregious liar that ever existed, truth must have issued at least a hundred times, for once that falsehood, wilful falsehood, has taken its place.

Again, no man is the same as himself at all times. It has been said of wisdom: it may be said, and with equal truth, of probity; it may be said, and not altogether without truth, of veracity, that most important, because all-extensive, branch of probity. The mind, of which the force has sunk under the temptation at one time, may stand against it at another: the same mind has its stronger moments and its weaker moments; without taking into the account that sort of revolution so much oftener talked of than exemplified, a thorough change. On the part of the temptation, likewise, the strength of it is liable to variation (as hath been already noted,) upon a scale distinguishable to an infinity of degrees.

From a man's having borne false witness in some one instance (or even, as we shall see presently, without any such warrant, and merely from his having done or thought, or having been supposed to have done or thought, something wrong, in some other way that has nothing to do with falsehood,) it is inferred, and that with the most peremptory assurance, that he will never bear true witness in the whole course of his life! An induction, and

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is not perjury, and by means of which the least pernicious is perjury, is not the work of the witness, but of the legislator. In considering, therefore, the pretence of exclusion on this ground, mendacity is the species of improbity to be considered, not perjury. Abolish oaths, you would abolish perjury; but would the mischief of mendacity be diminished?

The mendacity here in question is indeed the mendacity of an individual occupying the station of a judicial witness; mendacity uttered on the occasion of judicature. To this extent, considered as a sort of presumptive evidence of future contingent mendacity in danger of being committed on an occasion of this same sort, mendacity committed on a judicial occasion in a past instance will (it is true) afford a presumption stronger than any single act of mendacity taken at large. But still, it is from mendacity, not from perjury,—from mendacity, whether preconverted or not into perjury,—that the mischief has flowed: it is to that mischief that the degree of improbity is proportionate.

If the profanation of the ceremony were alone regarded, the indication afforded by it of improbity would be very slight, or even evanescent. Such at least must be the case in a country in which this profanation is not only generally, but publicly and notoriously, practised, and at the same time unattended with the sense of shame, by men in elevated stations, and in other respects of unblemished characters. But in England, it has been seen in a former book (Book II *Securities;* Chap. VI. *Oath,*) that examples of this profanation are thus general, even among men distinguished from the common mass by superior probity. That that ingredient in the composition of perjury should, in any considerable degree, operate as an indication of mendacity, any more than any other species of improbity, is tantamount to a contradiction in terms.

such an induction, grounded on a single instance!

To pronounce a man guilty of any other offence without the opportunity of a hearing, is allowed to be the summit of injustice To pronounce a man in the same manner guilty of an intention to commit perjury, is given, on this occasion, as a most refined invention for the furtherance of justice!

He *was* heard (it may be said) he was heard, before he was pronounced guilty of the fact on which the incapacitation was grounded —He was heard, yes but upon what occasion? On the occasion on which he is deemed incredible? No but on the occasion of a transaction altogether different which may have happened yesterday, it is true, but between which and the occasion in question, an interval of half a century may, for any provision the rule makes to the contrary, have elapsed

The exclusionist, at any rate, is estopped from representing conviction of perjury as a mark of distinction between the unfortunate liar in question, and other men According to him—perjured or unperjured before—every man, for the most trifling profit, is ready to commit perjury

From all this, is any such inference to be drawn as that perjury is a light matter? that it is no stain upon a man's character? that it affords no presumption against the truth of his testimony in succeeding instances? Far be it from me to have harboured, for a moment, any such conceit What I am contending against (let it never be out of sight) is absolute rejection rejection in all cases —not suspicion and distrust The very repugnance, with which it is but natural the reader should have received the proposition of opening the door of justice to testimony of this tainted kind, is a sort of proof and earnest of the safety of the measure The same precipitate emotion, under the influence of which the man of experience, the man of law, has so generally shut the door against testimony thus stigmatized, may be expected to act upon the whole with equal force, and with quite as much as its due force, even upon men of his own elevated level much more upon the unthinking multitude below So broad, so prominent is the stigma—so conspicuous and impressive the warning which it gives,—the danger is, not that the man thus distinguished should gain too much credence, but that he should not gain enough *Fœnum habet in cornu* Suppose an inexorable door shut against him, or, although open, suppose an inexorably deaf ear turned to him, and observe the consequence:—that crimes, all imaginable crimes, may be committed with impunity, with sure impunity, on his person and in his presence

When the perjurer is a principal in the cause—when the person on whose part false testimony is apprehended (apprehended on the ground of false testimony given in a former instance,) and the person whose purpose would be served by the false testimony (whose interest, it is apprehended, may be the efficient cause of such false testimony,) are one and the same, in this case it is only on the part of one person that the improbity is presumed and in his instance the presumption is but too well justified by former experience But suppose the perjurer not himself a party, but only called in by a party, in the character of a witness how stands the presumption then? Without subornation on the one part, perjury on the other part is, in this case, I do not say an impossible crime but at any rate not a natural one. Spontaneous perjury, to serve a person who knows nothing of it, and who, therefore, does not so much as conceive himself to be obliged by it, is certainly a possible case, but it is not a natural one But, if perjury on the part of the witness supposes on the part of the party a sort of subornation, more or less explicit,—how stands the danger, how stands the supposition, when, to produce the apprehended mischief, criminality, and in this high degree, on the part of two different persons, must have taken place? On the part of one of them, the presumption indeed has a ground to stand upon but on the part of the other, it has no ground Will it be said, that the invoking, in this way, the aid of a person thus exposed to suspicion, affords a suspicion but too natural of a connexion in guilt? The suspicion might have some force, if on all occasions, or on most occasions, a man had his choice of witnesses But in general the case affords no such choice Chance—the same chance which gives birth to the offence, or other cause of dispute (to the offence, if real, or to the event which disproves the reality of it, if the accusation be groundless,) —this same chance brings to the spot the witnesses, by whose testimony, if obtainable, the cause is to be decided To have his witnesses to drag out of the house and the very bosom of the adversary, is no uncommon case

Cases, however, there are, in which a man has usually his choice of witnesses—actual *observing* witnesses to the transaction—eventual *deposing* witnesses in case of litigation. I mean the case of attesting witnesses to conveyances and other contracts. Apply the rule of exclusion for perjury to this case Because my witness has since perjured himself, am I to be deprived of my estate?*

* Where a witness, who at the time of the transaction was an uninterested one, has since given himself an interest in the cause,—as, for instance, by a wager,—English lawyers have decided—and with indisputable justice—that, by this act of the witness, the party shall not be

In considering whether improbity, and in particular whether this strongest case of it, ought, in point of policy, to be considered as a ground for the exclusion of testimony,—the consequences in point of utility to the public taken in all its parts, have, on this occasion as on every other, been taken by me for the standard of right and wrong. But the consideration of these consequences,—has it in general been the efficient cause of the decisions given on this head, in the established systems of jurisprudence? To a certain degree, yes; exclusively, certainly not. In the legislation and jurisprudence of various nations, and of England among others, the offender, not the community injured by the offence, has been the object in view—antipathy, not benevolence, the prevailing motive. Infamy, and (as a visible sign of infamy) exclusion from the sanctuary of justice, has been a lot of punishment superadded to what other lots were found at hand; a sort of makeweight punishment to fill up the measure. It is one of the instances, which, in but too great number, may be found in the English as well as other established systems, of the sort of punishment that has been called *misseated* punishment: punishment *in alienam personam*: a sort of punishment which, in this particular application of it, may be styled *chance-medley* punishment. The punishment does not fall upon the witness who is disqualified, but upon all persons who may have need of his evidence. A certain person has offended, and, to add a sting to his punishment, an unoffending crowd is collected below, and a pailful of punishment is thrown down upon their heads out of a window. An innocent stranger is laid hold of, and a sword run through his body, that with the point of it a useless scratch may be given to the caitiff who has provoked all this vengeance.

§ 2. *Inconsistencies of English law under this head.*

Under English jurisprudence, the testimony of a proposed witness, if previously convicted of perjury, is altogether inadmissible.* So says the general rule. Not that exceptions are altogether wanting.

1. Exception the first:—A piece of parchment called a *record* having been rendered necessary,—if anybody has contrived to keep it out of the way for a few minutes, the perjurer's evidence is good evidence.† What the record (such part of it as is not itself mendacious) can exhibit of the case, is as nothing in comparison with what the judge's notes might show, or the testimony of another person present at the trial on which the perjury was committed. But production of the lying parchment produces fees; production of the other evidence would not yield fees.

The oracular and sacred character attributed in the books to everything that bears the name of a *record*, is grounded on the supposition that the instrument, if not the composition of the judge, has at any rate been authenticated by his perusal. This supposition, unless by the merest accident, is never true. While all this honour is paid to the spurious document, the genuine one, which actually is the composition of the judge himself who tried the cause, passes unregarded.

Admitting the judge's notes as the best of all evidence, when it happens to be attainable, — the species of evidence there is, which cannot but exist: a species of evidence scarcely inferior to the judge's notes, and greatly superior (rationally speaking) to the second-hand as well as uncircumstantial evidence furnished by the copy of the record: and which is sure to be not only attainable, but actually present, and that without expense. This is no other than the evidence of the perjured witness himself, whose conviction, on the account in question, is supposed to have taken place. This, however, is too sure, and simple, and cheap a method of coming at the

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deprived of the benefit of his testimony.[a] The damage which a man is not allowed to do by an act otherwise so innocent as that of a wager,—shall he be allowed to do it by so criminal an act as perjury?

[It is rather curious, that, while the attesting witness, if he has happened to perjure himself since he signed his name, would not, I suppose, be admitted to prove his own signature, he is admitted to disprove it: "A person who has set his name as a subscribing witness to a deed or will, is admissible to impeach the execution of the instrument:[b] although by so doing he confesses himself to have been guilty of a crime which differs from the worst kind of perjury only in the absence of oath—from forgery only in name.—*Editor.*]

[a] *Vide supra*, p. 403, note †.—*Ed.*

[b] Phillipps on Evidence (edit. 1822) i. 41, and the cases there referred to.

* Hawkins says (iv. 355)—"I do not find it clearly settled, whether the pardon of a conviction of perjury, makes the party a good witness:" and he quotes a number of cases bearing upon the point. It seems, that for perjury at common law, the party pardoned may be be a witness; but the 5 Eliz. restrained the king from granting a pardon. Gilb. 145. This statute was very seldom made use of. Indictments for perjury may now be very much simplified, in consequence of the facility afforded by the 23 Geo. II. c. 11. —*Ed.*

† Leach's Hawkins, § 103.—[What Hawkins says (iv. 437,) is on the authority of a case in Salk. 46, which is quoted by the Author in the next page.—*Ed.*]

truth, to be allowed of.* An observation that appears to have been made on this subject is, that when a man has been convicted of a crime, it would be an unpleasant thing to him to speak of it, and thence it is that a man, whose testimony, if admitted, will be sure to be delusive (for that is the supposition,) is to be admitted to give this delusive testimony, rather than that any questions should be put to him concerning a fact on which perjury without detection would be impossible But, if its being unpleasant to a man is a reason for not asking him a question, *à fortiori* it ought to be a reason for not punishing him for how unpleasant soever it may be to a man to say, I have been whipped, pilloried, or transported, the operation of whipping, pillorying, or transporting, should, one would think, be still more so

In no possible case can the unpleasant circumstance in question, the punishment (if it is to be called one,) be surer of not falling upon one who is innocent, than in the present, for if he to whom the question is thus put, whether he has been convicted of such or such an offence, never was convicted of it, —how it should ever happen to him to forswear himself, and answer in the affirmative, unless he takes a pleasure in forswearing himself to his own prejudice, is scarcely to be conceived How well disposed soever a man may be to be unjust to others, there seems to be no great danger of his being disposed to do injustice to himself

This preference of the interests of the guilty to those of the innocent, how absurd soever in all cases, will at least have the effect it aims at, in the case where, if a witness is not liable to be exposed by his own confession, he is not liable to be exposed at all, in those cases (some such there are) where no other evidence of specific criminality is permitted to be adduced But where the difference in point of unpleasantness is no more than what there is between the confessing his own guilt, and the having it proved to his face by evidence which is deemed still more convincing, such as the production of the record of his conviction,—what possible use there is in this tenderness, even to the criminal to whom it is shown, seems not very easy to point out

2 Exception the second —Where the stain upon the testimony has been done away by any of the approved restoratives of which in the Chapter of *Restoratives* †

3. Exception the third —Where the testimony, being self-regarding, viz that of a defendant, is delivered in the shape of affidavit evidence, and "in relation to the irregularity of a judgment in which such person is a party" (This, then, must have been in a civil suit. What if in a criminal suit? Try the cause, and then you will know Examine the authorities, and the farther you examine, the farther you will be from knowing)

The reason is a good one provided always that the rule be, in the first place, acknowledged to be absurd and mischievous "It hath been ruled, that a conviction of perjury doth not disable a man from making an affidavit in relation to the irregularity of a judgment in a cause where such person is a party; for otherwise he must suffer all injustice,‡ and would have no way to help himself But it can only be read in defence of a charge (*i e* against a charge,) and not in support of a complaint"‖ Not that, in the sort of case thus excepted, the reason is by any means so good as in the other sort of case so carefully distinguished All other evidence being supposed, in both cases, unattainable,—in what respect is a man less exposed to suffer all injustice by not being admitted to give his own testimony in support of a complaint of his own, than by not being admitted to give it for the purpose of defending himself against a charge? In other words, in what respect is he less exposed to suffer injustice, by not being permitted to give his own testimony in his own behalf when plaintiff, than when defendant? On the contrary, the danger he would be exposed to from injustice would be greater if the proposition were reversed Debarred from being heard as a witness for himself in the character of *defendant*, he is exposed to no injuries but such as may be attempted to be inflicted on him by the intervention of the hand of justice debarred from being heard as a witness for himself in the character of *plaintiff*, he is exposed to all injuries without exception

From a charge he cannot, in the way of conviction, be a sufferer, but upon the supposition of a suit of some kind or other instituted, and perjury committed, or at least misrepresentation made, in support of it, with the judge upon the watch to protect him against it In this case, the scene of the injury lies *in curiâ*, and there he has the probity and compassion of the judge for his defence In the opposite case, it has lain (*jargonicè*) *in pays* and there, whom had he for his defender? If the adversary had ordinary prudence, seconded by ordinary good fortune, nobody Suppose yourself for a moment, gentle reader, in this unpleasant predicament put into it, not by any perjury of your own (you would not forgive me the supposition,) but by the united perjury of two wicked adversaries Invited by these lawyers, your enemy, being stronger than yourself,

* 4 Leach's Hawkins.
† *Infra*, Chap. VII.
‡ In Salkeld, it is "*injuries*."
‖ Leach's Hawkins, § 103.

and catching you alone, may beat you to a jelly; or (if it be more agreeable to him,) first having tied you to the bed-post, he violates your wife and your daughter, they also being perjurers or quakers,* in your presence. Of himself, the privilege thus given him could hardly have occurred to him. But he has overheard a lawyer brag of it as a good joke; or he he has found it in a book by accident.

Examine the case in another point of view, and now with the eye of an exclusionist: you may see another reason for taking the exception (if an exception there must be) elsewhere rather than here. Let it be in his own cause, and, therefore, in his own behalf: here is interest in the case, and to a certainty: whereas, if the cause be one to which he is not a party, and in which he has no natural interest, perjury on his part, if unbribed, will be without a motive; nor can he be bribed without a person able and willing and bold enough to offer him a bribe; three conditions which do not meet in one person every day.

There remains yet one part of the case, which, on different occasions, has been brought to view already. When the most suspicious of all evidence (so far as improbity is concerned) is received, in what shape is it received? In the shape of *viva voce* evidence, the deponent present in court to be examined and cross-examined by the adversary and the judge? Oh, no: this is exactly the shape in which the door was just now expressly shut against it. Oh, no: the dish must be served up in the shape of affidavit evidence, dressed at leisure, with an attorney to dish it up, a licensed accomplice to help cook the poison, and no taster to detect it.

Thus, in regard to the exclusions grounded on improbity, stands the matter upon the face of the books. But such is the infelicity of the subject, such the felicity of the profession, there is no trusting even to the freshest of their books. The apparent uncertainty of the law is such as we have already had a glimpse of, and such as we shall see in a fuller and fuller light in proportion as we advance: but the real and latent uncertainty of the law (I speak always of the common law) is still deeper and more profound. Ever unfathomable, essentially fluctuating: such is the ocean, such is the common law.

Inquiring among professional friends the degree of observance given to the rules excluding witnesses on the ground of improbity, I learn that judges may, in this point of view, be divided into three classes. Some, treating the objection as an objection to credit, not to competency, admit the witness, suffer his evidence to go to the jury, presenting the objection at the same time, warning the jury of the force of it, and when thus warned, leaving them to themselves. If, after this warning, the jury convict a man of whose guilt the judge from whom they have thus received the warning, is not satisfied,—thence follows, as a matter of course, a recommendation to mercy,—whence follows, as a matter also of course, a pardon. Another class suffer the testimony to be given, but if they do not find it corroborated by other testimony, direct the jury to acquit, paying no regard to it. A third class, again, if they understand that no other evidence is to follow, refuse, in spite of all authorities, so much as to suffer the jury to hear the evidence.†

Of what individuals these several classes are respectively composed, I do not know, and should be very sorry to be obliged to know. The object in all these cases is the preservation of the innocent. To this object there are these three roads, all equally effectual: — the first, a rational course, and conformable to law, meaning always the published, the known, the knowable dispensations of the law; — the second, arbitrary, assuming, self-willed, trespassing upon the regard due to the free agency of juries, unconformable to the spirit of the constitution, but containing nothing absolutely repugnant to any peremptory injunction of the law, — the third, equally and completely repugnant to reason and to law.

Under the jurisprudence of ancient Rome, the great and powerful judge called the prætor used, at the commencement of his prætorship, to hang up for the information of the suitors, in a conspicuous situation in some public place, a table of the rules by which he proposed to govern himself during his year.

Of the three different courses taken, as above mentioned, in relation to the same business, by so many classes of English judges, I, having no other interest in being informed than what I possess in the general capacity of an English subject, should be unwilling to know which, on any given occasion, has been or would be taken by any individual judge. But, in the capacity of a prosecutor in any of the cases in question, were it ever my misfortune to find myself standing in that capacity, it would certainly be highly material to me to procure (if it were possible) two tables:

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* As to the evidence of Quakers, see Vol. VI. p. 381, note 6. — *Ed.*

† These remarks were written about the year 1803. The same diversity still (1839) prevails. It frequently happens, that where the principal witness has been a party concerned in the commission of a theft, or in the subsequent reception of the stolen property, and there is no corroborative testimony to the material facts of the case, the counsel for the prosecution, with the consent of the judge, withdraws the case from the consideration of the jury, after merely stating the nature of the only evidence he had to adduce in support of the charge.—*Ed.*

the one a standing one, containing the names of the twelve judges, each being accompanied with the designation of that one of the above three courses which it is his practice to pursue, the other an occasional one, containing the names of the judges, who, upon the trial of the cause in which I was in a way to be prosecutor, would be destined to preside If the judge I saw reason to expect, was a judge who would suffer a jury to hear, and to act as if they heard, I would under his auspices take my chance for bringing the truth to light but if he were either a judge who would not suffer a jury to hear, or one who would not suffer them to act as if they heard, most certainly I would have nothing to do that I could avoid doing, in the way of prosecution, under the direction of such a judge

It would be equally incumbent on me to decline bearing a part in any such sham trial, whether I consulted the rules of personal prudence, or those of social duty—whether I regarded the effect of such a prosecution in the way of burthen on my own finances and my own ease, or, in the way of example, on the conduct of those to whom, in the capacity of persons exposed to the temptation of offending, information of the practice in this behalf might be of importance

The example is bad, when a man supposed to be guilty is seen to remain unprosecuted But the example is much worse, when a man supposed to be guilty is seen to be prosecuted, but prosecuted under circumstances in which it may be and is known beforehand that prosecution will be to no purpose, saving always the impoverishment and harassment of the prosecutor, impoverished and harassed already by the injury—impoverished and harassed commonly still more by the fallaciously offered and really withholden remedy The escape for want of prosecution, is the simple escape of a guilty man from punishment "the escape taking place after prosecution, and effected by such means, is an example of the triumph of him who is guilty, and of the punishment of him who is innocent and injured "

§ 3 *Improbity in other shapes an improper ground of exclusion*

If from that modification of improbity which consists in a breach of veracity on the very sort of occasion in question (viz judicial testimony,) no sufficient ground for exclusion can be deduced,—much less (it is evident) can it, from improbity manifesting itself in any other shape. English jurisprudence furnishes in this part of the field a rich harvest of learning, which whoever has an appetite for absurdity may go and feast upon, at the table spread for him by Hawkins, Bacon, and Comyns, with their everlasting authorities

Looking into the offence for this purpose being a process to which thought, howsoever misapplied, is necessary, and thought being attended with trouble, sages have substituted a more expeditious operation, which is, the looking at the punishment. Treasons, felonies (unclergyable and clergyable,*) præmunires, misdemeanours by these denominations are expressed all the distinctions they know of, in point of malignity (or say improbity) between one group of offences and another; and, except the obscure and mostly incongruous intimation given of the nature of the offence in the case of treason, and the undistinguishable intimation of misconduct or delinquency in general conveyed by the term misdemeanour, none of these terms afford any the slightest intimation of any intrinsic quality in the offence itself, nor of anything else belonging to it, but the accidental circumstance of the punishment that has been attached to it.†

A system of arrangement is good or bad, instructive or fallacious, according as the objects ranked under the same division possess more or fewer properties in common In the system in question, the objects not possessing any essential properties in common,—any inference grounded on the place occupied by the object in the system, must, in the case of this system as of any other, be proportionably inconclusive To make a complete perambulation of the whole chaos, would, for this or any other purpose, require volumes upon volumes A simple or two must serve instead of a complete list

To judge of offences by punishments, the most detestable of mankind should be found in the class of traitors Treason being the sort of act most offensive to those whose dependent creatures judges used to be, treason is, in the eye of jurisprudential law, the very pinnacle of improbity In the character of a witness, a traitor, of course, supposing him to remain with his bowels in his body, never could be heard Reason, unless the case were particularized, would never know what to think of it of what sort of disposition (if of any) to regard it as evidentiary—whether of

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* The benefit of clergy was abolished by 7 & 8 Geo IV c. 28.—*Ed*

† Of late, it seems to be established, that the question, infamy or no infamy, is to be decided by the consideration, not (as formerly) of the nature of the punishment, but of the nature of the offence and for this decision credit seems to have been taken, as for a conspicuous stride in the career of liberality and improvement But what becomes of it, when it is considered that the conception even of the offence has no better ground than the observation of the punishments that have been annexed to it? And admitting the distinction to have been ascertained, is there any consistency in supposing that a judge will in any instance have attached an infamous punishment to an offence not infamous?

vice or of virtue. Enemies must be resisted—traitors must be punished: but to a traitor it may happen to be among the most profligate or the most virtuous of mankind. Occasions there are in abundance, on which traitor or no traitor depends upon bad success or good success. Take a monarchy, and suppose the title to the crown (the legitimacy, for instance, of the heir apparent of the last monarch) to be in dispute. Half the people believe the legitimacy; the other half disbelieve it. Each half are traitors, to the other half. Which are so by law? It depends upon the course taken by a few balls of different sizes. But will it be said that the course taken by the balls affords any indication of the side on which the greatest proportion of veracity is to be found? In cases like these (not to speak of concealed traitors,) every non-juror at least is at his heart a traitor. But is he the less trustworthy? On the contrary, who does not see that he is by so much the more so? His adherence to veracity, his insensibility to the force of sinister interest, is established by the most incontestable evidence — by evidence such as no adherent to the successful side has it in his power to give.

During the warfare between the two roses, —that is, from generation to generation, the good people of England, good and bad together, were alternately loyalists and traitors: consequently, if the men of law were fit to be believed, in all that time scarce a man in the country that was fit to be believed *

By a numerous and respectable description of men, probably by a great majority of those to whom the history of their country is an object of interest, Russel and Sydney (Russel at any rate) seem to be regarded as patterns of heroic virtue: of virtue, not simply in respect of the general tenor of their lives, but in respect of the very act which brought the life of each of them to its close. Both patterns (let us say) of heroic virtue: yet, if in the eye of the law (for that is the question) these men were not traitors, what men ever were or can be?

Next below treasons, stand unclergyable felonies. Among these, take homicide in the way of duelling.

Two men quarrel; one of them calls the other a liar. So highly does he prize the reputation of veracity, that, rather than suffer a stain to remain upon it, he determines to risk his life, challenges his adversary to fight, and kills him. Jurisprudence, in its sapience, knowing no difference between homicide by consent, by which no other human being is put in fear — and homicide in pursuit of a scheme of highway robbery, of nocturnal housebreaking, by which every man who has a life is put in fear of it, — has made the one and the other murder, and consequently felony. The man prefers death to the imputation of a lie, — and the inference of the law is, that he cannot open his mouth but lies will issue from it.

Such are the inconsistencies which are unavoidable in the application of any rule which takes improbity for a ground of exclusion. Take it for a ground of suspicion only, all these absurdities are avoided. On each occasion every man is judged of by his own works. A man is not pronounced unworthy of credit, merely because other men, who have committed other acts accidentally called by the same name as some act of his, are supposed unworthy of credit. The suspicion is founded, not on the *class* of the offence (which, as offences are classed, shows nothing;) nor yet on the *genus* of the offence, an indication still pregnant with delusion; nor, more implicitly, so much as on the *species*; but rather on the individual offence: and thus each shade of delinquency raises up that shade, and that shade alone, of suspicion, that belongs to it.

If the legislator had his choice of witnesses upon every occasion, and witnesses of all sorts in his pocket, he would do well not to produce any, upon any occasion, but such over whose conduct the tutelary motives exercised despotic sway: in a word, to admit no other men for witnesses than perfect men. But perfect men do not exist: and if the earth were covered with them, delinquents would not send for them to be witnesses to their delinquency. In such a state of things, then, the legislator has this option, and no other: to open the door to all witnesses, or to give licence to all crimes. For all purposes, he must take men as he finds them: and, for the purpose of testimony, he must take such men as happen to have been in the way to see, or to say they have been in the way to see, what, had it depended upon the actors, would have been seen by nobody.

A very short argument might be sufficient to satisfy us of the insufficiency of all arguments drawn from the topic of criminality in

* Look back, as above, to a few hundred years' distance in the track of time, you see a whole nation composed of traitors. Look on to a few hundred degrees' distance in the track of space, you may see a whole colony composed of felons: and felons not *in posse* merely, like the traitors, but *in esse*, duly converted into that state in due form of law. Upon the evidence of this or that one of these felons, this or that other of them has from time to time suffered death: murdered, thereby, or not murdered, is a question I leave undiscussed for the amusement of those who sent them there.

Question for a law debating club: Where are we to look for the worst murderers; to the Court of Common Pleas hanging a man upon good evidence?[a] or to a New South Wales Criminal Court hanging a man upon such bad evidence, that is, upon no evidence?

[a] Said to be murder. (Hawkins.)

the lump. The evidence of an accomplice is admitted, whatever be the crime, at least (which is abundantly sufficient for the purpose) in crimes which are regarded, as being of the deepest dye, and, as affording the strongest ground for exclusion in the instance of a witness whose criminality, whether of the same or a different species, is of less recent date *

Supposing criminality in general to be a just ground of incapacitation in this behalf, on the part of a witness produced in favour of a criminal prosecution,—the criminality manifested by a participation in that very crime would afford a juster ground than can be found on the part of a criminal not in the same predicament

Superior certainty, and superior freshness, are circumstances that concur in giving to the ground of exclusion, in this case, a degree of strength which is scarcely to be found in any other

First, in regard to *certainty* certainty of past depravity In other cases, the evidence of criminality (the only evidence admitted by the law) is the record of conviction But the conviction *may* have been erroneous the man may have been innocent, though the jury thought him guilty Here he says himself he was guilty, and unfolds all the circumstances of his guilt circumstances without which it would not have been in his power to display the guilt of the accomplice against whom his evidence is produced

Next, in regard to *freshness* for on freshness depends the presumption of *present* depravity, without which, *past* is nothing to the purpose of present depravity, as rendered probable by past In other cases, the criminality *may*, it is true, be recent, but what is equally true, is, that it may be any number of years anterior to the time when the testimony is given Long before that period, the crime may have been for ever buried in oblivion, and the character regenerated Here, the taint on the evidence is as fresh as the crime, by the prosecution of which the evidence is called forth †

In a double view, so far as the danger of deception is concerned, this single example ought to be regarded as conclusive. in the character of a proof from experience, and in the character of an *argumentum ad hominem.*

In the character of an appeal to experience.

The temptation at the highest pitch the individual exposed to it, an individual belonging to that class in whom the proneness to yield to temptation is at the highest pitch the force of the mendacity-prompting motives at the highest pitch, the force of the mendacity-restraining motives at the lowest pitch. and yet mendacity itself unfrequent in comparison with veracity, and, at any rate (what is the only thing ultimately material) deception, and consequent misdecision, extremely rare ‡

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* Most commonly, evidence of this description has other evidence of some sort or other, though frequently but circumstantial, to support it; indeed, it is seldom that circumstantial evidence can be altogether wanting But instances have happened in which the decision (the verdict of a jury under the direction of a professional judge) has been grounded on this without any other evidence. such is the credit that has been given to it, and may still be given to it at any time — [It has never been done in modern times. Rex *v.* Durham; Smith and Davis's case, 1 Leach, 478. The judges now require corroborative testimony, not only as to the *thing* done, but also as to the identity of the *person*, charged with having done it: in default of which, they always recommend the jury to acquit.—*Ed*]

† The reason, in point of common sense, for the exclusion, in the case of a *partiaeps criminis*, is thus strong But the technical reason—the reason to which so much importance is attached on other occasions—failing the reason founded on the probability of mendacity, is thrown aside. In law, it is not *criminality* that incapacitates, but *infamy* Now infamy, like most other words which have been borrowed from the language of ordinary life by the language of law, has two meanings one meaning when uttered by unlearned—another meaning when by learned lips. When a person who is not a lawyer hears of *infamy of character*, he usually supposes that it is the same thing as criminality, or, at least, that, when there is no doubt of a man's having committed a crime, it does not need the assistance of any such thing as a speech, from any such functionary as a judge, to render him infamous. Lawyers, however, have determined that infamy is the consequence, not of the *crime*, nor even of the *conviction*, but of the *judgment* Now, as the accomplice, who turns what is called king's evidence, usually has not been tried, he cannot have been convicted, nor consequently can judgment have passed against him There is no infamy, therefore, and consequently no untrustworthiness.[a] Let him even have been convicted, and on the clearest evidence, so judgment have not passed, he will speak the truth. but so soon as it has passed, he is unfit to be believed; from that moment he is a liar. It might appear, nevertheless, to common sense, that, other things being the same, it can make very little difference in the probability of a man's telling the truth, whether or no certain words have been uttered by a judge.—*Editor.*

‡ The absence of complaint on this ground is the more remarkable, and adds the greater force to the argument, inasmuch as on other grounds the effect of the permanent offers of reward held out by statute has been matter of frequent and just complaint. Rewards to different amounts being held out for crimes regarded as rising one above another in malignity, professional men forbear to inform against a man till

[a] This is an exaggeration: the untrustworthiness of the evidence of the accomplice who secures his own pardon, by endeavouring to convict his associates, is pointed out in the books, and acted upon by the judges, as has been seen in the note to the preceding page.—*Ed. of this Edition.*

In the character of an *argumentum ad hominem*, its operation seems to be still more forcible.

When, in case of deception and consequent misdecision, the mischief is so great — when, in a word, it is at the highest possible pitch, amounting, perhaps, to the murder of an innocent man, — you scruple not to give admission to the evidence. Every day you admit it — you all admit it; by none of you has so much as a suspicion been entertained, or at least been professed to be entertained, that the admission of it is, upon the whole, unfavourable to the interests of truth and justice. Yet, where the temptation amounts to nothing — where the capacity of opposing to the temptation (if there were any) that resistance which probity requires, remains unimpeached — and where the mischief, in case of deception and consequent misdecision, is next to nothing, — even there, if but the shadow of an interest flit before your eyes, you scruple not to shut an inexorable door against the evidence.

We have seen, in some measure, what is to be thought of the incapacitations grounded upon interest. We now know what to think of the incapacitations founded on criminality. Add *interest* and *criminality* together, and observe what follows. Interest incapacitates — criminality incapacitates: interest and criminality, each in the highest degree, do not incapacitate. In grammarians' logic, two negatives make an affirmative: in lawyers' logic, two affirmatives make a negative. In vulgar arithmetic, one and one make two: in lawyer's arithmetic, one and one make not two, but nothing.

Oh! but lawyers' interest is pecuniary interest: and this interest, which, being added to criminality, removes the incapacitation, is only the mere interest of self-preservation in regard to life, and nothing more. Well then, add pecuniary interest: add lawyers' only interest to other people's strongest interest: put three grounds of incapacitation together: instead of two, the three put together still make nothing, as before. A pardon, together with a reward, is offered to one conspirator for the discovery of another: neither reward nor pardon given, unless the man informed against is convicted. This is every day's practice. Such is the invitation: and the doors of justice are thrown open to the scum of the earth thus collected. After this, split hairs, and raise quibbles about a farthing's-worth of interest in one shape, and a farthing's-worth in another.*

§ 4. *If exclusion on the ground of convicted mendacity were justifiable, English lawyers and judges should be excluded.*

First, as to the professional lawyer — the lawyer in full practice. I speak not of attorneys, who, when it happens to them to lie, lie rather in deportment than in language, in deeds rather than in words: or, if in written words, in words prepared for them by the client's lips. The indiscriminate defence of right and wrong, by what is it kept up, but by the indiscriminate advancement of truth and falsehood?

What the perjurer has done once, and perhaps but once, the advocate is doing in every day's practice. Occasion, motive, everything the same, except the punishment and the ceremony: the kiss given to the book in one case — not given to it in the other.

The perjurer makes a lie, the advocate circulates it: the perjurer gives words to it, the advocate effect. To what amounts the difference? To the same as between the part borne

his guilt has risen to such a pitch as to entitle the informer to the highest (the £40) reward. It is, or at least is supposed to be, a point of policy not to gather the fruit till it is ripe. The whole system of rewards offered to accomplices in first-rate crimes (a system unknown upon the Continent) has grown out of the exclusion put by English law upon self-criminating testimony: of which in its place.

* One species of evidence, evidence of the most useful kind, is by this exclusionary rule inexorably shut out. The evidence admitted is that of a partaker of the crime, who, in recompense for such evidence, obtains the equivalent of a pardon: indeed, more than the equivalent of what is granted under that name. This man, then, upon requisition, gives information of as many crimes as he has been witness of; or at least of as many as, being known to be acquainted with, he is required to give evidence of. But the persons convicted with or without such bought evidence, have, many of them (perhaps most of them,) their catalogue of crimes of others to which they have been privy, and which, if required and admitted, they might be instrumental in bringing to justice. Such evidence would not always be given: the quality or quantity of inducement necessary to the extraction of it would not always be found. It would, however, sometimes, perhaps not unfrequently, be found: conscience, which so often produces from a man the confession of his own crimes, would naturally have less difficulty in producing the relation of those of other men. Whenever it happened to be produced, a more unsuspicious species of evidence could hardly be found anywhere: were it obtained by hopes of pardon, it would indeed in that case be upon a footing, but no more than upon a footing, with the evidence obtained by the virtual sort of pardon above mentioned: when afforded without hopes of pardon, it would naturally and almost certainly be the pure result of conscience. In capital cases more particularly, corruption would be, practically speaking, out of the question, since, by the supposition, the man would almost immediately be out of the reach of all earthly reward as well as punishment. It is just possible, but not at all probable, that for the sake of eating and drinking a little better during the short interval before death, he should designedly produce the destruction of a fellow-creature.

by one man and that borne by another in a plan of forgery.

The lawyer indeed has his licence to plead, his licence under the seal of the moral sanction: the perjurer has no such licence. Unquestionably the licence makes a difference: contempt and power sit not on the same head.

One difference requires to be marked. The licence granted to the advocate confines itself to the case where it is in that character that he acts: where it is to the use of others that he lies. As truly as the courtier said, *non omnibus dormio*, the advocate may say, *non omnibus mentior*: for (the fee, and the reputation of impressive and successful lying, excepted,) if he lies to his own use, he goes beyond his licence.

But when the habit, thus in ceaseless exercise, has been matured into a second nature, is it so natural that the line thus faintly marked out should never be crossed? Is it not more natural that, as public wrongs have been known to mix with private, the concerns of others should, to this purpose, now and then mix themselves with a man's own?

Concessum est oratoribus aliquid mentiri in historiis. To the orator who laid down the rule, was it an unfrequent occurrence to see him affording the example?

To a butcher, it may happen to be a man of humanity: he has a licence for shedding blood, a licence sealed with the same seal as that under which the advocate acts in the utterance of falsehoods. The licence extends to quadrupeds of all sorts, it does not extend to bipeds, or at least to bipeds without feathers. Yet, when human life is at stake, a butcher is never put upon a jury.*

It seems scarcely in the nature of things, that, in point of testimonial trustworthiness, the testimony of a professional advocate should, in any country, or under any system, be, in the eye of reason, altogether upon a level with that of a man of an equally cultivated mind in another station, taken at random. But whatever untrustworthiness may be found attached to the character on European ground, by far the greatest part of it will be found referable to the technical system, and whatever ulterior degree of untrustworthiness may be found attached to it on English ground, will be found referable to the peculiar degree of malignity to which the endemial disease of that system has risen in England.

Under the natural system (were it ever restored) — under the most perfect system imaginable, — the profession of the advocate never could cease to be necessary, how much less soever might be the demand for the exercise of it. But, under the natural system, the advocate is only the assistant, the bottle-holder, of the suitor, under the technical system, the champion, the substitute.

Under the natural system, the suitor being essentially present — present, so long and as often as any matter of fact, coming in any way under his cognizance, is in question, — there stands somebody, there stands the suitor in his proper person, responsible for the truth of everything that is said in his behalf: the person so responsible is always present in the face of the bystanders and the judge: in vain would the advocate, the echo, the hearsay witness, pretend to believe what the principal, then standing before him, dares not venture to assert, or at any rate to persist in.

When the client is out of the way, not only of punishment but of shame, the advocate (no longer the bottle-holder but the substitute) soaring on his own wings, believes, and proclaims aloud, whatever is most convenient to be believed. His gospel is in his hand, in his brief he beholds his sufficient warrant from beginning to end, the paper may be composed of lies, of lies replete with infamy, but the weight of it falls not on his shoulders.

In the writings of lawyers, a topic which, of course, cannot be an unfrequent one, is the respectability of the professional character: the transcendant excellence of the functions in the exercise of which it manifests itself: whatever in talent is most brilliant, whatever in learning is most profound, joined together and acting in the service of justice. What a maker of sticks has never yet been known to forget, is, that to every stick there are two ends: what a maker of this sort of panegyric takes care never to remember, is, that to every cause there are two sides, and that only one of these can possibly be in the right.

Another case which presents itself as a subject of examination, in regard to exclusion of testimony on the score of appropriate improbity, is that of English judgeship.

In speaking of this case of habitual mendacity, nothing farther will be requisite than the marking those circumstances which concur in distinguishing it from the last preceding case.

Meantime, lest the condition of being habitually stained with this degrading vice should be regarded as a necessary one, indelibly attached to one of the most exalted functions in government, it may be proper to premise, that England is the country on which the imputation will be found to rest, if not to the exclusion of any other, at least in a degree of most prodigious pre-eminence.

Even to that other of the three united kingdoms which is contiguous to England, the contagion has not extended itself: though, on the other hand, it has crossed the sea, and involved the other kingdom, the laws of

* As to this fallacy, *vide supra*, p. 61, sub-note *.

which have been drawn from an English source.

Even in England, the number of the persons thus regularly infected is so small, that were numbers the sole object, this head of preferable exclusion might seem to have scarcely a claim to notice. But when it is considered that the station here in question, limited as is the number of the occupants, is among the chief fountains from which the public morals are derived; and that in one of them in particular, sits a reverend personage, who among his official titles numbers that of *custos morum* of the nation, guardian of the public morals; the paucity of the occupants will hardly be adduced as a sufficient reason why, in this point of view, any more than in any other, the station should be passed by as an object undeserving of regard.

Had Clodius in his day paid a visit to this island, for the purpose of delivering a set of lectures on the virtue of conjugal fidelity; or had Messalina come over and purchased the site of Camden House, for the purpose of erecting upon the premises a boarding-school upon an imperial scale, for the education of young ladies; the individuality of the two characters would scarcely have passed as a reason why their conduct in their respective situations should be passed by, as an object too inconsiderable for notice.

Between the mendacity of the advocate and that of the judge (the scene is now confined to England,) there is this difference. Among advocates, taking any given individual, the exemplification of the quality is rather matter of suspicion than proof. That a large portion of his time is thus employed, is clear beyond dispute; but it would not always be easy to say exactly what particular portion or portions — to fix upon the particular cause, or hour, or minute. In the instance of the judge, this difficulty has no place. In this shape, as well as in so many others, the fruits of his industry are upon *record:* his name is subjoined to them, and in his own hand: they are consigned to that sort of instrument which (as if to give the better effect and virtue to this its quality) is proclaimed aloud as the standard of truth: that mass of authoritative and privileged asseveration, which no other asseveration (come it from what quarter, or from whatsoever number of quarters, it may) is ever to be suffered to contradict: a mass, the matter of which, being constantly (in the greater part of it) false, is on that account to be as constantly taken for true.

To be at a loss for specimens of the exercise of this talent, would be as if an astronomer were to be at a loss to find stars in the milky way. In the selection — since for illustration's sake a specimen must be produced — in the selection lies the only difficulty. To give them all, would be to transcribe no small part of the collection of those fruits of professional industry, which, in professional language, are known by the name of books of *practice.* To transcribe them, on the present occasion, would be to imitate the labour of the ingenious attorney, who, on the occasion of the entry of names and baptisms on a blank leaf, took occasion to enrich the budget of evidence with an office copy of the Bible.

In the *Mariage de Figaro,* the travelled valet, speaking of England, represents cursing and swearing as the matter constituting the basis of conversation. Though matter of that sort is more abundant than a lover either of good sense or piety would wish, yet, taken in the quantity there assigned, the proposition cannot but be considered as tinctured with that exaggeration, which, being natural to the occasion, shows itself for what it is.

If, instead of that vice, he had fixed upon the vice of lying; and, instead of common conversation, upon that sort of regulated discourse in the delivery of which a man might be expected to be more particularly on his guard; and had his observation been, that in England lying constitutes the basis of judicial procedure; his remark would have contained nothing beyond the simple and altogether indisputable truth.

Supported by irresistible power, effrontery has hardened itself to such a pitch, as to affect to regard mendacity under the palliative name of fiction: mendacity in the mouth of judges — mendacity, the source of fees, as conducive, as even necessary, to justice.

Such, in that exalted station, being the practice, the habitual practice, — what, in point of character and reputation, is the consequence? Just what it might naturally be expected to be: that in the scale of trustworthiness, the assertion of an English judge, writing in that character — the assertion of the guardian of English morals, stands exactly at the lowest degree conceivable. Not only is this state of things generally notorious, but it is built upon as such by the acts of the legislature: and this so truly and effectually, that it is upon the known untrustworthiness — upon the infamy, of this exalted character, that the law depends for the efficacy of its arrangements.

Among the other devices employed by the authors of the jurisprudential system for the attainment of their ends, was that of wording their notices in such manner as to convey no information: the consequence of which, actual as well as intended, was, that a man was punished and pillaged as for a contempt of the orders thus carefully kept from coming to his knowledge. The people of England having been under a course of pil-

lage in this form for some centuries, the cries of the oppressed prevailed at length with the legislature to apply what the authors of the grievance (the persons by whose counsels the legislature, on occasions of this sort, governs itself of course, for want of being able of itself so much as to understand the language,) what the authors of the grievance presented in the character of a remedy Instead of the sham notice, which till then had been the only notice ever delivered, — instead of this sham notice by itself, the instrument was in future to contain two notices The one was and is the old sham notice, signed by the judge — the customary heap of lies — the official discourse of the judge, whose name, in his own handwriting, conveying the assurance of its verity, was inscribed on it The other was and is a true notice — a notice that may be at least, and (the nature of the contents considered) commonly will be, a true one, signed by some attorney The two notices being in point-blank contradiction to one another, on what does the efficacy of the true instrument, and of the law by which it was instituted, depend?

On what but this? viz that the word of the attorney, who, unless by accident, has the advantage of not being known, shall be taken in preference to that of the judge, whom everybody knows, and who, as such, is so much better known than trusted, that he is regarded as unworthy of all credence

The assertion thus delivered (it may perhaps be remarked) has not received the sanction of an oath True unless any such duty as that of veracity should be understood as comprehended in the oath of office But what is no less true is, that the assertion is of that class, to which the reverend authors themselves ascribe a degree of trustworthiness beyond any which they will allow to an assertion from any other quarter, though backed by the sanction of an oath Records, instruments coming authenticated from that exalted and thus commanding station, — records, of the verity of which the above specimen furnishes a correct idea, are sure to be believed *i. e* (though known for what they are) acted upon as if true Depositions, assertions from all other quarters, though sanctioned upon oath, may be believed or not they must take their chance — but records are infallible

Is it the occasion, and thence the effect, — is it the occasion, or the ceremony, that makes the political mischief, the moral turpitude? Surely not the ceremony, but the occasion If the ceremony, then suppose a mass of testimony received without the ceremony, and an innocent man convicted and life destroyed upon that ground. In this is there no mischief? In this is there no turpitude?

On the other side, take two pieces of gold coin, two guineas, each of full weight, and, under the eye of an approving judge, to change the prisoner's doom from death to transportation, let the two-and-forty-shillings'-worth of gold coin be valued by twelve jurymen, speaking upon their oaths, at nine-and-thirty shillings, and no more * Look at this, which is every day's practice, and then say whether the distinction between the occasion and the ceremony be to the conscience of an English judge either a subject of doubt, or a matter of indifference

Thus strong is the objection in the case of the English judge stronger than in the case of the advocate — itself a stronger case than that of the convicted perjurer

Mendacity, it must not be forgotten, is the only shape in which improbity is here in question extended to other shapes, the imputation would be unfounded, and, in respect of its unquestionable groundlessness, revolting

The Lord High Chancellor, the Lord Chief-Justice, — you might be every day in his company, for any number of years, without being under any the smallest degree of apprehension on the score of your watch Your table might be covered with plate, and not so much as a tea-spoon would be in any the smallest danger of finding its way from his hand into his pocket In all such particulars, your assurance of probity on the part of the arbiter of the lives of unlicensed depredators might well be as entire, as, on the part of any such unlicensed depredator, your assurance of the opposite quality would

But in regard to that particular modification of improbity which alone is here in question, the matter may be seen to stand upon a very different footing, not to say an opposite one

It is to his celebrity and long-continued experience in the capacity of an advocate, that the Lord Chancellor or Lord Chief-Justice is indebted for his commanding situation in the character of a judge

In the case of the unlicensed depredator, mendacity is but a casual practice, an accidentally-necessary resource For the purpose of getting your watch, no lies are told by the man whose dexterity finds means in the crowd to extract it out of your fob For the purpose of getting your spoons, no lies are told by the burglar, to whose ingenuity the window-shutter of your butler's pantry has proved an insufficient obstacle If, for converting these treasures into others more particularly adapted to his immediate use, it be necessary for the acquirer to have recourse to an ordinary and unconfederated dealer, — true it is, that in that case a story may eventually be to be told But if, between the man of dex

* For the alteration of the law in this respect, see Vol. VI. p. 381, Note 2.—*Ed.*

terity and the man of thrift, there be a regular established connexion, cemented by the necessary confidence, invention has no need to draw upon itself; and though, in the shape of depredation, improbity thus extends and doubles itself, in the shape of mendacity it finds no place.

Far different, not to say directly opposite, is the case as between the two practitioners, on the ground of mendacity. On this ground, what, on the part of the practitioner whose strength lies in his hands, was but a casualty, is, on the part of him whose strength lies in his brains and tongue, matter of regular, of constant, of necessary practice. Set the one and the other in the witness-box, the dignified practitioner will be the most careful not to hazard any false statement that would be easily open to detection; but as often as the nature of the case holds out security against detection, a natural consequence is, that, of the two, he shall be the more ready at the utterance of falsehood, as well as more adroit and successful in the management of it.

The field of psychological facts is a field which, in its whole extent, holds out to learned mendacity this encouraging and fostering security. Under his brush, like drapery under that of the painter, intentions, motives, disposition, character—everything of that sort, takes, on each occasion, the exact shape and hue which the occasion, and the purpose that arises out of it, requires. In equity, all facts of this class are made by the learned draughtsman; at common law, by the leading counsel. Whether of his own stores, or by adoption from the attorney, from the paper of instructions in one case, from the brief in the other, is matter of accident, and not worth thinking about.

In all these particulars, misrepresentation, whether on the wrong or on the right side, is matter of course. On the wrong side it is matter of duty, a duty the more imperious the more perilous the wrong; and punishment, in the shape of professional dishonour and forfeiture of practice, would be the consequence of neglect: if on the right side, embellishment in this style is, if not a duty, at least a merit, —and reward, in the shape of honour, awaits the skilful and successful organ.

In the production of these cases, strong as they are, let not the purpose for which they are adduced—let not the proposition contended for, be for a moment out of sight. Even in these strongest of all cases, that of the advocate anywhere, and that of the judge in England, the object is not to recommend, but to reprobate, the shutting the door against the evidence. Rightly you can never act, so long as, on the ground of untrustworthiness and consequent fear of deception, you shut the door of justice against any human testimony. But if you will not act rightly, act at least consistently: and to do so, you must shut the door in the first place against yourselves. *Judico me cremari*, was the decision of Judge Blackstone's righteous Pope: take that case for your precedent, and say, *Judico me excludi:* the sacrifice will not be quite so great, the decision not less reasonable. Having done with yourselves, proceed upon your learned brethren, and their ungraduated fellow-practisers the barristers of the present time, the apprentices of the heroic age. From them descend to solicitors, and to attorneys, if any you can find, who, flying from public odium, have not taken shelter under the former, the less hackneyed name.

When the testimony of these venders of falsehood for daily bread is shut out, it will be time enough to think about shutting the door against the ill-fated Jonas, whose misfortune it was to be detected in acting, for once in his life, without a licence, that part which he sees performed every day with such universal applause, and on the highest theatres, under the sanction of a licence.

But, above all, forget not that most deeply-learned person, whom I was in danger to have forgotten, the special pleader: who, having never opened his mouth, has never spoken a lie; but who, from his first entrance into the profession, unto the present moment, whatever be the present moment, never knew what it was to set his hand to a single paper without a lie in it.

Let us not mistake. If the presumption of untrustworthiness do, upon any such grounds as above, attach itself with justice upon the English judge, it certainly is not upon the station; as little is it upon the nation. It is upon the system, the technical system, under which he acts: the system that causes him to be false—habitually and constantly false; and not only to be false, but to be the cause, and the constantly-acting cause, of falsehood in other men. The technical system is a hot-house of mendacity: the soil richer, far richer, in England, than under any other clime. The advocate, picked out in due time from the bed of special pleaders or chancery draughtsmen, is trained up in this stove. the judge is the advocate run to seed.

It extends not, this disastrous presumption, —it extends not, in anything like equal force, to the judge, nor even to the advocate, of any other country: it crosses not the Tweed.* Under Roman law, if, under the name of fiction, falsehood be now and then served up to the table of the judge, it is only, as it were, by way of desert, and in the character of a

* In the law of Scotland, there are very few, if there be any, *fictiones juris;* but their absence may be attributed to the extensive powers of the judges, in earlier times, which rendered any such indirect means of modelling the law to suit their views unnecessary.—*Ed.*

casual delicacy.* It is on English benches that it is gorged and disgorged, with an appetite that will bear the epithet of canine.

If it extends not, in any comparatively considerable force, to the judge, or even the advocate, in any other country, much less does it, even in England, to the country magistrate, the justice of the peace, much less does it, in any even the slightest degree, to those unlearned judges Never have they fed on any such foul diet they have never shaken hands with Den or Fen, with Doe or Roe no connexion have they with sham pledges, with sham bail, with sham anything fees flow not into their hands from any such polluted source.

To the general conclusion. be of this set of cases the strength what it may, it can never stand against the force of the general answer The more manifest the mendacity, the more secure it is against the danger of producing deception, that consequence, without which, mendacity, howsoever it be in intention, is altogether innocent in point of effect. By those from whom it issues, and who act upon it as if it were true, the mendacity of it is still more fully understood than it can be by anybody else.

After this conclusive answer, others that carry upon the face of them more or less truth, have, for the present purpose, little claim to notice A distinction may require to be taken between the judge and the man; and as in the Court of Exchequer the same robes include two sorts of judges — a common-law judge, and an equity-law judge, whose vocation consists in stopping and thwarting the proceedings of each other, — so in any and every court it may happen to the same envelope to contain two sorts of human beings — a veracious individual, and a perpetually-lying judge.

The remark is certainly not without foundation in experience Not that the observation can be altogether free from regret, that between the two opposite characters the contact should be so constant and so close; that one head should encircle two such faces The claim to competency is beyond dispute, but when credibility comes to be considered, proverbs in abundance, regarded commonly as the emanation of wisdom, the offspring of experience, obtrude themselves, and become troublesome: nor is it pleasant to consider, that the weakness of the union, in the character of an objection to what is called credibility, depends upon the truth of the proposition, that communications thus evil and thus close do not corrupt good manners.

No it is not for the purpose of advocating, but of reprobating exclusion of testimony, that these remarkable cases are spread upon the carpet it is not for the purpose of proving that these ought to be excluded, but that none ought to be excluded not only not the felon or the perjurer, nor even the ever-mendacious advocate of any country, but not even the constant arbiter, utterer, bespeaker, rewarder, and compeller of mendacity, the English judge

No let them not shut the door of the witness-box against any human creature but if nothing will satisfy them but that somebody must be excluded — if the demon of exclusion must have victims, — let judges and advocates be the first.

CHAPTER V

IMPROPRIETY OF EXCLUSION ON THE GROUND OF RELIGIOUS OPINIONS

§ 1 *Atheism an improper ground of exclusion*

In the case of improbity, the seat of the disease is in the will, in the case of atheism, the seat of the disease (such let us call it) is in the understanding Between the two branches of the mental frame, the communication is indeed most intimate true, but they must not be confounded Here the presumption is still more remote and slighter than before Could the absence of all sinister interest be ascertained, improbity in the case in which the presumption it affords is the strongest, — improbity in the shape of perjury, — would not afford any the slightest presumption of mendacity in any given instance Perjury is improbity But atheism is not improbity that it affords a presumption of improbity, is the utmost that can be said of it by anybody.

From the four sources above mentioned under the name of *sanctions*, the ideas of pain and pleasure are found operating on each man, with more or less force, in the character of standing tutelary motives: the physical sanction, the moral or popular, the political or legal, and the religious The atheist is one on whom the religious sanction has no hold. In respect of the extent of the cases in which they respectively operate, the physical is confined within natural limits; the political, by limits more or less casual and scanty: the moral and the religious, though hitherto variable, are altogether unconfined, and capable of covering the whole field But human con-

* *E. g*, the fiction by which, under the ante-Justinian law, a citizen, whom it was illegal to put to death, was, on his conviction of a capital crime, presumed to be a slave, and so executed; — that by which an invalid testament was litigated, on the assertion that the granter must have been insane; — the *jus postliminii*, by which citizens taken captive by an enemy were supposed to be still residing in Rome. For notices of some fictions in the civil law, *vide* Noodt. Probabil. Juris, lib. iii. cap. xii. *Huberi Prælectiones Index Fictio.—Ed.*

duct depends not merely on the number and nature of the moral forces to the action of which, on the occasion in question, the patient is exposed, but also on the sensibility of his mental frame with reference to each such force. To restrain this man, all four shall be unavailing: to restrain that man, a single one of them shall be sufficient.

It has been seen in Book I. how much may be said in behalf of the opinion that, in the character of a security for good conduct in the present life, the religious sanction is incomparably less efficient than either the moral or the political. If this opinion be true, it follows, that any presumption of improbity which can be afforded by atheism is very slight.

The question, however, whether in any degree, and in what degree, the absence of religion, or this or that erroneous opinion in regard to it, affords a presumption of improbity, may happily be added to the list of the questions the investigation of which is unnecessary to the present purpose. Why so? Answer: Because the fact of a man's entertaining any such opinion, is that sort of psychological fact, of the existence of which it is impossible for the judge to obtain sufficient evidence, on any other supposition than that of a degree of veracity, not only exclusive of the supposition of a more than ordinary propensity to mendacity, but in itself so preeminent, as to entitle the testimony of the witness to a more than ordinary share of confidence.

To cause a man for this purpose to be justly regarded as an atheist, the evidence must come either from an extraneous source, or from discourses formerly committed to writing by himself, or from his own lips.

1. Coming from an extraneous source, the persuasive force of the evidence finds two objections to encounter it. In the first place, it is at best but hearsay evidence: on such or such an occasion he declared himself an atheist. In the next place, the time of the fact, supposing it true, is a time past and gone. For aught that appears, the situation he is in in this respect may be parallel to that of a man who at one time had an interest in the cause—but an interest which, before any occasion led him to speak of the fact, was extinct. Once that error was entertained by him: admitted: but in the existence of a God is there anything so perfectly incredible, that when once a man has entertained the contrary persuasion, it is impossible for him ever to cease to entertain it?

2. Let the evidence be derived from former writings of his own. In this case, the first of the two above-mentioned causes of inconclusiveness has no existence; but the second remains; and with the same degree of force as in the former case.

3. Next, and lastly, let the evidence, whichsoever way it turns, come from his own lips. Being about to give his testimony, the first question put to him is, Are you an atheist? Answer, No, or Yes.

First, let it be *No*. If there be no extraneous evidence to the contrary, the objection is disposed of. But suppose extraneous evidence to the contrary; viz. the hearsay evidence above spoken of. *Primâ facie*, and in general, hearsay evidence is superseded, and turned into superfluous, equivalent to irrevelant, by the immediate testimony of the person whose supposed extra-judicial discourse is reported by it. But, upon occasion, for infirmation, or even for confirmation, of the immediate and judicial testimony of the supposed extra-judicial discourser, it may still have its use. Comes then the extraneous witness to the proposed witness's character, and says of him,—On such a day I heard him declare himself an atheist. But be this statement true or false, by it the declaration of the supposed atheist, the declaration whereby he says, I am not an atheist, is not contradicted. Then, when he declared himself an atheist, he was an atheist: now that he says I am not an atheist, he is not so. If, indeed, he says,—No; on the occasion of which the witness speaks, I did not declare myself an atheist,—then, indeed, contradiction exists; then it is for the judge to make his choice, and say to himself, which of them he will believe. Not that the choice is worth making; for the fact thus to be determined, is the state of the mind of the supposed atheist at that former time: whereas, the fact on which the alleged cause of the exclusion rests, is the state of his mind at the time when called upon to give evidence. If a written document is produced, as above, the contradiction is more conclusive than in the other case; unless the meaning put upon the document, or its genuineness, or its exemption (*i. e.* the exemption of the act of writing it) from force or fraud, be contested and rendered dubious.

Next, let the answer be, Yes, I am an atheist,* Then, indeed, the man must be an atheist; at any rate he must be taken for an atheist. But shall this answer be regarded as a piece of evidence warranting the exclusion? No, surely; and for this reason. The answer is either false or true. If false, the supposed cause of the exclusion fails in point of fact:—he is not an atheist; he cannot, therefore, with propriety, be excluded on the ground of atheism. If the answer be true,

* Those who do not believe in the existence of a God, or in a future state of rewards and punishments, cannot be admitted as witnesses in England. Omychund *v.* Barker, 1 Atkyns, 45; Rex *v.* White, Leach, 430. Gilb. L. E. 145. 2 Hawk. P. C. 434.—*Ed.*

the cause of exclusion fails on another ground. the presumption of mendacity, the presumption grounded on the atheism, is proved to be erroneous.

What is known to every man, cannot be unknown to him,—viz in the first place, the general odium to which this declaration is likely to expose him in the next place, to what a degree it cannot but diminish the degree of credence likely to be given to his evidence; *i. e* counteract what cannot but be his own purposes, if his evidence be purposely false. On the other hand, if he says, No, I am not an atheist,—the avoidance of that infamy, the preservation of his evidence from that discredit, is certain mendacity would find the field quite clear, disproof would be impossible. What, then, to the present purpose, is the effect of such a declaration? To show that from the three other sanctions, one or all of them, his will (such is his relative sensibility) experiences that degree of influence, which, on the minds of so large a proportion of mankind, all four together are so frequently insufficient to produce.

Compare this case with the above-mentioned vulgar notion about interest By that prejudice, men in general are presumed ready to give mendacious testimony by the slightest particle of interest Here is an interest,—and that an interest corresponding to the moral sanction—an interest corresponding to the fear of shame,—urging him, and with great force, to speak falsely on this occasion, by saying that he is not an atheist, when he is. Urged by a detachment of that force (viz. the force of the moral sanction) to deviate from the path of truth, yet, such is the power of that sanction over his will, there exists still in his mind the main body of that force (for by the supposition all the other three sanctions are out of the question,) acting upon him with such effect as to keep his discourse steady, and preserve him from straying into that sinister path towards which it is thus impelled.

This is no place for the discussion of opinions on the subject of religion; but one general observation belongs strictly to the present purpose. Were an atheist a worse monster than he has ever been supposed to be—bent upon doing mischief in all possible ways, on all possible occasions, and by all possible means, false testimony among the rest,—a rule excluding testimony on the score of atheism would afford no security against the mischief to be apprehended from that source: for, to get rid of the exclusion, he would have no more to do than to put himself to the expense of a falsehood, of which the detection is impossible. On the other hand, the exclusion operates, to a considerable extent, as a safeguard to all criminals, atheists or not, who, when called upon to bear testimony against one another, are willing to make profession of atheism.

Under the exclusions founded on criminality, a man has a licence to commit crimes, but he will not seek it for the purpose: it would be too expensive he must pay for it, either with his liberty (not to speak of other punishment) or with his life. Under those founded on religion, he may seek it for the purpose. he may take out the licence, and take it out for almost nothing A knot of any sort of criminals may conspire, and insure to one another impunity, so far as depends on the evidence of each other.

An atheist is a bad witness, but how to know him from another? It must be from his own account of himself, if from anything; for atheism is not written on a man's forehead Which, then, is the true atheist?—the man who says he is not an atheist, and is one? or the man who says he is an atheist, and is not so? This pretended atheist (it should seem) must be considered as the true one, for every practical purpose Those who speak of atheists as lying under the disabilities in question, must, if they mean anything, mean such persons, and all such persons, as exhibit the only marks of atheism which the nature of the case can by any possibility afford If this be true, here is a receipt, and that an infallible one, whereby any man that pleases may render his testimony unreceivable. The conspirators in one of the assassination plots against Henry the Fourth of France, or his predecessor (I forget which,) made use of the sacrament as an instrument for binding one another to mutual fidelity * Had they brooded over their plots under the shadow of the English common law, they might have found in atheism, or pretended atheism, a security of rather a different nature, it must be confessed, but applicable to the same use, and of rather superior efficacy A man might have taken ever so many sacraments, and be never the worse witness· but one good declaration of atheism, made in proper form and in proper company, will be enough to make him as bad as can be desired. When a man has been received to serve the king, if he would serve with safety, he must produce a certificate of orthodoxy, as demonstrated by taking the sacrament according to the forms of the English church.† When a man proposes to join in murdering the king, if he would do the business in safety as against his associates, he must make them furnish him with a certificate of their atheism.

Speculation, quoth somebody. No; cases

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* Thuani Historia.

† The 9 Geo.IV. c. 17, repeals so much of the Corporation and Test Acts as requires the sacrament to be taken.—*Ed.*

of evidence excluded on account of atheism have every now and then presented themselves in practice.*

The same strain of imbecility which gave rise to the examination on the *voire dire*, has, after suffering the question to be put—"Are you an atheist?"—and receiving an answer regarded as amounting to an affirmative, shut the door against the witness; and, in revenge for his veracity, administered injustice instead of justice to the party unfortunate enough to stand in need of this evidence.

Besides the offence against the dictates of reason and justice, the question thus put was repugnant to the known rules of actually existing law. In virtue of a statute still in force,† a declaration to any such effect subjects the individual to penalties of high severity: and the rule, that no man shall, in return to any question, give an answer that can have the effect of subjecting him to any sort of penalty, is the firmly-established fruit of that mischievous superstition, the war upon which will form the business of the ensuing Part.

Question and answer together, the disclosure was such as could not but have given no slight wound to the feelings of a great majority, if not the whole, of the surrounding audience. But the wound had for its authors, not the honest and intrepid witness, but the crew of learned sophists, the attorney who put the insinuation into the brief—the advocate who formed a question out of it,—but, above all, the judge, who suffered such a question to be put.

§ 2. *Cacotheism, or bad religion, an improper ground of exclusion.*

How impossible it is from atheism to deduce a proper ground for exclusion, we have just been seeing. From cacotheism, though no good ground, yet a less bad ground might be made, if there were any man whose God commanded him to commit perjury; meaning always by perjury (what it were so much to be wished were always meant by it,) mendacity by party or witness on a judicial occasion—oath or no oath. The gods of the Hindoos, if the translations we have of their scriptures are in this instance to be depended upon, license such mendacity in certain cases.‡

On this, as on every other part of the ground, common law is up in arms against common sense and common honesty, and, by its inconsistencies, against itself.

The God of the Jews, and, by a prodigious and modern stretch of jurisprudential liberality, the God of the Mahometans,‖ and the god of the Hindoos,§ are tolerated as not countenancing perjury.¶ The God who

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* The books exhibit several cases of this sort; and from private information it has happened to me to hear of several not mentioned in any book.

[Such a case occurred only a few months ago. One of Carlile's shopmen had been robbed. His evidence was refused, and justice denied to him, on the ground of what lawyers affectedly called *defect of religious principle.—Editor.*]

† Since this was written (July 1806) the statute against blasphemy has been repealed;[a] but the Lord Chancellor (by virtue of that power of superseding the will of the legislature, which judges never hesitate to assume to themselves whenever they need it,) has taken upon himself to declare, that to deny the Trinity is still an offence at common law.—*Editor.*

[a] Independent of the statute 9 & 10 Will. III. c. 32, a blasphemous libel was still indictable at common law. Rex *v.* Carlysle, 3 B. & A. 161. The statute was repealed, so far as regards the denying any one of the persons of the Holy Trinity to be God, by the 53 Geo. III. c. 160. The 3 Jac. I. c. 21, enacts, that if in any play or exhibition of that kind, the name of the Trinity, or of any of the persons of the Trinity, be made use of, in a profane and jesting manner, the offender shall forfeit £10.—*Ed.*

‡ *Vide supra*, Vol. VI. p. 272.

‖ Buller, 292. § Ibid.

¶ Moreover, by a still more recent effort of liberality, a Scottish schismatic, under the name of a Covenanter, has also been admitted to give evidence; although instead of kissing the book, as a man of perfect trustworthiness would have done, he contented himself with looking at it, lifting up his right hand at the same time.—[In Mildrone's case, Leach, 412, "Mr. Justice Gould said, that on the trial of the rebels at Carlisle, in the year 1745, finding it to be the ceremony of a particular sect, he admitted the witness to swear by the form of holding up his hand, without touching the book, or kissing it; and that he afterwards referred the case to the opinion of the twelve judges, who determined that the witness was legally sworn." On this authority Mildrone was exempted from kissing the book, and was sworn in the following form:—"You swear, according to the custom of your own country, and the religion you profess, that the evidence you shall give between our sovereign lord the king, and the prisoner at the bar, shall be the truth, the whole truth, and nothing but the truth. So help you God." If the English judges had thought the matter worth inquiring into, they would have found, that kissing the book is a practice quite unknown in Scotland, unless in deference to the peculiar religious scruples of a witness. The Scottish form does not appear to have any connexion with religious views; and it is probable, that the Scotchmen who objected to the kissing the book, were merely obstinate individuals, annoyed by finding a deviation from the practice to which they had been accustomed. The form of the oath in Scotland is—"I swear by Almighty God, and as I shall answer to God at the great day of judgment, that I will tell the truth, the whole truth, and nothing but the truth, in so far as I know, or shall be asked, on this occasion." In the revenue department of the Exchequer Court of Scotland, the practice of England was intro-

binds men to veracity by broken saucers,* the God of the Chinese, — if they have a god, though it has so often been said they have none, — even he is tolerated the God of the catholics and the God of quakers is not tolerated. In intendment of law, he either commands perjury, or is, at best, indifferent about it.

No; this account is not yet a correct one were this the law, it would be reasonable, in comparison with what, when correctly stated, it will be seen to be

I. Catholics

Catholics excluded! those Christians, in comparison with whom, those who are not Catholics compose a small minority, Church of England men a still smaller! Catholics, than whom, till as it were of yesterday, there were no other Christians! Evidence of catholics excluded! Are we then commanded by law to believe that there is neither society, nor laws, nor judicature, nor evidence, nor veracity, among the greater part of Christians?†

Catholics excluded! Oh no — not all catholics: no, only those who have exhibited a degree of attachment to the duties of religion; such a degree as, among protestants, would be as rare as martyrdom is rare. A catholic, as such, is not excluded; he must be a popish recusant ‡ An oath is tendered to him — an oath such that the catholic who takes it renounces his religion, denies that he is a catholic: it was devised, and avowedly, for this very purpose Thus, then, under the spirit of this policy, a distribution is made of catholics into two classes — perjurers and non-perjurers to all who will perjure themselves, the door of the witness-box is thrown open; against all who will not perjure themselves, it is shut

It is with catholics, as we have seen it to be with atheists It is not to atheists that the law is opposed it is only to such atheists as will not perjure themselves ‖

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duced at the Union In Clerk and Scrope's History of the Exchequer in Scotland (p 32,) there is this curious remark—"When witnesses appear in court, those for the plaintiff are first examined on oath, to be taken either conform to the English or Scottish form. The last is sometimes required, as what some people fancy more solemn; and especially, if the first be profanely considered by the witness, only as a custom-house oath, as is but too frequently the case."—*Ed.*

* In the pamphlet intituled, "Trial at large of Acon, a Chinese Tartar Sailor, for Murder. Tried at the Admiralty Sessions, holden at the Sessions' House, in the Old Bailey, on Friday, July 4, 1806, before Sir William Holt, knight, judge of the High Court of Admiralty, and Sir Simon Le Blanc, knight, one of the judges of the Court of King's Bench. London: Printed for, and sold by, R. Butters, 22 Fetter Lane, Fleet Street." Page 4, "The oath being repeated in the Chinese language, on the conclusion, a China saucer is presented to the person, which he holds in his right hand, and then dashes to pieces, the signification of which is, that if he does not speak the truth, may his body be dashed to pieces in the same manner as the saucer."

† Somehow or other, it happens, that for two centuries there is not a case of state perjury on the black side, but religion, and in particular the Church of England religion, is at the bottom of it. The popish plot is a striking example. I am not so shallow or so violent as to conclude from this circumstance, that a man who has a religion is less trustworthy than one who has none, or that the Church of England religion is a worse religion than the Catholic. But one use I cannot refrain from making of these occurrences, against the incapacitation grounded on catholicism. On the Church of England side, I find in history symptoms of perjury of the worst sort: and on the Catholic side none. I am not so mad as to say, that whoever is a Church of England man is on that account unfit to be believed; but thus much I cannot but say, that as far as the indications afforded by the history of England extend, there is more ground for excluding a Church of England man than for excluding a Catholic, or a man of any other sect

‡ A popish recusant (it may be said) is now become no more than an empty name. To be a popish recusant, a man must be a papist; and there are now no papists. new oaths having been devised, new oaths, which catholics, it is supposed, have no objection to take [a] Be it so but then the class remains open to receive as many as may choose to enter into it That some would remain attached to it, at least in their hearts, was the very supposition upon which the new laws were grounded. Else, what use for any new laws? else, what is there done by the new laws, that would not have been done much better by a sponge? Why leave the statute-book still incumbered with the engines (rusty as they are) of persecution and intolerance? But antipathy, blind antipathy, must have its pastime saved for it: deprived of flesh and blood, it must still have a mannikin to pummel and vent itself upon. Hogarth has painted cruelty on its progress: this is cruelty on its return. Be this as it may; on this head, so far as exclusion is concerned, whatever thanks may be due to statute law, none are due to jurisprudence.

‖ It is thus with oaths, on every occasion on which they are employed as tests A line drawn with great ceremony: the population of the country divided by it into two classes. On one side of the line, all those whom the proffered seduction is unable to draw aside from the path marked out by conscience; on the other, all those in whose eyes the most solemn and deliberate assertion is an empty ceremony. On the one side, all those of whom, by the experiment, you are made sure that they will not be perjurers; on the other side, all those, of each of whom, the best that can be said is, that it cannot be known whether he be or be not a perjurer. A line drawn; and to what purpose? That every man of whom it is clear that he will not perjure himself, may be subjected to

[a] See 18 Geo. III. c 60; 31 Geo. III. c. 32; 43 Geo. III. c. 30; and finally, the Act known by the name of the Catholic Emancipation Act, 10 Geo. IV. c. 7.—*Ed.*

II. Quakers.

What is known to everybody, is, that as far as anything can be true that is predicated of men in whole classes, the quakers are the most veracious of mankind. Whatever regard men at large are wont to pay to that which they say upon oath, that, and more, is paid by this knot of friends to what is said by them (on the like serious occasions at least) without oath.

By the legislature itself, to say the least, they are not regarded as mendacious. Laws have been made for the express purpose of giving indulgence to their weakness, and admitting them to give evidence without the ceremony. Laws made: yes; but here comes jurisprudence with its distinctions, its perplexities, and its inconsistencies. In with him, on *civil* ground: out with him, on *criminal*.* Occasion there has been to say, over and over again, that, as to all criminal cases, where the punishment is not beyond pecuniary, the distinction is nominal and frivolous: since, for the self-same offence or supposed offence—for the self-same cause, a man may be proceeded against (at the option of whoever chooses to proceed against him) in the one way or the other. Accordingly, to the extent, at any rate, of this coincidence, the admitting law cannot do right, but it must do wrong. It cannot do right in admitting the quaker in a civil cause, without doing wrong in excluding him when the suit chosen has been one of the criminal sort.

But suppose the punishment ultra-pecuniary: suppose man's life at stake: suppose a quaker,—that is, a man calling himself a quaker,—wicked enough to attempt murder with his tongue: has not the law suffering enough at its command to punish him with? In non-quakers, law exempts not from punishment murder committed with this instrument. The punishment which, in this case, is too much for a non-quaker,—might not some of it be reserved for the quaker, and serve as a succedaneum to the ceremony to which he is thus recalcitrant?

Conceive a class of men, amounting to many thousands, on whose persons, male or female, and in whose presence, so there be no other witnesses, all other men are left free—have a licence from the law, to commit (so they be but capital) all imaginable crimes,—rape, robbery, burglary, mayhem, incendiarism, and so forth. As to property of persons absent, destroyed or stolen in their presence, this, with so many other trifles of the like nature, is scarce worth adding. I remember the case of a man who, in pursuit of a scheme of plunder, set a house on fire, and who, because nobody had seen what he was about but a quaker, was turned loose again to burn other houses.

Here again comes the same sort of inconsistency as was observed in the case of the atheist and the catholic. Obeying the dictates of conscience, a man remains incredible. violating them, he becomes credible.

III. Persons excommunicated.

You omit paying your attorney's bill: if the bill is a just one, and you able to pay it, this is wrong of you; but if unable, your lot (of which immediately) will be just the same. If the business done, was done in a court called a common-law court, your attorney is called an attorney, and the case belongs not to this purpose. If in a court called an ecclesiastical court, the attorney is called a proctor: you are imprisoned, and so forth;—but first you must be excommunicated. For this crime, or for any other, no sooner are you excommunicated, than a discovery is made, that, being "excluded out of the church," you are "not under the influence of any religion:"† you are a sort of atheist. To your own weak reason it appears to you that you believe; but the law, which is the perfection of reason, knows that you do not. Being omniscient, and infallible, and so forth, she knows that, were you to be heard, it would be impossible you should speak true: therefore, you too are posted off upon the excluded list, along with atheists, catholics, and quakers.

Forbidden by his religion, a quaker will not pay tithes: sued in the spiritual court, he is excommunicated. As a witness, he is now incompetent twice over: once by being a quaker, and again by being excommunicate. Why by being excommunicate? Answer, per Mr Justice Buller: "Because he is not under the influence of any religion."‡

Of the exclusionary system, a part of the mischief (it has been already observed) not to speak of other parts, is, that it involves in it a licence to persons unknown, in unknown numbers, to commit injustice in all imaginable shapes: to commit all imaginable crimes.

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to some disability, some insecurity, some dishonour: that every man, of whom it is matter of doubt whether he is or is not perjured, may be gratified with a share in some monopoly, with the possession of some privilege. In the case of such a law, who will, and who will not, be perjurers, cannot be seen till it is passed and executed; but what may be seen, and that as soon as it has been put to the vote, is, that,—in intention at any rate, and so far as depends upon themselves,—all who vote for it are suborners. Thus it is, that, with religion on their lips, men wage war against morality and human happiness. When will such warfare cease?

* See Vol. VI. p. 381, Note 6.—*Ed.*

† Buller, 292.

‡ Since these two paragraphs were written (July 1806,) the incompetency of excommunicated persons to give evidence has been removed by the statute 53 Geo. III. c. 127 (Phillipps, i. 26.)—*Editor.*

To the legislator, having always an interest more or less unmixed in the well-being of the people — being always more or less governed by that interest, — to the real and legitimate legislator, acting as such, it could hardly have happened, unless by sinister counsel, to give in to a system so obviously hostile to the well-being of the people

By the judge, acting under the fee-collecting system, and under the sinister impulse given to him by that system, — by the judge wielding in disguise the sceptre of legislation, public interest would, at best, and where not exposed to an eye of positive hostility, be regarded, of course, with indifference When lawyer's profit (the only serious object of his care) had mischief (in whatever shape — expense, delay, vexation, misdecision, failure of justice) for its immediate cause, or (what comes to the same thing) its inseparable, though but collateral accompaniment, — mischief would be the fruit of his choice and hence it was by the exclusion of the presence, and thence of the testimony, of the parties, that the foundation of the exclusionary system, that grand support of the fee-collecting system, was laid. When the above-described connexion between lawyer's profit and non-lawyer's misery either did not exist, or did not present itself to his view, — then it was that, every now and then, it would happen to him to produce mischief and misery, not purposely, not with malice prepense, but only, as the clown in Dryden's legend whistled, for want of thought

In the present case, it would appear, that so wide a deviation from the line of utility and justice was mainly occasioned by the sentiment of antipathy

Although punishment admits of no other justificative reason, than a probable prospect of the production of greater good — of an increase in the aggregate mass of happiness, of a decrease in the aggregate mass of misery, yet such has rarely been the final cause of punishment in the mind of the legislator especially in those times of primeval barbarism, in which all systems of legislation have had their rise Diminution of suffering (viz on the part of the community injured by the offence) may have been, in any given instance, the *result* and *fruit* of punishment, but, even where this is the case, not diminution, but production, of suffering — viz. on the part of the offender, — has but too often, and perhaps in the origin of society, most commonly, been at least the predominant, if not the sole, *object* and *end* in view By the view of such or such a mode of conduct, the feeling of antipathy has been excited in the breast of the man in power: to gratify it, he sets himself to work to plague and torment the individual by whom that unpleasant sensation has been excited: by the spectacle of the suffering so produced, the appetite receives its gratification. At the same time, the same spectacle, exhibiting itself to the eyes or the imagination of those who, were it not for the punishment, might have engaged in the practice of acts of the same sort as the act thus punished, restrains them, to a certain degree, from the thus forbidden practice, and causes acts of that description to be less frequent than they would be If the mode of conduct whereby the antipathy has been produced be of the number of those, the consequences of which have more of evil in them than of good, the restraint thus produced is beneficial to the community It is not the less beneficial to the community, for not having been present, in idea, to the mind of the man in power but neither, on the other hand, from its having been the eventual result of the use he has thus been making of his power, does it follow, by any means, that the idea of it was previously present to his mind If it had been uniformly present to his mind — if the benefit to the community had been the ultimate object of his exertions — if the suffering of the obnoxious person had, instead of being the ultimate object, been no more than the means, the mediatory object, — the quantum of suffering would have been measured out according to the object — would have been suited to it in quality, would have been adjusted to it in quantity, and would not anywhere have overshot the mark not a particle of suffering would have been produced, of which the effects had not previously been fully comprehended and accurately ascertained Of any such accuracy, however — of any such calm and exclusively-appropriated attention to the aggregate interest of the community, and the ends of public justice, the very idea is new — even at the present advanced period in the career of perfectibility and civilization. Much more must the practice have been generally unknown, in those rude times in which the art of legislation was in its cradle — in those times of infantine ignorance, which are still suffered to rule the destiny of riper age — In this temper of mind, among men whose minds were engrossed by these narrow views, no wonder that any vehicle or mass of mischief, which promised to add anything to the plague, should be snatched up and hurled at the head of the obnoxious offender, with little knowledge of, and as little solicitude about, the contents laid hold of, and eagerly employed, not only without staying to investigate the consequences, present and future, near and remote, certain and contingent, with reference to the obnoxious individual, — but with as little attention to any effects of which it might be productive on the feelings of other individuals, connected by accident only with the individual by whose offence the passion had been excited — individuals whose suffering, had it been included in the prospect, was

not of a nature to contribute anything to the gratification aimed at.

Antipathy, when its exertions are regulated by utility and justice, is the handmaid of justice. Antipathy towards the injurer is the natural, and in a human bosom in some degree even the inseparable consequence of sympathy for the injured.

Unhappily for mankind, the antipathy thus directed has not been most energetic or most busy when the object to which it pointed was the most noxious. They who have diminished the sum of human enjoyment—they who have augmented the sum of human suffering—these find antipathy, sooner or later, not averse to repose: they whose opinions are not our opinions—they whose pleasures are not our pleasures—they whom we oppress, they whom we exclude from their share of common benefits,—these are they who find antipathy implacable. Wherever the praise of virtue is to be earned without the expense of self-denial, the most vicious will never be found the most backward in the chase.

Against the perjurer, his kinsman the forgerer, and the motley fellowship of felons, without staying to distinguish one from another, the door was shut, as it were in a pet, and "for want of thought." The precedent once made, the opportunity of stigmatizing and plaguing the traitor and the atheist, with his kinsmen the catholic, the quaker, and the excommunicate, was not to be lost. Always remembered, that the more unforeseen exclusions there are, and the more unforeseen exceptions to exclusions, the more arguments; and the more arguments, the more fees.

The outlandish men, the Mahometan, the Hindoo, and the Chinese, against whom the door, if ever shut, has been opened, are almost as far from us as the atheist, and much farther than the catholic or the quaker. But the distance of the outlandish man is his protection. Blind from birth to the lights by which we are illuminated, he is not a rebel to the examples or the arguments, logical or golden, by which we are governed. Nuisances, it is true, all pagans are; but happily, in their case (unless now and then by accident,) the nuisance is at a distance from the nose.*

* As to the Chinese, they have so evil a reputation, and look so much like athiests, that, had the *sine quâ non* of solemn justice not been wanting, the breaking of the saucer might have been followed by an examination on the *voire dire* (*supra*, p. 404;) and the religion or irreligion of China might have been settled, in some way or other, to the satisfaction of English sages. But Acon was poor, and Acon had no advocate. On this occasion, as on others, homicide being proved, murder was presumed.

CHAPTER VI.

IMPROPRIETY OF EXCLUSION ON THE GROUND OF MENTAL IMBECILITY, AND PARTICULARLY OF INFANCY AND SUPERANNUATION.

THE last ground of exclusion on the score of deception, to which our consideration is called, is *imbecility*.

From whichever source it be derived, the propriety of regarding imbecility, upon occasion, as a cause of *suspicion*, is obvious and indisputable. From whichever source derived, the taking it for a cause of *exclusion* will be found equally indefensible.

Mental or corporeal, imbecility—a term of relation—admits of degrees *ad infinitum*. Imbecility, in a variety of respects, is the lot of all created beings. Supposing that, in any degree, imbecility were capable of constituting a proper ground of exclusion, by what mark could that degree be distinguished from any other? From the impossibility of finding an answer to that question, results the impropriety of taking it for a ground of exclusion in any case. In the absence of any universal mark of such a degree of imbecility, to form such opinion as the nature of the case admits of, there is but one rational course, which is, the examining of the proposed witness: which only rational course is the very course that, upon the supposition of the exclusion, is not suffered to be taken.

Infancy, superannuation, insanity: whatever be the modification—connected or unconnected with the circumstance of age—the answer will be still the same.

Between infancy and maturity, it is necessary, for some purposes, to draw a line at a venture; and that line (notwithstanding the wide difference in respect of intellectual strength between individual and individual at the same age)—that line a common one, fixed for every individual at the same place. But to the present purpose, no such line is necessary: no such line can afford any security against deception: no such line can fail of producing, if not deception itself, yet (what is worse) misdecision.

In the case of superannuation, the impracticability of drawing any line for that purpose, without the most palpable absurdity, is plainly obvious. Imbecility, and to such a degree as to make delivery of testimony not merely ineligible but impossible, is the effect of infancy at a certain age. Imbecility, to this purpose, or indeed almost any other, considered as the result of superannuation, is but an accidental concomitant, and indeed a rare one, at any period of old age.

In the case of insanity, a fixed point of time for this purpose is not incapable of being proposed, but incapable of being employed

to any good effect: when (for example) a man, having by competent authority been deemed incapable of retaining in his own hands the management of his own affairs, without preponderant prejudice to himself and others, has by competent authority been declared in that state, and placed under the authority of a guardian for that purpose

Here indeed would be a point of time fixed, but no line could be drawn through it, applicable with any advantage to this purpose From any degree of comparative unfitness in respect of providence, and the various other faculties necessary to the management of the variety of affairs that occur in human life, no tolerably-assured inference can be drawn respecting the capacity or incapacity of giving a correct and intelligible statement of a single fact which came within the cognizance of a man's senses Before the arrangement made, a man may have been completely incapable perhaps of obtaining perception of the fact — perhaps of remembering and giving a correct and intelligible statement of such perception, though obtained — after the arrangement, competent or incompetent to the general management of his own affairs, to the purpose of delivering testimony it may happen to him to be as completely competent as another man These observations are brought to view for the purpose of nipping in the bud, if possible, future contingent exclusions on this ground.

Of the three sources and modifications of intellectual imbecility, infancy is the only one that has been taken for exclusion by English law Accordingly, of the three words mentioned in this view, infancy is the only one, of which, for this purpose, any mention is to be found in the books For the same reason, *imbecility*, the word here employed for the purpose of including the three cases, and bringing to view the ground they stand upon, is in these treasuries of technical science equally unknown.

In a direct way, infancy cannot at present be employed as a bar to admission, howsoever immature the age For, with the approbation of the twelve judges, in the case of an infant of no more than seven years old,* and in a case of an infant under seven years old† (how much under is not said,) this evidence was received

Unfortunately, to the admission given in this case, two conditions precedent have been annexed.

One is, that the child shall have taken an oath; *i. e.* gone through the same ceremony by which testimonial relation is preceded in other instances. To this operation, had it been performed, there could have been no objection The misfortune was, that in a certain instance it was omitted: and the consequence was, that, a rape having been committed "on the body of an infant under seven years of age," the man by whom, if by anybody, the mischief was done, was sent out to commit other rapes

"The prisoner" (according to the learned reporter ‡) was convicted, but the judgment was respited, on a doubt [not having any relation to the fact, but] "created by a marginal note to a case in Dyer's Reports, for these notes having been made by Lord Chief Justice Treby, are considered" (continues the book) "of great weight and authority and it was submitted" (by Mr Justice Buller, anno 1779) "to the twelve judges," whether evidence, under any circumstances whatever, could be legally admitted in a criminal prosecution, except upon oath? Answer No, not in any case.

2 The other condition was and is, that the "infant *appear*, on strict examination by the court, to possess a sufficient *knowledge* of the nature and consequences of an oath" —"of the *danger* and impiety of falsehood."‖ For a more particular description of the *knowledge* and the *danger* above spoken of in general terms, the following exemplification promises to serve as well as any other that could be substituted to it, since neither the questions nor the answers are fixed by law. Extract from the newspaper called the *Times*, dated 17th Sept 1803 Proceedings at the "Old Bailey, Friday, Sept 16, 1803 Mary Ann Carney, a daughter of the prisoner, only twelve years of age, was examined relative to the idea she entertained of an oath, and the consequences that would result from telling a falsehood The answer which she returned was *exceedingly correct* viz that if she told a falsehood when on oath, she should be put in the pillory when in this world, and go to the devil when in the next."

To the putting of a question to the effect above described, I know of no conclusive objection, but, to the deducing, either from silence or from any answer whatsoever which may have been extracted by such a question, a decision pronouncing the exclusion of the testimony, objections occur that seem perfectly unanswerable.

It is requiring of the child, as a condition precedent to her being suffered to give a sort of relation which a child of any age that can speak may be perfectly competent to give, a sort of account which a child of that immature age (to go no farther) seems altogether incompetent to give. The testimony to the relevant point is to a fact of the most simple nature — a fact which, supposing it to have

* Leach, i. 430. White's case, *notes*
† Gwillem's Bacon (edit. 1807,) ii. 577. Leach's Crown Cases, i. 237. Brazier's case.

‡ Leach, i. 199. ‖ Leach, i. 200.

happened, must have presented itself to the senses of the patient, and made a very deep impression on them. The subject-matter of the testimony to the irrelevant point, is a fact of the most complex and abstruse nature: a fact that has been matter of dispute among the maturest, the strongest, and acutest minds.

The relevant question—the question to which (if to any) the child would have been competent to give an answer—was, what she had seen and felt? The irrelevant question prefixed, and (in one event) substituted to it, included a string of questions: what on this most abstruse subject she had been taught, what she had comprehended, and what she had retained? The evidence—the only evidence that, in answer to such an examination, could have been given by such a child, was, not the opinion of the child, but an article of hearsay evidence: the account given by the child of the instruction it had received.*

Observe the effect of the criterion so unhappily employed. The proper question, whether the child has been thus injured, is put aside; and, instead of it, another question is put in, viz. whether the child can say its catechism.

Of the substitution thus made, or preference thus given, of a question foreign to the merits—to the only question belonging to the merits, the following present themselves as the natural consequences:—

1. In some cases, excluding good and true evidence; thus excluding justice, and giving impunity to the guilty. If the child has not been tutored in the requisite manner, and that with effect on the part of the child, as well as diligence on the part of the instructors, the child may have been abused and mangled, the malefactor goes unpunished, laughing at the sages from whose zeal, so little according to knowledge, he has obtained a licence.

2. Placing the fate of the cause (in a capital cause, the life of the prisoner) in a state of complete dependence on the will and pleasure of the person or persons under whose power the child is all the time; its parents, for example. Is it their wish that the cause should be deprived of the benefit of the child's evidence? The catechism is omitted to be administered, or a sort of anti-catechism administered in the room of it, according to the nature of the case. By a false answer, had the testimony been admitted, the child might have been subjected to punishment as for perjury, and the parents to legal punishment, or at least to disrepute, as for subornation of perjury. On the occasion of the preliminary examination, neither from silence nor from any answer whatsoever—from any such answer as in this view they may have presented, need any such consequences be apprehended. Thus it is, that in this way the full benefit of perjury, or subornation of perjury, may be obtained, without any of the risk: the full benefit of perjury, under the protection, and as a fruit of the wisdom, of English jurisprudence.

3. Holding out to false and mendacious accusation a receipt for fabricating evidence, and, by a false gloss, bestowing on it an appearance of trustworthiness. The supposition that the individual whose fate depends upon his knowledge of the law, should on any occasion be in possession of any such knowledge, may be apt to appear ridiculous; but it is what by accident does now and then happen. The mother of such a child forms a scheme for ruining a male enemy. She employs the requisite time and labour in impressing upon the mind of the child two lessons: the one, a false story of the supposed injury; the other, an appropriate catechism, such as may afford the requisite satisfaction to the pious anxiety of the judge. Delighted with the advances made by the sweet child in the science of theology, to entertain a doubt of its veracity would be impiety in the eyes of jurisprudential science.

The same artificial mark of trustworthiness, which, on the occasion just spoken of, gave such complete satisfaction in the instance of a child of twelve years old, might, in many instances, be imprinted with equal facility and success upon the testimony of a child not above half, or even a third of that age. It might even be imprinted upon the faculties, mental and vocal, of a naturally-accomplished and well-instructed parrot or magpie—with this difference, that, in the case of the unfeathered witness, the questions would require to be in that form to which an advocate is confined when examining a witness of his own

* In relation to the principal point, at one time the practice was, instead of examining the child itself, to examine the parents or other persons as to the account which, immediately after the transaction, had been given by the child to them. To this sort of evidence, the examination of the child itself in court was afterwards added or substituted: if added, with indisputable propriety; not so, if substituted, to the absolute exclusion of the hearsay evidence: since, for infirmation or confirmation of evidence, the occasional use of hearsay evidence is not only indisputable, but recognised in practice. In regard to the principal fact, the reason assigned for the preference thus given to the evidence of the child itself, was, that that of the parents, &c. was but hearsay evidence. In regard to the incidental fact (the instruction given to the child,) the same consideration might have suggested the propriety of examining the parents themselves in preference: the account of what instruction they had given to the child, would come from their lips in the shape of immediate evidence; from the lips of the child, the only shape in which it could come would be that of hearsay evidence.

side; whereas, in the case of the feathered witness, they would require to be in that more commodious form, with the use of which he is indulged in the examination of a witness on the opposite side.

4. The wording of the test being moreover unfixed, as is the case with everything that has no more determinate foundation to rest upon than that of jurisprudential law,—the testimony of the most trustworthy witness is liable to be sunk by any failure of coincidence between the persuasion of the judge and the persuasion of the child (that is, of its instructors) on a subject thus obscure and delicate Not to mention extreme cases, such as those of atheists and other unbelievers,—Christians are not wanting, to whose conceptions the devil presents himself in the character of an allegorical and purely ideal personage. If, in the case of the child whose answers on this head gave such complete satisfaction at the Old Bailey, the expectation of an eventual visit to the president of the infernal regions was regarded as an article of faith indispensable to the present purpose,—an answer disaffirming the existence of that tremendous personage, might have been fatal to the merits of the cause On this supposition, a boy of twelve years, whose good fortune it had been in other respects to have been under the tuition of Dr. Priestley, or any other equally zealous defender of the Christian faith, might, for want of the necessary protection depending upon his own evidence, find himself exposed to the most afflictive personal injuries —or, at the expense of real mendacity, find himself obliged to purchase the factitious reputation of the opposite virtue

Learned judges have seldom time to introduce any very searching probe into the bowels of the evidence give them a good round answer, satisfaction enters, and ejects diffidence "I shall be put into the pillory in this world, I shall go to the devil in the next"—"Exceedingly correct," is the observation of the reporter, "exceedingly correct" (unless the reporter were incorrect,)—"exceedingly correct," or something to that or the like purport or effect, must have been the observation of the judge.

In the individual cases in question, the parties on both sides being low people (for of the labours of counsel on their behalf nothing is said,)—the answer, being thus pointed or rounded, and adapted to the taste of learned judges, passed without further scrutiny. His reverend lordship was not less indulgent to the young theologian, than a friendly examiner at Oxford or Cambridge would have been to a candidate for a degree in divinity, or a friendly chaplain at Lambeth to a candidate for holy orders. But suppose this preliminary examination conducted by the tongue of a well-fee'd advocate alas! what would all the science of the tender student avail against the sharpness of so penetrating a probe! Conceive a Garrow opposed to the tender novice how little would it cost him to drag to light either some jeofail in her creed, or the confession of a fact which, in the case of her making a tolerable *primâ facie* answer, could never be otherwise than true, viz. that she had been tutored for the purpose.

By considerations of the above, or some other nature (that is to say, by some of them,) an impression appears to have been made on reverend minds Mr Justice Rooke,* in the case of an unsatisfactory response, adjourned the cause, and committed the young witness to the charge of a clergyman, for religious instruction, in the mean time. This *succedaneum* to exclusion obtained the approbation of the other judges.

To the impressing upon the memory the lesson to be given by the reverend divine, six months' interval between circuit and circuit was, if diligently employed, extremely well adapted it would have been equally well adapted to the rendering the fair and tender reporter more and more perfect in any fabricated story of an injury, supposing no injury to have been sustained. But, on the opposite supposition, for the keeping alive in the infant memory a correct recollection of the transaction in its true and proper colours, the disservice that could not but be done by this long interval presents itself as equally indisputable In this point of view, an expedient, of the sincerity of which, in its design, it is impossible to entertain a doubt, presents itself as being, in its tendency, extremely well adapted to every purpose of falsehood and injustice, and equally ill adapted to every purpose of truth and justice

The case is unhappily of no unfrequent recurrence Justice is wanted for it, if for any case It is with this as with most other points of procedure the difficulties it is encumbered with, are chiefly, if not wholly, the work of artifice and science In itself it presents little difficulty If mendacity were apprehended, who would not rather have to encounter a raw and juvenile prevaricator, than a reflecting veteran, with length of experience and maturity of age?

Where evidence is concerned, the duty of learned judges (such has ever hitherto been the case) forbade them to do justice Their duty is to preserve existing rules. and existing rules were made that justice might not be done In a case of this sort—where evidence of this description was a chief ingredient in the composition of the mass of evidence,—if it were lawful to discover truth, truth might be discovered with at least as much facility and certainty as in the case of

* Gwillem's Bacon, II. 577.

ordinary evidence. The fact, if there be anything serious in it, is established by *real* evidence—by the physical and physiological marks of violence. Here we see one of the perpetually-recurring cases, in which all doubt might so easily be removed, one way or the other, by the examination of the defendant. The examination of the child being taken out of the hearing of its parents, on the one hand, of the defendant on the other—that of the defendant out of the hearing of both,—the light of truth could scarce fail to issue from the collision of the evidence.

Where immaturity of age does not exist in any such degree as to deprive the child of the several degrees of the respective faculties concerned (perception, judgment, memory, and expression) that are respectively necessary to bestow on the testimony the indispensable degree of correctness,—the want of the faculties necessary to the execution of a successful plan of mendacity, gives to such immature testimony, in a very material respect, the advantage of the maturest evidence.

In the immature and tender mind, if the influence of the moral and religious sanctions is apt to be weak, unsteady, and precarious, the mendacity-restraining influence of the physical sanction is stronger then than afterwards. Of memory, if deeply impressed and vigorous (as, in the sort of case in question, when taken fresh, it can hardly fail to be,) the expression is delivered without effort. Invention, under the perpetual condition of not being true, and yet appearing to be true, is the work of anxious and unremitting labour: the less the mind is exercised in the habit of reflection, the more apt will it be to sink under the trial.

By the power of the political sanction, concentrated in this case in all its plenitude in the hands of the domestic ruler, the will of the patient might be acted upon (it is true) with a mendacity-promoting force superior to any that may be expected to bear upon the patient in an adult state, in a state of comparative independence. In few adult minds is any other fear so strongly impressed, as the fear of the rod is, in general, capable of being impressed on the infant mind, by a severe and steady hand. But the disadvantage to which, in this case, the interests of truth and justice are subjected by the weakness of the volitional faculty, may be expected to be at least compensated for by the weakness of the intellectual faculty. The child strives to lie as well as it is able; but under the opposing force of cross-examination, it is unable to lie with effect.*

This much in regard to the case of infancy, which is (as already observed) the only case of imbecility which has been taken for a ground of exclusion by English law.

A case, however, presented itself not many years ago, in which a witness was rejected, not indeed on account of imbecility, but on the analogous ground of a supposed deficiency of appropriate knowledge.

Indictment of a woman for bigamy. Rex *v.* Eleanor Whetford, Guildford Assizes, Saturday, 9th August 1806, before the Lord Chief-Baron. (*Times* and *Morning Chronicle*, 11th August, both in the same words.) The first marriage, or supposed marriage, the parties both English, at Gretna Green, in Scotland. The celebration of the ceremony, in the manner usual in Gretna Green marriages, proved by the habitual operator, the vice-priest, a tobacconist. "David Laing, the Gretna Green parson, was first called. He stated that he performed the ceremony over the prisoner and her husband, in his way; that was, he read nothing, but he said something off the tongue, and authorized them to cohabit together."

The Lord Chief-Baron said he would not admit this as a marriage. He asked him what he was. He replied, a tobacconist. His lordship observed, that a fellow or two, like the witness, did these sort of things; but both himself and the parties were liable to punishment.

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* From the Asiatic Annual Register for 1802, pp. 132–144. Indictment for murder: Rutney, a boy of seven years old, brought forward by the prosecutors to give evidence against the prisoners, one of them his own mother (p. 138.) To the preliminary examination, nothing could be more satisfactory than his answers. "He seemed completely aware of the guilt of telling a lie; and distinguished the punishment due to simple falsehood, and to falsehood upon oath, by saying, that a person guilty of the one deserved to be flogged, but that those who were guilty of the other ought to be hanged. His general notions of right and wrong were equally correct, and all his answers were given in the most firm and undaunted manner.

"Having gone through this preliminary probation, he was sworn in the usual manner; but it very soon appeared that not one word of truth was to be expected from any part of his narrative. Fortunately, the story which he told was, in itself, so inconceivable, as to carry its own refutation along with it."

Thus far the report. The jurisdiction of the Christian devil not being recognised among the Hindoos, the theological, or diabolical part (shall we say) of the test, it may be observed, was not applied. *Deserve* and *ought* are the terms employed: terms of ambiguous import, importing obligation, but not specifying the source. Of the three sanctions—the religious, the political, and the moral—the last only seems, on that occasion, to have been brought into action upon this eastern theatre. A test thus imperfect—a test not containing any theological elements in its composition, could not easily have been employed in the laboratory of English jurisprudence.

Here, then, the fact was out of dispute. the guilt, in a moral view (to say nothing of the religious,) equally out of dispute. yet the judge acquits the prisoner — acquits her for evermore. Why? Because the state of the law, in respect of the validity of the marriage, was not, according to the conception of the learned judge, proved by a proper sort of person "He would not receive the law of Scotland from a tobacconist" What? nor yet from anybody else? That "both the fellow and the parties were liable to punishment," so much his lordship knew So much he knew but exactly at that point stopped his lordship's knowledge. and, what is more, exactly at that point commenced his determination not to know

By a special verdict (not to mention other means in use,) he might have been informed and by the same regular course, information of no slight importance to the whole country might have been gained.

In the case quoted above out of Gwillem,* a step altogether out of the regular course was taken. The evidence appeared not sufficient for conviction. what was the regular consequence? That the prisoner should be acquitted. Instead of that, the trial is put off to the next assizes the defendant, guilty or innocent, in prison all the time The proceeding was reported to the twelve judges it was approved by them it was therefore legal Of these twelve reverend and learned persons, the Lord Chief-Baron himself was one Had he thought of this when trying Eleanor Whetford, he would have learnt that there are middle courses between instant conviction and instant acquittal, if the learned judge thinks proper to employ them

Delay, and of the same length, in the one case created, in the other case not created When created, to what end? That an infant, under seven years of age, might, at the option of its parents, be instructed in theology, or in mendacity, or in both, while the memory of the supposed fact had, if real, all that time to fade in When refused to be created, what were the circumstances under which the omission took place? When the point that might have been aimed at by the delay would have been accomplished by it with the utmost certainty — accomplished to the satisfaction, not only of the public at large, but of the learned judge himself for (says he) "if you have any advocate of character, I will receive his testimony." Was there, in the opinion of the learned judge, any such universal perversity at the Scotch bar, as that no advocate of character would be to be found, who, in relation to this point of Scottish law, would be to be prevailed upon to give his opinion (to the present purpose called his "*testimony*") for his fee?

In the former case, the defendant [witness] was "a fellow that did those sort of things:" in the Guildford case, "the defendant was a young lady of handsome person and elegant manners, and her appearance at the bar excited considerable sympathy on her behalf in the spectators in court."

Why mention this circumstance? I mention it, in addition to what has already been said on that subject in another place, that it may be seen so much the more distinctly, how easy it is, under the existing system, for a judge, in meting out justice, to have two measures. one for "fellows," — another for "young ladies of handsome person and elegant manners." and with what unhappy success, power, in reality arbitrary, has been covered up from observation by technical forms

By the description of the person of the defendant in the Guildford case, the recollection of the classical reader is naturally sent back a few thousand years, to the incident which, in all subsequent causes, involved the proceedings of the court of Areopagus in habitual darkness. Of course, "the handsome person and elegant manners" of defendant Eleanor Whetford cannot possibly have exercised on the decision at Guildford any such influence as, in the case of *Rex v. Phryne*, proved so salutary to the defendant Phryne, and so fatal to justice, under Athenian judicature † Concerning living judges, where anything of moral blame would attach, fiction herself is silent but, as over departed ones, history, so, over future contingent ones, fiction at any rate, maintains an undisputed power Availing myself, then, on the present occasion, of the right of fiction (for, abhorring it as exercised for any purpose of judicature, I have not the least objection to it for the purpose of argument,) the use I make of it is this, viz that, under the law of England as it now stands (viz in virtue of the features above described in it,) an English judge is at least as much at liberty as the judge of any other country, in pronouncing his decisions, to consult (not to speak of his pocket) his party, his humour, or his taste; and that, on condition of looking grave all the time, and pronouncing certain combinations of learned words, such as never can be wanting, he will find no more difficulty in acquitting beauties than in browbeating fellows. Not but that, so far as concerns the bare possession of the *jus nocendi*, truth might serve a man for predicating it of all alike, the living and the dead: it is only when the faculty is to be spoken of as being in actual exercise, that truth will decline to serve you, recommending it to you to employ fiction in her stead.

* *Vide supra*, p. 430.

† Potter's Grecian Antiquities, i. 105. Lucian in Cataplo.

CHAPTER VII.

OF THE RESTORATIVES FOR COMPETENCY, DEVISED BY ENGLISH LAWYERS.

IF, directed to no other end than the avoidance of deception, exclusion of evidence is bad altogether, bad to the whole of its extent, — whatever does anything towards the narrowing that extent, is so far good. Such being the effect of the restorative processes now to be considered, the application of them is so far good.

Here, then, it might seem at first sight that they ought to be dismissed; referring to the books for an account of them, instead of seeking to augment the load of this work by superfluous matter.

In two points of view, however, it may be not altogether useless to bestow upon them a further glance.

One is, the proof they afford (if any further proof can be wanting) of the impropriety of the rule, of which, in proportion to their extent, they destroy the efficacy. For in scarce any instance can the propriety of them be defended, but by arguments which prove or assume the impropriety of the rule. The other is, the poison they keep infusing into so commanding a portion of the public mind: the imbecility, or improbity, or both, which, on the part of the class of minds by which such conceits have been hatched, they presuppose, and tend to perpetuate. The laws about witchcraft* were in their day copious and tremendous sources of injustice: the opposite conceit about *exorcism* might so far have its use, if, in here and there an instance, it served to snatch a victim from the other prejudice, or in any other way to narrow the channel of injustice. But, forasmuch as this quack remedy served to confirm in men's minds the opinion of the existence of the disease, and thence to give extent and permanency to an opinion which is in itself a most cruel disease, the effect of it was, perhaps, rather pernicious than beneficial upon the whole. What exorcism has been to sorcery and witchcraft, the restorative processes here about to be brought into view still are, in relation to the practice of treating evidence as if it were bewitched, and thence unfit for use.

In a system of law, absurdity, even although no immediate practical consequences are deduced from it, is never a matter of indifference; for whatever is found so exalted is venerated, and whatever is venerated is imitated.

To keep up in the composition of the legal system as large a proportion of absurdity as the stomach of the people can be made to endure, is among the deepest and the most favourite arts of lawyercraft: the security of the impostor is in proportion to the stupidity of the dupe. What renders the device the better adapted to its purpose is, that in the situation in which the lawyer acts, the most stupid and the most acute find equal facility in the practice of it. To adorn a spot with a palace, or strengthen it with a fortress, demands the skill of the architect or the engineer; but to encumber it with rubbish, is an operation to which the rudest hands are competent, especially if stationed on the heights above.

If what follows in this chapter should appear to resemble a sick man's dream, rather than a work of reflection — should exhibit all the wildness of the Arabian Nights, without any of the beauty, — pardon, gentle reader: such as I have it, give I it unto thee. By me, it has not, any of it been made: all that I have done by it, is to present it in its native colours, after stripping it of the mask of sapience in which lawyercraft and bigotry had dressed it up.

The theory of trustworthiness, untrustworthiness, and restoration of trustworthiness — of health, disease, and mode of cure, so far as concerns the branch of the pathologico-psychological system here in question, has revealed itself here and there, in unconnected rudiments and fragments, to the sagacity of English lawyers. But, with shame be it spoken, never yet was it formed into a complete and consistent whole; never was this interesting branch of the science of evidence placed upon its proper basis, till the genius of Dr. Gall arose, and dazzled with its effulgence the eyes of astonished Europe. By the discoveries of that great man, we are at length enabled to understand what English lawyers have been at.

The faculty of delivering true testimony, depends (like all other faculties, moral and intellectual) upon a particular organ which is the seat of it: a portion or protuberance of the human cranium, which may be called the organ of trustworthiness. Near this precious organ (alas! too near it) are stationed the organs of *interest* and *improbity*, two of the principal organs of untrustworthiness. When the appropriate exciting matter correspondent to either of these respective organs applies itself to the system, the organ of untrustworthiness dilates, extends itself, and by its overbearing influence depresses the organ of trustworthiness: on the other hand, no sooner is the appropriate and correspondent instrument of restoration taken in hand, and applied *secundum artem*, than the tumidity antecedently superinduced upon the organ of untrustworthiness subsides, and the organ of trustworthiness (like a giant refreshed) rises and reassumes its native strength and stature.

* *Vide supra*, p. 101, note *.

Antecedently to this theory, by which all difficulties are now at length cleared up, the ingenuity of English sages had discovered (though by a method not wholly clear of the imputation of empiricism) divers remedies, which, acting upon the peccant and œdematous matter of the organs of untrustworthiness, operate upon the organ of trustworthiness in the character of *restoratives*

The annals of psychology afford a case of an unhappy gentlemen, a Mr Simon Browne, whose misfortune it was one day to feel his immortal soul perish within him * For a species of mortification so fatal in its extent, the pharmacopœia of that day at least, seems not to have furnished any remedy Had the disease been confined to that part of the soul which is the seat of veracity, the case would not have been thus desperate For the restitution of the organ of trustworthiness, Westminister Hall affords no fewer than five specifics Four of these are drawn from the mechanical school, and consist in the scientific application of four several instruments,† a burning iron, a small seal, a great seal, and a sort of lever called a sceptre Of the fifth, the appropriate instrument is a tongue

When the peccant matter acts in the shape of interest, the small seal will suffice when it is of the nature of improbity, nothing less than the great seal will serve The sceptre is applied to the same purposes as the great seal, but the scale it acts upon is larger, and indeed indefinite By the great seal, improbity is discharged in a small stream, as it were by a hand-pump, and from only one bosom at a time by the sceptre it is discharged as from a pump worked like that at the royal dockyard at Portsmouth, by a steam-engine The number of bosoms capable of being thus cleared by it, and by a single stroke, is absolutely without limit

1 *Burning Iron* — In the character of a restorative of competency when impaired by improbity, the use of this instrument is confined to felonies, and among those to clergyable felonies The iron, being made red hot, is applied to the hand there must be a hissing and an outcry, but of each, any the least degree is sufficient the outcry must be performed either by the prisoner or a lawful deputy the hissing may be performed by a piece of bacon. In this case, the *modus operandi* of the remedy is so obvious, it is almost superfluous to mention it the virus is burnt out by the actual cautery, exactly like the virus of a mad dog the organ of untrustworthiness collapses, and its antagonist resumes its post.

Somehow or other, this remedy has of late years grown out of fashion Instead of undergoing the operation of the cautery, the patient is sent to breathe the air of New South Wales Whether the competency of such of the sojourners there on whose evidence others of them have been hanged, was previously restored or no, is not as yet known, the question not having been yet laid before the twelve judges If yes, it must have been by the air of the place, known as it is to be in other respects remarkably salubrious

The action of this restorative depends upon a variety of circumstances, some of them not immediately obvious to any but learned eyes The difference (for example) between a felony clergyable and one not clergyable,‡ turns upon a farthing: if the value of the article stolen, being really 40*s*, should be set a farthing too high, the operation would fail This is so well known, that in that case it never has been employed But if it were really worth eight or ten guineas, and valued at as many shillings (a case as frequent as the other is unexampled,) such undervaluation would not impair the efficacy of the remedy

The offence may even be precisely the same, —and yet, no burning, no veracity Theft to the value of twelvepence farthing is grand larceny, and grand larceny is burnable theft to no greater value than twelvepence is but petty larceny, and petty larceny is not burnable The grand theft, consequently, when properly punished—that is, properly pardoned —leaves the veracity unimpaired the petty theft (till a late statute came in aid) destroyed the veracity beyond recovery Whether, for example, the veracity of a Londoner who had stolen a quartern loaf was recoverable, depended upon the assize of bread in London as settled for that week for, stealing the self-same loaf under the self-same circumstances, would be the grand or the petty offence, according to the assize.‖

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* Hawkesworth's Adventurer.

† At an early period, purgation before the ordinary, by those who were entitled to the benefit of clergy, acted as a restoration; but this was abolished by 18 Eliz. c. 7. On this subject, see 1 Phil. 31.—*Ed.*

‡ This distinction was abolished by 7 & 8 Geo. IV. c 28.—*Ed.*

‖ It may be argued on the other side, that though the material subject of the larceny, the loaf, is the same, and everything else the same, the value, and thence the offence, is not the same, since there is the farthings'-worth of difference. This may be very true, and yet the facility of revival on the part of the veracity is not as the magnitude of the offence It is, on the contrary, in the inverse ratio of that magnitude: for the sole difference in the two instances is confined to the value, and it is in the greater offence that the veracity revives,—it is in the lesser that it is unrevivable. When I say *unrevivable*, I mean by common law. But no difficulties are too arduous for legislative wisdom. Parliament has spoken; and the farthing's-worth of difference has been

Neither is it to any such cause as the consummation of the punishment, and the change of character inferred from the operation of its reforming powers, that the return of veracity is to be ascribed. Other punishments may run their course; other punishments, whatever may be their duration, may have run their course, and the incredibility remain unextinguished. It is not time, but heat, that works the cure. Neither does whipping possess any such virtue as that of a restorative to veracity: for whipping is not fire. A conviction of an offence, for which whipping is the sentence, expels the veracity; but the execution of the sentence does not in this case bring it back again. To a plain understanding, the incredibility might as well be whipped out as burnt out, or the new credibility whipped in as burnt in: but this, it seems, is not law. There is no purifier like fire.*

Doubts have arisen how an application made to the hand should ever reach the heart. There are some people that will raise doubts out of anything. some have been seen sitting upon benches for years together, without doing anything but raising doubts.

Not many years ago, an ingenious physician of the mechanical school, used to extract "mercury out of the bones." It was discharged in an uninterrupted stream, by an hydraulic machine of his own invention: for years together, the advertisement was repeated in the London papers. Sir Kenelm Digby's method of curing wounds was by applying a small quantity of his sympathetic powder to a few drops of the blood: the cure was performed "without hindrance of business, or knowledge of a bedfellow." the patient might all the while be at any number of miles distant. This with him was every day's practice. *Vide* the cases, as reported by the learned knight himself These cases are much stronger than the case in question.

2. *A Great Seal.*—The sort of great seal to be employed on this occasion, is that which is employed for granting pardons. Supposing (what has sometimes happened) the ground of the pardon to have been the persuasion of the convict's innocence, the restoration of the admissibility would, under the rule of consistency, be a necessary consequence: in every other case, whatever propriety there might be, consistency is out of the question. An experiment was once made by another sort of seal, called a privy seal: the experiment failed. the seal was not found to be big enough.†

The pardon, has it been a pardon upon the merits, or not upon the merits? What sort of a thing is a pardon upon the merits? by what mark is it to be distinguished from a pardon through favouritism, corruption, or caprice? What are the proper grounds for pardon?—What lawyer ever thought it worth his while to put to himself any such question?

All these questions, together with many another that might be added to them on the ground of reason, are, fortunately for the reader, rendered superfluous by two determinations on the ground of positive law. Unless in particular circumstances, exclusion on the score of infamy is not done away by a pardon on the merits; it is done away by a pardon which cannot by any possibility have been a pardon upon the merits: I mean a pardon granted by statute, at a particular time, to all malefactors without distinction. In this case the instrument is,

3. *A Sceptre.*—The power of this engine, as applied to other purposes, is no secret: in the character of a restorative of trustworthiness, it has never yet received the attention it deserves. In the case of the burning iron, the principle upon which that instrument acts, has, to render it clear, been declared to be the same as in the case of the statute pardon. The sceptre may, to this purpose, be considered as composed of an

done away. Since the 31st of the late king,[a] petty larceny no longer incapacitates. Before many centuries are at an end, who knows but that, by farthings'-worths at a time, the whole mass of incredibility may have been removed?

* There are cases, indeed, in which whipping, or fine, or transportation, or any other kinds of punishment, have all the virtue of burning: but this is only when they have been substituted for it by act of parliament. in all other cases, nothing but burning will serve. The benefit of clergy has of itself no virtue: burning, or a statutory substitute, is indispensable. "In Lord Warwick's case," says Phillipps (i. 32,) "one who had been convicted of manslaughter, and allowed his clergy, but not burnt in the hand, was called as a witness for the prisoner; and on an objection to his competency, the lords referred it to the judges present, who thought he was not a competent witness, as the statute had made the burning in the hand a condition precedent to the discharge."—*Editor.*

[a] The 31 Geo. III. c. 35, enacts that no person shall be an incompetent witness by reason of a conviction of petty larceny: and the 7 and 8 Geo. IV. c. 29, abolishes this distinction between fraud and petty larceny.—*Ed.*

† The English of this is, that it belongs to the Chancellor, not to the Lord Privy Seal (or at least not to the Lord Privy Seal alone,) to grant pardons. Understand, in a direct way: for in an indirect way, as above shown,[a] it belongs to anybody.

[A statute of the last session but one (6 Geo. IV. c. 25,) enacts, that a pardon under the signmanual, and countersigned by a Secretary of State, shall have the same effect as a pardon under the great seal.—*Editor.*]

[a] See Book VIII. *Technical Procedure;* Chap. XIV. *Nullification.*

infinite number of burning irons, applicable at the same time, and (like Sir Kenelm's sympathetic powder) at a distance, to an indefinite number of hands Inquiring into each man's conduct and character would give infinity of trouble By so simple a contrivance as the application of a sort of rod, called a sceptre, to a roll of parchment, all this trouble is saved

So far, everything is as it should be But one consideration presents itself, suggesting melancholy reflections. The power of trustworthiness and untrustworthiness is vested in the same royal and sacred hands as the power of life and death If it depend upon the pleasure of his Majesty to extirpate the virus of mendacity from any the most corrupted hearts, and in any number, so must it *à fortiori* in any less tainted hearts—*à multo fortiori* in all untainted ones Observe, then, the malice—the habitual and hereditary malice, of the advisers of the crown for so many successive ages at no greater expense than that of a piece of parchment, with the momentary use of a gilt stick, the expense of which is incurred already, they might banish for ever the spirit of mendacity from the lips of men they might make all men trustworthy,—and they will not.

It has been exactly with these advisers of the Defender of the Faith and so forth, as with those of the Pope of Rome Possessing the key, it depended upon him (the successor of St Peter) to throw the gates of Paradise wide open, as those of Kensington Gardens on a Sunday! Yet did he keep them shut, opening only now and then a wicket, all for the paltry profit of selling tickets one by one

4 To conclude, and crown this list of cabalistical and preternatural restoratives of trustworthiness when expelled by improbity,—we come to one, the operation of which, though more powerful than all of these put together, is altogether natural, and in "the ordinary course of things" This (if in this case as in the others, the instrument must be specified) consists of the tongue of an attorney-general, employed in so familiar an operation as that of telling a lie An assemblage of words, purporting to be a history of the prosecution, with the judgment in which it terminated, is written upon a piece of parchment this parchment is called *a record* Lies there are always in it, or it would not be what it is—errors scarce ever: in the case in question, at any rate, there are none This will not hinder the attorney-general from coming into court and saying (if he is in the mood,) "I confess errors in the record" so sure as he does so, so sure is he to be taken at his word.*

It has been already mentioned as among the intermediate ends of lawyer-craft, to corrupt the morals of the people, and among the means to that end, the planting and cherishing in the public breast the love of lies, by causing their salvation to be conveyed to them, on every favourable occasion, through that corrupt channel On the present occasion, that sinister policy employs itself with peculiar advantage Pursuing this line of policy, lawyers have heaped mischief upon mischief, that lies upon lies might be employed, and popularity upon popularity gained, by curing it They have acted as a surgeon would do, who, having a mad dog tied up, should secretly cut or slip the knot, that the animal, on gaining its liberty, might send in to its master a supply of patients In an endless variety of shapes, they have entailed ruin upon the innocent, and against this ruin they have left no remedy but in a lie for the guilty, yes, but for the innocent there is no mercy, no safety, but in a lie A Pandora's box is opened upon the people, and such is the contrivance of the machine, that in nothing but a lie shall there be power to shut it Under such a system, where is the bosom that can defend itself against the love of lies?

American savages have been proverbial for cruelty The savage is mild and placable, compared with the English lawyer The savage mimics or broils his enemy, and is satisfied the lawyer, at a whisper from above, gluts on the child unborn his unprovoked and mercenary cruelty No mischief is so unassuageable as that which employs for its instrument a mass of corrupted language. Perillus's bull, after it had broiled its author, was soon laid upon the shelf *Corruption of blood*, the invention of a corrupted understanding, at the suggestion of a corrupted heart—that most barbarous of all abuses of words,—remains, if the lawyer have his will, remains to corrupt justice as well as language, to the end of time

By a lie from the attorney-general, lawyer-craft's last shift (such virtue is there in a lie) even this syphilis, so dexterously inoculated and so strictly entailed, receives its cure. The lie is spoken, and the patient is made whole and not he alone, but in and through him, an endless line of patients

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* Smith, if that be the man's name, spelt with a *y* instead of an *i*, or with a superfluous *e* at the end of it For finding errors, of a sort fit to be confessed, a sure way is to make them; but should there happen to be none, it comes to the same thing.

N.B—Should these errors, or any other errors, have been made by the attorney's clerk by whom the indictment was drawn up,—left or made in it, whether to save the trouble of reading over, or to oblige a friend,—they are as good errors as if they had been made by the attorney-general himself.

In this same *ultimum remedium*, the suitor, to whose indispensable witness (guilty or not guilty) it has happened to have been convicted of perjury, beholds, in one case, his only hope.

I say in one case: for here comes in quibble upon quibble. Prosecute at common law, the inadmissibility is pardonable: prosecute upon the statute (for there is a statute against perjury,) it is not pardonable. How is it then? In this case, and this alone, has the sovereign been ill enough advised to tie up his own hands? Not he, indeed: but the man of law, the corrupter of blood and language, has tied them for him: the same sophist, who, by his quirks, ousted the innocent of pardon in that former case, follows up his blow and ousts another set of innocent persons, of whom (as in the former case) this, and this alone, is known, viz. their innocence. Such is the doctrine, as it stands in the books. Not that any judge need be bound by it, any further than it is agreeable to him to be bound by it.

Cleansing our lips of the flash language — emerging from the regions of imposture — let us speak, if possible, in plain English. The power of the privy seal to remit punishment, and therewith to restore the faculty of giving testimony, having been questioned on the behalf of the chancellor, was disallowed. But the power of the chancellor, as we have seen, has its limits. Among the officers of the crown, to the power of the attorney-general, and to that alone, these limits oppose no bar. The privy seal (it may be said) being placeable and displaceable by the king, also the chancellor, also the attorney-general, — the distinction is but nominal: in every case it is the power of the king, acting only by different hands. To a second glance, however, there will be a very substantial difference. Each functionary, so long as he retains his office, retains at least a negative upon everything that is done in it. Restrained by any considerations whatever, let the attorney-general for the time being refuse to confess errors, — unless by some strange mishap there should be errors (and then perhaps not in all cases) the testimony would be inadmissible.

Meantime, in this account is assumed a proposition which not improbably may not be true, — viz. that, in virtue of a record, in which, at the suit of the king, conviction and judgment are registered without outlawry, — in the same way as outlawry is done away, in a case where the king is nominal plaintiff, by the king's attorney-general, by so easy a process as the telling of a lie, — so, in case of conviction and judgment, may all other penal consequences, by the same lie. Perhaps this may not be true. It would be scarce worth walking across the room to see all that has been said about it. When once we steer a hair's-breadth out of the sphere of every day's practice, everything is matter of cross and pile. Jurisprudence is not among the subjects of human knowledge: to predicate certainty of it, or anything approaching to certainty — certainty to a discourse which has not so much as a certain word belonging to it, is an abuse of language. Where statute law is, and judges in due subjection, there, and there alone, is certainty.

What the lion has striven in vain to do, may sometimes be done by the mouse. It has already been stated, that, if the parchment is out of the way, the competency of the perjurer sets the gainsayer at defiance. Here, then, is a power of restoration, vested in any hand which, by fair or foul means, with or without risk, can gain a momentary command over the necessary parchment. I throw out this as a hint to the ingenuity of future functionaries, wheresoever stationed and howsoever denominated, who, with or without right, possess the physical faculty of taking in hand these mysterious parchments. Which would be the more *astute* contrivance, — smuggling the parchment for a few minutes, or confessing errors in it when there are none, and by a man who has never looked at it?

On other occasions, availing themselves of the power they possess *de facto* over these precious parchments, judges have made out of them for themselves the faculty of leaving a man in possession of a remedy, or depriving him of it, at pleasure. For example, in the case of a prosecution deemed malicious, they begin with so ordering matters, that, without possessing a copy of the record (the record in which the history of the prosecution is supposed to be given,) no man thus injured shall have it in his power to seek redress: this done, they allow him this copy, or withhold it from him at pleasure.

The expedient is so perfectly in the style of jurisprudential science, that, though an innocent man were to be saved by it from punishment, or the widow or the orphan from losing their subsistence for want of evidence, I should not despair of seeing it (if occasion served) employed in practice.

Were any other instance wanting, the practice called *withdrawing the record* might serve to show that these mysterious tabernacles of pretended truth are never employed in a manner so congenial to their destination, as when, like cups and balls, they are in some way or other made the instruments of trick and subterfuge. By an unlearned reader, a record of the court, being a history of the proceedings of the court, would naturally be supposed to be the work of an official hand, treasured up in official custody, and as little in danger of finding itself in any other than official hands, as the regalia at the jewel-office. Alas! by the mob of gazers whose station is at a distance from the curtain, how imperfect the

conceptions formed of the mysteries acted behind it! It is the destiny of these jewels of the jurisprudential treasury to find a Colonel Blood in every plaintiff whose attorney sees reason to urge him to this daring enterprise By so simple an operation as the filching (*anglico-jargonicè*, withdrawing) the record,* —the plaintiff, should it be his fortune to discover in time a momentary gap in his evidence, gives himself a right to a new trial. while, under exactly the same necessity, a defendant would be left to take his chance, trying the cause a second time upon affidavit evidence, to know whether it shall be tried a third time upon proper evidence.

Necessity, the mother of invention, will sometimes give birth to expedients, which, when once brought to light, are afterwards adopted by convenience In the theatre of the ingenious Mr Astley, the lips of the *dramatis personæ* being sealed by authority, scrolls upon great occasions, perform the office of sweet sounds From this humble station might not a hint be taken for the use of a more exalted theatre? A statue (any one of the three kings might serve) attired in the costume of the great officer of the crown, his majesty's attorney-general, and upon the pulling of a string, a scroll, as it drops, unrolls itself, with this epigraph "His Majesty's Attorney-general confesses errors in the record"

Not that it is in the nature of things, that in any rank (much less in so high a rank) an English lawyer should feel himself less at his ease when saying the thing that is not, than when saying the thing that is far be it from this pen to dip itself in any such injustice in that point, there could not be any the smallest difference between the living person and the statue But a case not unfrequently realized is, that—the habitual station of that high officer being, not in that high court in which, besides the three wooden kings, the "king himself" is, in the intendment of law, always present, but on the other side of the passage—the consequence is, that as often as errors are to be confessed or any other function to be performed by the person of that high officer in that high court, the passage is to be crossed This is the inconvenience, in tender consideration whereof, the proposal is submitted it being considered how perfectly light in the balance any quantity of mischief of which non-lawyers are the bearers is, when set against a grain of inconvenience pressing upon any such learned, especially any such eminently learned, pair of feet or shoulders· there needs no rhetoric to impress upon learned minds a due sense of the magnitude and importance of the occasion

What if the learned gentleman in office for the time being were to come into court once for all, and confess errors in all records present and future; taking, *pro hâc vice*, lies for errors? Alas! that would never do: in the first place, it would be true, it would rip open the hen whose eggs are fees.

Such are the restoratives to competency under English law

Is there any part of this theory of restoration capable of being regarded in a serious point of view? Let us try let us take that which presents the gravest aspect From the burning iron, the great seal, and the sceptre (it may be said,) no great matters are to be expected Admitted,—of all these instruments, —admitted, they leave the man as they found him But the little seal? this is quite another affair this does not leave a man as it found him this actually destroys his interest. In a will, a legacy of £50 is given to a man who otherwise would have had nothing does not that give him an interest in supporting the will by his testimony? He agrees not to accept the legacy, and, in evidence of such agreement, commits it to writing (it is then called a release,) and puts his seal to the release His right to the £50 is now clearly gone and is not his interest, the supposed mendacity-promoting motive, gone with it?

No, indeed is it not still the same imposture, only a little more thickly covered

In the first place, let it never be out of mind, that, according to the principles of the exclusionists themselves (as far as their principles can be judged of by their practice,) the nostrum never can be of any manner of use, since, be the interest which a man is under ever so great, they admit him notwithstanding they admit him, as we have seen already, when he is an extraneous witness; they admit him over and over again, as will be seen further on, when he is a party

In the next place, if the state of the mind be at all considered, it is not in the nature of the case, that from the operation (make the most of it) the state of the witness's mind should experience any material variation

He releases, he gives up his interest. But whence came this sacrifice? The sacrifice may be to any the greatest amount, but to any the least amount, a sacrifice without an inducement is an effect without a cause. One cause alone constitutes any rational mode of accounting for such a sacrifice,—viz a treaty between the proposed witness and the party to whose interest the testimony (it is understood) will be serviceable But if any such treaty has taken place, the witness must have said over and over again, and naturally to, & in the hearing of, more persons than one, So and so is what, at such a time and such a place, I saw so and so is the testimony I have to give In other words, over and over

* See 3 Bl. Com. 357.

again it must have happened to him to have delivered extrajudicially, in the presence of a variety of witnesses, in substance and effect (if not in tenor) the very evidence which, if admitted, he will have to deliver in judicial form and place. How then can it be said, that, when the pecuniary interest is out of him, supposing it really out of him, he is devoid of interest? If that be true which is so decidedly affirmed as well as disaffirmed by English lawyers, that reputation, reputation for truth and honesty, is of no value to a man, then indeed he is devoid of interest: but if reputation be of any the least value to him, if he would part with so much as a farthing to preserve it, then, even in that case, he has still an interest; and an interest adequate, according to them, to the production of mendacity in any case.

Here, then, is an interest, and that an adequate one—an interest not taken away by the operation, but still subsisting. Remaining in all cases, it supersedes the necessity of looking out for any of those modifications which may be produced by any difference in the nature of the interest in different cases. But, for illustration and still more complete satisfaction, let us look a little way into those differences.

In the next place, then, here is a transaction between two parties: an inducement there must have been on each side, or the transaction could not have taken place. On the one hand, unless an advantage in some shape or other accrued to him from it, the releasing witness would not have performed his part in it: and moreover, on the other part, unless some advantage accrued to the party, neither would the party have borne his part. But this advantage to the party could not, in the nature of the case, have been constituted by anything else than a tie of some sort or other, direct or indirect, engaging the witness to persevere, and deliver in court evidence to the same effect as that which had been delivered by him out of court. What particular shape it may have happened to this tie to assume in each individual case, it would in general be fruitless, and always needless, to attempt to investigate.

Take the matter in another point of view. The testimony thus vamped up,—is it true or false? If true, the vamping is of no use: if false, what then is the effect of it?

Useless, then, it is most completely, this lawyer's pantomime. But though useless, it is far from being inoperative: it is practically mischievous. Though interest never can be a just cause of *exclusion*, it never can fail to be a just cause of *suspicion*. The object of the mummery, the effect of it, if it has any (and it is not the lawyer's fault if it has none,) is to wipe away this suspicion from the mind of the judge; to cause a man, whose testimony is really under the action of interest, to be regarded as if it were not.*

In some obstinate cases, the virtue of the little seal has been found not altogether strong enough for the work assigned to it. An occasion is upon record, in which, maugre all the efforts made by the witness to get rid of the interest, and with it of the matter of untrustworthiness, it stuck to him like birdlime, so that the consequence was, he could not be received. Experiments are not unknown to jurisprudence, any more than to other arts. The milder, howsoever morbid and peccant, matter of interest, might it not be absorbed as it were by the more acrid matter of felonious untrustworthiness? Might

* In a case decided in the last reign, decided in the time of Lord Mansfield, a doctrine is laid down, by which, if acted upon, all objection to the competency of a witness on the score of interest is virtually done away. (Peake, 106.) A witness having a natural interest in the event of a cause—having a bequest to gain by the establishment of the validity of a contested will (the bequest of the reversion of a copyhold estate,) offered to give up his interest by giving up his claim to the bequest. The party to the cause—the party principally interested in the establishment of the validity of the will, declined acceptance of the offer. The testimony was admitted as competent, though the offer was not accepted, and the interest remained. From this time, the decision having remained unquestioned, nothing but a mere pantomime can be necessary to the removal of the bar to the competency of a witness on the score of interest. The witness makes his bow to the attorney for the party, and tenders a piece of parchment called a surrender or *release*: the attorney makes his bow to the witness, and puts by the parchment.

In that instance, perhaps, to obviate the imputation of collusion, the party to whom the surrender was tendered was the heir-at-law, the party prejudiced by the establishment of the will. This party, thinking probably that the effect of his refusal would be to knock up the will, refused to accept the proffered benefit: he would have got this part of the succession, but, by the consequent establishment of the whole will, he would have lost every other part.

Would the decision have been the same, had the surrender tendered been a surrender made for the use of the residuary devisee or legatee? It might have been, with nearly as little danger to truth, and with more benefit to substantial justice. In this case, the party to whom the offer was made, and the party by whom it was made, having each of them a perfect and undefalcated interest in the establishment of the will, the maker of the offer might have been assured beforehand of the non-acceptance of it; which he could not be, in an equal degree, in the other case: since the heir-at-law, rather than have nothing, might in that case have accepted the offer, and in a future similar case certainly would accept it: the devisee had everything to gain by agreeing to refuse the offer, and everything to lose by not agreeing to refuse it; since, if he did not undertake to refuse it, the witness, having no motive for making it, would not make it, and so his testimony could not be received.

not the matter of interest be considered as *merged* in that of felony? The doctrine of *merger** has done in its day greater feats than this. If this be admitted, everything else is plain sailing. Witness, having an interest not purgeable by release, commits a felony nothing more easy. felonies are committed every day for much worse purposes Plaintiff prosecutes witness pleads guilty, puts on a bacon glove, and is burnt in the hand. attorney-general confesses errors in the record; which, whether there are any or not, he is always ready to do, on proper occasions and proper considerations. If one of these operations will not be sufficient, the other will: at any rate, both together

Thus, if you have the misfortune to tar your coat, put a little butter to the tar, the tar is merged in the butter, rub on a little oil called spirit of turpentine, tar and butter are both merged in it altogether merge in air, thin air, and your coat is as admissible as it was before

The pharmacopœia of technical restoratives bears no slight analogy to the impostures that at different periods have been seen acted on the spiritual and medical theatres—to *exorcism*, *animal magnetism*, and *tractorism*

Of the operations of the exorcist, the success is infallible, in the expulsion of non-existent devils of those of the magnetist and the tractorist no less so, in the expulsion of non-existent diseases. Of the operations of the lawyer, or rather the knot of lawyers (for here co-operation is necessary,) the success, in respect of the expulsion of the demon of mendacity out of the breast of the patient, is no less assured, provided he was never there if he has not been there at the moment preceding the operation, neither is he immediately after it But if at that antecedent instant of time the demon was in actual possession of the premises, is it in the power of the release with its talismanic seal to eject him? The prayers and mandates of the exorcist, the arm of the magnetist, or the brass of the tractorist, would be of equal efficacy.

In these several impostures, as in most others, the respective operators have this in common, that, in the instance of any given individual, it is not always altogether easy to determine to which of two congenial and co-harmonizing classes he appertains—that of the impostors or that of the dupes As to the jurisprudentialist, his most common state is, perhaps, a sort of middle state between the two. What he knows is, that the pretence makes business and brings fees: what he cares not about is, whether it be true or false.

In one respect, the jurisprudential operators fall far beneath the medical and pneumatological. By the force of imagination, in addition to the non-existent diseases, the magnetizer and the tractorist may not improbably have now and then administered cure or relief to an existent one By the same powerful though unsteady instrument, it may even have happened to the exorcist to have quieted or soothed real and excruciating perturbations, howsoever derived from an unreal source But after the acts of exorcism performed by the lawyers for driving the demon of mendacity out of the bosom of the witness,—if so it was that at the time of clapping the seal to the parchment he was in possession of the premises, in any one instance could he ever have been expelled?

On the north side of the Tweed, witnesses (we have seen†) are subject to a kind of disease called *partial counsel*. It seems to be a sort of contagion, the matter of which is adherent to the witness's box. Fortunately, the Pharmacopœia Edinburgensis affords a specific for it it is of the cathartic class, scientifically (shall we say, or vulgarly?) called a purge A dozen or two of words are given a man to gabble *secundum præscriptionem*, he having first placed himself duly in the place and posture of a man giving evidence,—and the remedy is at once administered ‡

As to the peccant matter, fortunately for the bystanders, it goes off, not by the *primæ viæ*, like the matter of incredulity in the bosom of Felix, when, as in Hogarth's print, expelled by the eloquence of the Christian orator, but by a sort of insensible transpiration

As to its efficacy, the proof of it is in every day's practice Not a case in which the specific has ever failed to be administered, not a case in which, after the operation, a patient was ever known to complain of any the slightest remnant of the disease.

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* 2 Bl. Com 176.

† *Vide supra*, p. 396.

‡ This is in allusion to the practice in Scotland of putting two questions to a witness after he is sworn, to the following effect:—"Have you any ill will against the prisoner at the bar?" "Has any one given or promised you anything for what you are going to say on this occasion?" —The second question only is put to witnesses for the defence.—*Ed.*

PART IV.

VIEW OF THE CASES IN WHICH EVIDENCE HAS IMPROPERLY BEEN EXCLUDED ON THE GROUND OF VEXATION.

CHAPTER I.

VEXATION TO INDIVIDUALS ARISING SOLELY OUT OF THE EXECUTION OF THE LAWS, NOT A PROPER GROUND OF EXCLUSION.

It has already been proved—that is, observed (for surely this is one of those cases in which to observe is to prove)—that there are cases in which exclusion of the evidence, on the ground of the vexation inseparable from the delivery of it, is a proper measure;—viz. where the collateral mischief consisting of the vexation is preponderant over the direct mischief produced by the chance of misdecision or failure of justice resulting from the want of the evidence.

It was, at the same time, and in the same way, proved, that there are cases in which such exclusion, bottomed on that same ground, is not a proper measure;—viz. all cases in which the balance as between the two mischiefs is on the other side.

The several cases in which the mischief of the vexation resulting from the delivery of the evidence is capable of being preponderant over the mischief of misdecision or failure of justice for want of the evidence, have this common property,—viz. that the vexation is produced by circumstances entirely independent of the uneasiness produced by the obligation of making any disclosure, the effect of which is to subject the proposed witness, or any other person, to any punishment or other burthensome obligation, to which it is the intention of the legislator that he should be subjected. It is produced, in all these cases, by circumstances accidental and extrinsic: for example, disproportionate expense by reason of a long and expensive journey or voyage; irreparable loss of time; disclosure of collateral facts, such as a third person has no right by law to be informed of.

Besides these accidental lots of vexation, there is, however, one, which may be considered as naturally, and in the ordinary course of things, attached to the obligation of giving evidence: and that is, the thought of the unpleasant and more or less prejudicial consequences, which the evidence may have the effect of producing, to the prejudice of the proposed witness himself or some other person, by reason of the execution of a judicial decision, of which such evidence may constitute, or help to constitute, the ground. By the idea of such consequences, considered as liable to be produced by the evidence, an unwillingness to deliver it (which is as much as to say, vexation in the event of its being delivered) will, in many cases, be produced. Concerning this unwillingness, indubitable or presumable, a notion has obtained, that, in many if not in all cases in which the existence of it is regarded as certain or probable, it constitutes of itself a sufficient reason for excluding the evidence to which it is regarded as attached. And, in one of the most enlightened nations of Europe, this notion, having been adopted by judges, and, under their authority having formed itself into a rule or maxim of jurisprudential law, has constituted the basis of an arrangement exercising a most extensive and important influence over the whole fabric of the law of procedure. Regarding it as one of the most pernicious and most irrational notions that ever found its way into the human mind, I propose to allot this whole Part to the task of sifting it to the bottom, in the hope that the labour employed in a task at once so important and so new, will not be regarded as ill-bestowed.

To constitute a just ground of exclusion, the lot of vexation here in question must be a mass of that evil over and above what would have been produced by a decision to the same effect grounded on other evidence—on any evidence to which the lot of vexation in question would not have been attached. For, supposing the exclusionary notion to extend to all other evidence—to other evidence at large—to whatever vexation might come to be produced by evidence of whatever description, having the effect of subjecting some person or other to the punishment or other burthensome obligation in question,—to say that, in consideration of the vexation thus resulting, no such evidence ought to be received, would be as much as to say, there ought not to be any such thing as a punishment or other burthensome obligation ever imposed; in a word, that there ought not ever to be any such thing as a *law*.

But (it may be said) there are such things as bad laws: and in no country is the body of the laws altogether free from them. Now, the effect of the practice which, in opposition

to the exclusionary rule in question, forces testimony from persons of all descriptions, without regard to unwillingness and consequent vexation, is, to give to whatever substantive laws it is employed in giving execution to, a degree of efficiency much beyond what they would possess in the opposite case. But, by giving this extraordinary degree of efficacy to all laws (substantive laws) without distinction, it will give the same degree of efficiency to as many bad laws as it happens to the aggregate body of the laws to include. and forasmuch as in every existing system the extent of this mass of bad laws is more or less considerable, the mischief of the practice against which the door is shut by the exclusionary rule would be proportionably great.

In the character of an argument in favour of the exclusionary rule, the defect of this argument will, I imagine, be found apparent upon the face of it. But inasmuch as, when sifted to the bottom, it will be found to lead to discussions of a very delicate and important nature, I do not propose to leave it ultimately in its present state, to stand altogether upon its own strength or weakness For the present, however, confining the examination to the question immediately appertaining to the present Book, I shall content myself with bringing to view, by way of answer, the following observations viz —

1 Supposing that, for the accomplishment of the purpose stated in the argument, the exclusionary rule is, upon the whole, well adapted, it can be so in no other respect than that of its operating in the character of a debilitative upon the whole of that portion of the body of substantive laws to which it applies; weakening their efficacy,—rendering them so much the less efficacious, in respect of the purposes which they respectively have in view. But, so far as this alone is considered as the result of the rule in question, and that result a beneficial one, it is no otherwise of use than as any other institution or arrangement would be of use, that should in an equal degree contribute to weaken the efficacy of the laws

On one only supposition would the balance of its effects be on the side of benefit, and that is, if the aggregate body of the laws were so constituted, that the mischief resulting from such as are mischievous, outweighs, upon the whole, the good resulting from such as are of a beneficial character But, that, even under the worst government of which any accounts are extant, the supposition here in question was ever realized, seems altogether improbable for, on this supposition, a state of anarchy would be less mischievous than — would be preferable to — such a state of government.

2. The person to whom it is proposed to form his opinion, and consequent decision, respecting the propriety of the exclusionary rule, is the legislator In the political state in question, either that rule is not as yet established, or it is already established. If not, then, considered as addressed to the legislator, the argument stands thus: —

Monitor. In the state subject to your authority there are a multitude of bad laws: to weaken their efficacy, please to establish this exclusionary rule.

Legislator Excuse me Of such laws, if any, as in my judgment are bad laws, I shall not content myself with weakening the efficacy, I shall abolish them altogether. In regard to such of them as in my judgment are good laws, I should be sorry to do this, or anything else, that should in any degree weaken their efficacy.

Shift now the scene to a state in which the exclusionary rule has already been established —

Monitor. In the state subject to your authority there are a multitude of bad laws It has been proposed to you to abolish the exclusionary rule Do no such thing it is a most useful rule, it serves to weaken the efficacy, and thus to diminish the mischievousness, of your bad laws

Legislator Thanks for your caution. But being also fortunate enough to have a multitude of good laws, my wish is, to give to those good laws the highest degree of efficiency they are susceptible of The effect of this exclusionary rule which you are so anxious to preserve, is (taking your own account of it) to weaken the efficacy of whatever laws, good as well as bad, it is applied to Taken in its natural state, and unless subject to limitations to which you do not propose to subject it, it applies to all laws, and weakens the efficacy of all it is for this reason I mean that it should no longer have any application to any of the good ones, and it is in that view that I mean to abolish it altogether As to the bad laws, I shall not content myself with weakening their efficacy. convince me of their badness, and I shall abolish them

Monitor But, among those laws which in your judgment are bad ones, and which accordingly you propose to yourself to abolish, may not there be some, which, regard being had to the affections and prejudices of the people, it would appear to you not advisable to abolish?

Legislator. I should be sorry to find any such but if such there be, there are several courses, any or all of which I should prefer to the giving up the benefit of the increase which the abolition of the rule would give to the force of such of the laws as to me seem good ones.

1. I would cause to be laid before the peo-

ple the reasons by which my disapprobation of such laws as to me seem bad ones was produced. Having operated upon my mind, probably enough they may operate on other minds; especially as coming from a station from whence, if tolerably well dealt with, men are apt enough to take their opinions as well as their laws. And, moreover, should it so happen, that, by my reasons thus made known, any others should be brought forth, that in my maturer judgment should prove preponderant over mine, I propose to myself to take the opposite course; viz to go over to the side of the people, instead of their coming over to mine.

2. In the meantime, if I despaired of being able either to bring over the people to my opinion, or to carry over mine to theirs, I could, if I thought it worth while, leave the debilitative rule to apply itself to the particular laws thus appearing to me to be bad ones. Leaving these laws in that state and degree in which I found them, the people would have no reason to complain of me: and, barring the operation of the rule in debilitation of my good laws, I should give to them all the operative force which it is desirable that good laws should possess.

In the case where the evidence in question is of the self-regarding, the self-criminating kind,—if testimony extracted from a man's own lips were attended with any the smallest degree of probability of unjust suffering on his part, over and above that which results from testimony extracted from an extraneous and indifferent witness, there would then (on the ground of danger of deception and consequent misdecision) be, in point of reason, a ground, not for exclusion indeed, but, however, for suspicion and caution more than ordinary on the part of the judge. But who does not see that the supposition thus brought to view for the purpose of illustration and argument, is a supposition which holds good, not in the present case, but in the case directly opposite, viz. that of self-serving testimony? with only this difference, that, whereas in that case there is only a chance of the existence of falsehood on that side, there is a certainty of the non-existence of it in the present case. It is not every man that will swerve from the truth for his own advantage: a man of entire probity will not, to the value of a hair's-breadth. But there is not that man breathing, who, being in his right mind, and having his own interest alone at stake, ever will knowingly swerve from the line of truth to his own disadvantage.

There is but one sort of evidence which, practically speaking, is free from all danger of producing deception by mendacity; and this is the sort of evidence upon which an exclusion has been put by English lawyers.

Two men have each committed an offence, or done, each of them, an improper act of any other description—an act which in both cases is improper in the same degree and the same way. In the instance of one of them, it so happens that the act can be proved against him without resorting to his own testimony: in the other instance, so it happens that, though with the help of his own testimony it would be proved upon him, yet without that help it cannot. Is there any earthly reason why the lot of one of these men should be better than that of the other? why his suffering should be in the smallest degree less? Yet, under the exclusionary rule, one of them suffers not merely less than the other, but absolutely nothing; while his not more guilty fellow suffers the full rigour of the law.

Cross and pile (whether antecedently or subsequently to conviction) would not, by man in general, would not certainly by English lawyers, be regarded as a just and proper method of determining, amongst two or more equally guilty, which should and which should not suffer. Cross and pile, when called in by the common sense of jurymen for their relief in a situation of honest doubt, has been reprobated with indignation by their learned and official directors. But, in the case here in question, acquittal by cross and pile would be a signal improvement, if substituted to acquittal by the force and virtue of this exclusionary rule. In cross and pile, the naturally-sagacious or learnedly-instructed knave would not behold any means of safety more open to himself than to his less instructed fellows: whereas, it is the nature of the exclusionary rule to operate as a licence for delinquency to all those whose astuteness, seconded by ordinary good fortune, enables them to take advantage of it. Who shall count the multitudes that day after day have been acting under this licence? For it is among the properties of this invitation to guilt, that those who act under it with most felicity and success are those who enjoy the ulterior advantage of not being known to have acted under it.

That, under the protection of this licence, the impunity of the wicked may be as complete, and the encouragement to wickedness as inviting as possible, malefactors and lawyers have joined in another practice. Under circumstances of notorious delinquency, liberated in virtue of this or any other incident foreign to the merits, malefactors may be seen everywhere holding their heads high, and (as often as occasion presents itself) assuming the port and language of injured innocence. Accordingly, when a delinquent has been thus fortunate, to speak of him in the character of a delinquent is an offence punished, and with equal rigour, as i the ob-

ject of the imputation had been a character of the purest innocence. In a place where (happily for the existence of society) the offensiveness of unwelcome truth to the feelings of evil-doers does not enable them to transfer upon their censors the punishment due to themselves, what a clamour was once raised by the appellation of *acquitted felons!* As if an acquitted felon was a sort of animal no more capable of finding itself in existence on English ground, than a spider was supposed be in Ireland. All this while, under the genial influence of this and so many other rules so ingeniously and successfully directed to this end, acquitted felons and acquitted malefactors of all sorts and sizes are as much at home in the British Isles, as venomous serpents in Guiana, or crocodiles in the Nile. In a relaxed constitution of the body politic, acquitted and unprosecuted malefactors of all kinds are no less congenial to that artificial body, than, in a constitution of the same character, the tænia, the lumbricus, and the ascaris, are to the natural body. In one particular, the parallel discovers an unhappy failure. In the natural body, it is not in the power, and as little (let us hope) in the wish, of the licensed practitioner, to propagate the breed of the vermin to the plague of which it is exposed: whereas, in the political body, by the instruments which there has been such frequent occasion to bring to view, we have been seeing the hand of the practitioner occupied, with unwearied perseverance, in sowing the seeds of wickedness in every imaginable shape.

CHAPTER II

ENUMERATION OF THE SORTS OF EVIDENCE IMPROPERLY EXCLUDED ON THIS GROUND BY ENGLISH LAW.

Various are the points of view in which the vexation, that in this case appears to have been taken for the ground of the exclusion, has been contemplated: various the correspondent modifications of which the evidence, regarded as the cause of such vexation, has been considered as susceptible, and the correspondent specific denominations that either have been, or (to express those several points of view, and the consequent arrangements they have given birth to) require to be, respectively affixed to those modifications. Numerous are even the sources from which those modifications have been derived —

1. The nature of the consequences of the evidence in respect of good and evil. Hence the distinction — evidence of a nature to serve, evidence of a nature to disserve.

2. The identity or diversity, of the person yielding the evidence, and the person affected by the consequence of it. Hence the modifications expressed or expressible by the appellatives *self-serving*, and *self-disserving*, or *self-prejudicing*.*

3. His station in the cause: whether that of a party or an extraneous witness. No appellatives deduced from this circumstance; but, in respect of the legal arrangements, much importance given to it.

4. Nature and denomination of the suit, on the occasion of which the evidence is proposed to be delivered; viz. criminal, or non-criminal — commonly called *civil*.

5. Nature of the evil constituting the vexation, viz. the evil or disservice produced by the disclosure. From this source, and the second and fourth taken together, come the modifications expressible by the several appellatives *self-criminative* or *self-inculpative*, *self-disgracing*, *self-discrediting*, or simply *self-onerative* (as where blame is out of the question).

6. The nature of the affection which is the seat of the vexation, viz. whether self-regarding or sympathetic.

Where one person (a *trustee*) stands charged with the interests of another (a *fidei-committee* or *cestuy que trust*) as in the case of guardian and ward, factor (or agent) and principal, lawyer and client (especially where the existence of the relation is voluntary on the part of the trustee,) an affection of sympathy, of which the fidei-committee is the object, may naturally enough be supposed to exist in the bosom of the trustee. This being assumed, a consequence is, that where, from the evidence delivered by the trustee, a vexation or prejudice of the self-regarding kind may be expected to befall the fidei-committee, a proportionable (however short of equal) vexation of the sympathetic kind may, in like manner, be expected to find its way from the same source into the breast of the trustee. To this head may be referred the most plausible reason that has been found for the exclusion that has been put upon what, taking the only appellative in use, and which is of the dyslogistic, or vituperative cast, may be called *trust-breaking* or *trust-betraying* evidence.

Where, a number of individuals living together in the character of members of the same family (as is the case with husband and wife, parent and child,) evidence delivered by one member would be a cause of vexation to another, — vexation in a mixed mass, partly sympathetic, partly self-regarding, is liable to find its way into the bosoms of these several members from that source. In this vexation we see the most plausible reason that has been found for the exclusion that has been put upon some of the modifications, and some only, of

* Under the mutual appellative *self-regarding*, both self-serving and self-disserving are comprised. Self-serving evidence belongs not to the present purpose. — (See the next Chapter.)

that which may be termed *family-peace-disturbing* or *family-disturbing* evidence.

When the effect of a lot of self-criminative evidence has been to produce the conviction of him by whom it has been delivered, it is capable of receiving the appellation of *self-convicting* evidence. But, forasmuch as, antecedently to conviction, this effect, not having as yet taken place, can only be matter of expectation and conjecture, the appellation could not, without impropriety, be applied to self-criminative evidence at any such antecedent point of time.

Laying together the modifications deduced from the several sources above mentioned, we shall find six species, each presenting itself as entitled, on some account or another, to a separate consideration. These are —

1. Self-criminative, reaching beyond self-onerative.
2. Self-onerative, and self-criminative not reaching beyond it.
3. Self-disgracing.
4. Self-discrediting.
5. Trust-prejudicing.
6. Family-peace-disturbing.

The effect of the testimony will be in some respects different, and the reasons for and against the admission of it stand upon a correspondently different footing, according as the station which the proposed deponent occupies in the cause is that of a party, or that of an extraneous witness. We will consider him successively in both these stations: as a party, in the ensuing Part; as an extraneous witness only, in the present.

CHAPTER III.

IMPROPRIETY OF THE EXCLUSION PUT UPON SELF-DISSERVING EVIDENCE BY ENGLISH LAW.

§ 1. *Uses of self-disserving evidence, and mischiefs resulting from its exclusion.*

THE fundamental rule on this subject is generally given in Latin: *Nemo tenetur seipsum accusare:* no man is bound to accuse himself. Taken by itself, the proposition, as thus delivered, having its source rather in the affections than in the understanding, has more of rhetoric in it than of logic, and presents no clear idea until it be translated into more simple language. The part of an accuser is one part; that of a witness is another. The part of the accuser is that of the plaintiff, of which that of the prosecutor and that of the informer are modifications; these being names that are given in different cases to the plaintiff, according to the nature of the cause. By "no man shall be *bound* to do so and so," is meant, no man shall be liable to be *punished* for not doing so and so. Of the proposition, "no man is bound to accuse himself," the literal meaning, reduced to clear and unambiguous language, is, no man shall be liable to be punished for not instituting a penal suit against himself; for not preferring a bill of indictment against himself, or lodging an information against himself; or not bringing a penal action against himself; or preferring an appeal against himself, — as the case may be.

In plain English, the maxim is neither more nor less than so much nonsense. To find an intelligible meaning for it, we must have recourse to practice; we must shut up our law-books, and observe what passes before our eyes. We then find that the question is, not whether a man shall be bound to commence a suit against himself; nor yet whether, without being called (the suit being commenced by any other person,) he shall be bound to come and give evidence against himself: but whether, being called, and questions being put to him, he shall be bound to make answer to such questions.

The substitution is not a mere impropriety, but a sophism, a fraud. A law which should say to a man — Whenever it happens to you to commit a crime, come and accuse yourself, come and give information against yourself — would, on the face of it, be an absurd one. The object of the sophism is to cause it to be believed, that, in the liberty of propounding to a man under accusation or suspicion of a crime, questions, the object of which is to discover whether he is guilty or no, this sort of absurdity is involved. But, that no such absurdity is involved in that liberty, is what everybody will see, to whom it is not more agreeable to shut his eyes.

Observe, too, what in this case is the import attached to the terms expressive of obligation — *bound, forced, compelled.* Observe what is the nature of the compulsive force.

Obligation to *speak* is not here in question. In the case where the penal process is of the acute kind, punishment directed to this object is what has been commonly expressed in French by the word *question* — in English, by the word *torture.*

Obligation, on the part of the defendant, there is in fact in this case none. What it imports is mere *permission:* permission to the adverse party (the plaintiff,) and to the judge, one or both, to put questions to the defendant; for the sake of the faculty which thence results to the judge, of noting the answers or the silence (whichever is the result,) and drawing his inference from them.

From the faculty of putting these questions, what is it that the defendant has to fear? It is this: From the known principles of human nature, according to a course of observation common to all mankind — according to the result of a set of observations, which it can scarce happen to a man to have arrived

at man's estate without having had frequent occasion to make—between delinquency on the one hand, and silence under inquiry on the other, there is a manifest connexion; a connexion too natural not to be constant and inseparable.

The delusive language in which interested artifice has dressed out the exclusionary rule being thus stript off, let us now take a more detailed observation of the mischiefs flowing from it. These mischiefs will correspond to the *uses* of the species of evidence thus marked out for exclusion: *i. e.* to the occasions on which, and purposes for which, the demand for it is liable to present itself

1. In the first place, in so far as it is to be had, it has already been stated as being (not only upon the face of it, but by the confession of those who, notwithstanding, have been in the habit of excluding it) the very best possible sort of evidence the evidence the most completely satisfactory evidence, in a word, so completely, and even exclusively, satisfactory, that, according to the Roman system, after the delivery of such evidence as under English law is deemed conclusive even where the punishment is at the highest pitch, the mass of evidence is regarded as deficient without evidence of this kind, and the deficiency as being so important, that torture (howsoever ill employed) has, under the dominion of that jurisprudence, been everywhere employed for the filling it up.

First use of self-disserving evidence—augmenting the security against misdecision and failure of justice, by furnishing the most trustworthy and satisfactory ground of decision, the best security against failure of justice, or misdecision, for want of evidence,—viz evidence of the best, most trustworthy, most satisfactory kind. *Habes confitentem reum*, says the Roman orator as much as to say, Having this, what more can you desire?

2. This is not all. Under the distress produced by the exclusion put upon the best evidence, recourse has been had (through a sense of necessity, and that the wound given to justice might not be past endurance) to bad evidence of various descriptions evidence, the inferiority of which has, on other occasions, and where (for want of better) there has been a real demand for it, been not acknowledged merely, but proclaimed Under this description come—1. The supposed confessorial testimony of the party, delivered through the medium of hearsay evidence, and, of course (in case of misconception, designed or undesigned) without the opportunity of explanation, completion, and correction. 2. Written discourse, supposed to be in the handwriting of the party, and supposed to contain on his part a sort of confessorial testimony, delivered in the state in which it has been supposed to be found, but, at the option of the adverse possessor, complete or mutilated; and, at any rate, without adequate opportunity given of explanation.

Second use of self-disserving evidence,—adding a security against misdecision and failure of justice, by adding or substituting more trustworthy evidence to less trustworthy.*

* It is curious to observe the desperate shifts to which legislators are put, in order to counteract the pernicious effect of the debilitatives which they have suffered to be introduced into the system of judicial procedure.

In one instance, for want of that best sort of evidence which lawyers have taken care to exclude, lawyer-led legislators have been forced to content themselves with, and to set down as conclusive, the very worst sort of evidence, viz. *common report*.

By one statute, reputed thieves,[a] haunting the avenues of playhouses, and so forth, are made punishable so and so.

If a man can be proved a thief, what matters it where he is found? If he cannot be proved a thief by other means, how is it that his being found in the avenue of a playhouse is to prove him so, or so much as contribute anything to the proving him so? Not to speak of passengers,—among all the persons who, from the building of a playhouse to the burning of it, ever entered into a playhouse, has there ever been a single person who was not found in one of the avenues to the playhouse?

A reputed thief? reputed such by whom? By the thief-takers A reputed thief is a man who is believed to be such, by some person who is, or professes to be, acquainted with his habits of life. Who is that person? An accomplice? No; for in this case he would be able to speak to some individual transaction, in the course of which the reputed thief acted as one In a word, and in experience, it is never other than a thief-taker.

But the thief-taker,—by what means is it that he has come to form, concerning the man in question, an opinion pronouncing him a thief? By the word thief (though not in all cases and necessarily, yet obviously in the present case,) a *habitual* thief, a man who is so by habit, is implied To constitute a habit requires a multitude of acts By any one single act is he capable of being proved to have been a thief in so much as a single instance? If so, there is no need of any such law.

What? Cannot you prove so much as a single act? Then how is it you can prove the habit? Cannot you prove so much as an act? Then how is it you can prove so many as (though it were no more than) two such acts?

Curious enough must be the sort of testimony on which a man is convicted under this law. Into the composition of it, no individual act can enter: *opinion*, the opinion of the thief-taker, is everything there can be of it. I know him to be such: I know him to be generally looked upon as such: of this sort is all there can be of it. Against erroneous or mendacious testimony, the grand security is cross-examination: cross-

[a] Under the 5 Geo. IV. c. 83, which repealed all former statutes against rogues, vagabonds, &c., persons may be punished for being "reputed thieves," and persons are so punished every day at the police-courts.—*Ed.*

3. The person whose bosom is the source of self-disserving evidence (the plaintiff, or more commonly the defendant, in the cause) is one person: that person is forthcoming of course. Whatever evidence is extractible from that source, is extractible on the spot, and without addition to the expense. Stop up that source, whatever evidence you can hope to get from other sources, if got at all, you must get as you can, from, perhaps, a variety of sources, from each at the end of an indefinite length of time, and under the pressure of an indefinite load of expense. Hence,

Third use of self-disserving evidence, saving of delay, vexation, and expense.

A striking illustration of this last use is afforded by the case in which, for the conviction of a defendant, it is necessary that his handwriting should be proved.

As, at a trial at common law, the party himself (the defendant) can in no case be examined in behalf of his adversary the plaintiff; the plaintiff, to prove the defendant's handwriting, is obliged to go upon the hunt for other witnesses. In some instances, a witness for this purpose will be to be had without any additional expense. But this is altogether matter of chance; and for this single purpose it may be necessary to fetch a witness on purpose, at any degree of inconvenience to the witness, from any imaginable distance, and consequently at a proportionate expense. This expense rests ultimately on the shoulders of the party who on that side bears the burthen of costs. If the burthen of costs rested uniformly on the party who is in the wrong, even in that case this unnecessary expense would be a grievance: in case of *mala fides*, indeed, it may have its use in the character of a punishment: but it would be a supposition by much too favourable to the intellectual character of the law, and by much too injurious to the moral character of the people, to suppose this to be the more common case. Nor yet does the burthen of costs rest, with anything like uniformity, upon the party who is in the wrong, or even upon the party whom the decision supposes to be in the wrong. So far from it, that, to distinguish the cases in which it shall rest upon the party who is supposed to be in the wrong, from those in which it shall rest upon the party supposed to be in the right, is a discussion that occupies the contents of a reasonable octavo volume.

The expense, which consists in the pecuniary allowance to the witness, added to that of the instrument of summons, with the lawyer's fees belonging to it, appears in pounds, shillings, and pence; but the delay and vexation (not to speak of incidental and casual expenses, which may be the necessary accompaniments of the process of investigating by reflection and hunting out by inquiry a man's connexions, for the purpose of lighting on some person capable of proving his handwriting by the regular mode of proof,) all this put together forms a mass of inconvenience, which, though it cannot always be correctly expressed in pounds, shillings, and pence, is neither the less real nor the less heavy.

When the sort of witness in question, or one who is thought to be such, or pretends to be such, has been hunted out, the prize may but too easily turn out to be no better than a snare and a source of miscarriage. The suitor whose misfortune it is to stand in need of such testimony, is thus rendered dependent upon the probity and prudence of an individual more or less likely to be in connexion with the adversary. In case of non-appearance, the witness is, indeed, answerable in damages. Be it so: but suppose the property at stake an affair of thousands, while a few hundreds or scores would afford the witness a sufficient inducement to stand an action on that ground, or to take himself out

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examination, by which, if the individual facts charged are false, true ones (by their inconsistency with which, they are disproved) may be brought out against them. In no other criminal case would the depriving the defendant of the faculty of cross-examination be deemed endurable. In this case, by the very nature of the evidence (that is, of the only fact deposed to,) the faculty of cross-examination stands excluded. When, in a case of this sort, a man says, I believe this man to be a thief; should the case be, that he entertains no such belief, by what evidence can his falsehood be made appear? — Do you know of any one instance in which the man acted as a thief? This is the only sort of question, which, in the view of discrediting the declaration of opinion, could be asked; and this, by the supposition, is one that cannot be asked.

Not that to the account of the exclusionary system alone is to be placed the offence committed against justice by the law that has last been brought to view. It is the effort of necessity, struggling under the load of debilitatives, by which, under judge-made law, to that deplorable degree of which the printed accounts are witnesses, the arm of penal justice is enfeebled. Capital punishment (by which humane men are deterred from testifying against crimes, more than dishonest men from committing them,)—this, together with the principle of nullification (by which, on the ground of pretended errors discovered by fee-fed brethren, the power of pardon is given by judges to lawyers and their clerks,)—these, together with other causes of debility, the enumeration of which belongs not to this purpose, cannot but be admitted for their share.

But, independently of these concurrent causes, the single virtue of the exclusion put upon self-inculpative evidence suffices to account for a large proportion of that mass of unpunished delinquency, by the contemplation of which the legislature was drawn into a measure so outrageously repugnant to justice as that which has just been brought to view.

of the reach of it? Suppose another modification of fraud, more simple and more safe. To a question put out of court, "Can you prove such or such a man's handwriting?" the witness, who in fact cannot, answers, however, and purposely, in the affirmative. On the trial, he answers in the negative: the document, a necessary one (a note of hand, suppose,) is set aside, and the cause is lost What punishment? what remedy? Perjury, by the supposition, there is none, and for the falsehood out of court there is no punishment.

The only sort of person to whom it is possible (speaking of suitors) to profit by the pretended tenderness of this rule, is the knavish and immoral suitor, who, being in the wrong, and knowing himself to be in the wrong, avails himself of the inability of the adversary to fulfil the conditions thus wantonly imposed upon him by the law, avails himself of this misfortune to obtain a triumph over justice It is for the purpose of rewarding and encouraging the iniquity of one knave of this description, that the useless burthen above delineated is fastened upon the shoulders of perhaps a hundred suitors.

On the supposition of a perfect calmness as between the parties, seconded by an uncommon degree of intelligence as well as disinterestedness on the part of their agents, possible it certainly is for this source of delay, vexation, and expense, to be avoided mutual and amicable explanations having taken place, the party whose handwriting is in question agrees to admit it at the trial All this is a possible case but is it the most common case? Let experience declare Not that so much as the possibility extends beyond that class of cases which are ranked under the head of civil cases in cases called penal, any such sacrifice to truth is altogether out of the question.

To the list of the uses rendered to justice by this best of all evidence, corresponds the list of the mischiefs produced by the exclusion of it promoting, in two distinguishable ways, misdecision and failure of justice, making a factitious addition to the natural and necessary quantities of delay, vexation, and expense.

To these mischiefs may be added another, the opposite of which could not so conveniently have been presented under the head of *uses*. I speak of the poison continually infused by the exclusionary rule into the moral branch of the public mind.

Hold the virtues of veracity and sincerity in contempt or detestation look up to mendacity and insincerity as your strongholds, the pledges of your security. Look upon the licence of exercising them as the boon for which you are indebted to the mercy and loving-kindness of the man of law. Hold nothing for base and mean, that promises to preserve you from the obligation of rendering justice, —from the anti-religious and hell-born rules, *do as you would be done by, repent and suffer for your sins* Hold nothing for base and mean, —or, holding your heads high, and speaking in a tone of firmness and defiance, maintain, that to practise whatever is most base and mean, is among the Englishman's most honourable privileges Deny your own handwriting in so many words, —or, denying it in deportment as significative as words, refuse or forbear to recognise it deny your written words, and when a question is put to you by words spoken, keep your lips close, lest the truth should make its escape, and justice be done *

Such is the exhortation which the exclusionary rule never ceases to deliver to the people Such is the lecture delivered by the judge, by every judge, as often as he marks with his approbation this flagitious rule.

A man who, uninvested with any coercive power, should, in the character of a moral instructor—of a schoolmaster, a lecturer, or a divine—stand up and say to his auditors, "If a man with whom you have a difference happens to have in his hands a letter or memorandum of yours that you apprehend would make against you, deny it, —do not own it, —put him to the proof of its being yours, and if he is not able, triumph over him as if he were in the wrong,"—if it were possible that a man without power for his protection should take upon him to preach such doctrines, he would be abhorred, and not without reason, as a corrupter of the public morals What, then, shall be said of those by whom such baseness is not simply recommended, but efficaciously rewarded? Men sow vice, and then complain of its abundance! The same hands which are every day occupied in thus planting

* Two young lawyers, members of a volunteer corps, have incurred penalties: their names stand upon the muster-roll. Convened before a magistrate, the delinquency is proved upon them: they are acquitted notwithstanding. Why? Because their signatures cannot at that moment of time be proved All this while, they are upon the spot, capable of being interrogated, had law permitted. but it is the boast of English lawyers, and of men duped and corrupted by English lawyers, to turn aside from truth thus discovered, with a degree of abhorrence such as no falsehood could provoke So universal is the corruption, that this subterfuge, this negative act of meanness, was thought worth committing by these young lawyers to save 17*s.* 6*d.*, but it is spoken of by the newspaper reporters without the least symptom of disapprobation. Here we have the corrupted: but where are we to look for the corrupters? Among the judges, whoever they were, to whom the demon of chicane is indebted for the establishment of this rule.

[a] Morning Post and Morning Chronicle of Nov. 18, 1803.

and propagating mendacity, are as constantly lifted up against it, and employed in punishing it.

The above is not the only mode in which this superstition is a source of corruption to public morals. It is from the wanton sacrifice thus made of the purest evidence, that the field of justice is regularly inundated by the foulest and most polluted. To save one malefactor from the vexation of returning answers to unpleasant questions, the answer of a no less guilty malefactor is purchased by impunity, crowned with rich remuneration. Among partakers of the same crime, a gang of burglars, murderers, or incendiaries, *ille crucem pretium sceleris tulit, hic diadema:* and the order of things which, among the corruptions of ancient Rome, is painted by the poet as the summit of injustice, is, in the eternally vaunted law of modern Britain, become the ordinary course of what goes by the name of justice.

Thus it is that, to the punishment of one confederate in a knot of malefactors, the nourishment and encouragement of another is become a condition almost inseparable.

And to this, together with certain other superstitions alike adverse to the interests of morality and justice — to this and those together, it is to be ascribed, that, — whereas in other countries the arts of depredation are carried on only by fits and starts, upon the spur of an occasional temptation, by here and there an unconnected and unsupported individual, — in England they are carried on professionally and systematically, by associations of malefactors, bound together in the ties of partnership, in bands now and then thinned, never extirpated, under the eye and with the protection and encouragement of the three constituent branches of government, the judicial, the executive, and the legislative.

Out of the same root grows that system of remuneration, which renders it an act of improvidence on the part of the subordinate ministers of justice, to remove a scholar in the school of depredation before he has risen to the head of it — to fasten upon a pilferer, till he has ripened into a burglar — to take at £10 a prisoner, who by a little forbearance might have yielded £40; just as, among renters of fish-ponds, it would be bad husbandry to take a pike of five pound weight out of a pond, in which he might have thriven on to ten pound.

§ 2. *Causes of the exclusion of self-criminative evidence:* — 1. *Interests of criminals and other evil-doers.* 2. *Interests of lawyers.*

In seeing the mischiefs entailed by this rule upon the community at large, we see its uses to criminals, delinquents, *malâ fide* defendants, extortious and oppressive plaintiffs; in a word, to evil-doers of all sorts and sizes. Moreover, in seeing the persons to whom it is of use, the persons whose sinister interests are served by it, we see the hands and the hearts that stand pledged for its support.

In speaking of the taxes on justice,* it was mentioned as one of the unfortunate characteristics of this species of tax, that, though of all taxes, actual or possible, the most burthensome, and in every respect the worst, it was not in the nature of it to find opponents: because the body of litigants (if a body it could be called,) being ever fluctuating, and essentially split, was, to the purpose of mutual support, and opposition to extrinsic pressure, no better than a rope of sand: and, what is more, were the body itself ever so well knit together, it would still be but a body without a head. The tax, therefore, uniting in itself these two unhappily conjoined properties, — viz. of producing the greatest possible quantity of misery to the people, and the least possible quantity of opposition and uneasiness to the man in office, the result was but too obvious. Relief was hopeless, unless the moment (perhaps an ideal one) should ever arrive, that should produce a financier to whom the most important interests of the people should be dearer than his own momentary ease.†

In the present case, the tables are unhappily reversed. Throughout the whole substance of the community extends itself, like the tænia in the natural body, a cluster of internal enemies, possessing, amidst whatever other diversity of interests, the common sinister interest urging them to behold their security in whatever arrangement contributes to weaken the efficiency of the law. The rule in question, being (as we have seen) a capital article in the list of debilitatives, will naturally be the object of a proportionate degree of attachment to the body thus composed. To the body of litigants, besides being divided against itself, there is no head. The body of delinquents (including those who, for having the law on their side, are but so much the more mischievous) find a regular and irresistible head in the man of law — in him who, during the sleep or fascination of the legislator, possesses and exercises all the authority of the legislator, though without the responsibility or the name.

With all its blemishes, the aggregate body of the laws having more in it of that matter which is beneficial to all men, than of that which is prejudicial to this or that one, — it is more (it may be said) for the advantage of the whole community taken together, that the force of the aggregate body of the laws

* *Protest against Law Taxes*, Vol. II. p. 573. — [These Taxes, in as far as regards the stamps on law papers, were abolished by 5 Geo. IV. c. 41. See Vol. II. p. 582, Note. — *Ed.*]

† That time is happily come. — *Editor.* [*Vide supra*, p. 377.]

should be at its maximum, than that it should stop short at any inferior degree True, if the interest of all were understood by all to be exactly as it is, and felt in proportion as it is understood But (such is man's nature,) a slight interest coming home to his own bosom, and presenting itself in distinct colours, will act on him with greater force than a much stronger one, common to himself with others, and viewed at an indeterminate distance Whosoever, on any special account whatsoever, regards himself as obnoxious to the adverse pressure of the laws, will behold in the weakness of the laws, and in every institution that presents itself as contributing to the weakness of the laws, the means of safety. The advantage depending on the protection afforded to him by the laws against a crowd of possible injuries not presenting themselves individually to his view, will, in comparison with this conspicuous and distinct advantage, act upon his mind with very inconsiderable force The smuggler, the official peculator, and the political malcontent, would each of them find, in a regulation which should cure any of the weaknesses of the law, an increased security against whatever mischiefs he stands exposed to, at the hands of the common herd of malefactors but, the more distinct and nearer the danger with which he might conceive himself threatened by the influence of the same remedy, the more apt would the new security be to present itself as far from being worth to him the price which he would have to pay for it Profit, the difference between the old and the new security against depredation at large loss, to the smuggler, his livelihood — to the peculator, his ill-gotten gains — to the political malcontent, the object of his plots

The anxiety to preserve the body of the laws from being cleared of these debilitative poisons, will, according to circumstances, display itself with particular force, sometimes in the inferior, sometimes in the superior classes When in a criminal cause, the station of defendant was occupied by John Wilkes, the vilest quibbles that ever issued from the lips of depredation under the mask of justice were revered as oracles.

In a mixed constitution like the British, by some odd turn in the wheel of fortune it will now and then happen, that, among a multitude of secret or unnoticed instances of official delinquency, some one shall be unfortunate enough to become the subject of prosecution. On such an occasion, that the defendant (how clear soever his guilt) should find one at least of two parties zealous in his support, is a matter of course. Here, then, the debilitative poisons above spoken of become the object of eulogy and attachment in the highest circles. If those that have been compounded for past exigencies present themselves as sufficient for the present turn, they are made the most of, and no others looked for: if, in the *pharmacopœia politica*, no remedies of this class, as yet upon the list, promise to come up to the purpose, others must be made up. *inveniam aut faciam*, such is the alternative

A revolution in administration, it may be said, offers a chance for justice since, by motives congenial to those by which one party stands engaged to undermine, an opposite party (and that, for the moment at least, the stronger) stands engaged to defend, the foundations of justice But, unfortunately, the incentives which animate the assailants are apt to be neither so universal, nor so strong in their operation, as those which animate the defendants for, at the bottom of this momentary interest, thus salutary to justice, there exists a common interest (and that a paramount one,) by which transgressors of all parties are linked together in an interest opposite to the interests of justice It is to the advantage of all men who partake, or hope to partake, in the sweets of administrative power, that the laws by which they, and men in their sphere, have made a show of binding themselves, should, in everything but show, be as near as possible to a dead letter.

If, under such a constitution, it should at any time happen, that of the two contending parties each should contain a delinquent whose delinquency had been flagrant enough to attract public notice, it may be imagined how generally dear to all public men every institution would be, that was seen to act as a sedative upon the force of justice, — how strong and general an aversion would await any remedy that *promised* (shall we say, or *threatened*?) to render to the arm of justice its due tone

Under such a constitution, a natural, not to say a necessary, consequence, is, that the course of procedure, so long as it has jurisprudential law for its guide, should swarm with rules, which, without contributing in any degree to the protection of innocence, should, by the protection they hold out, afford in a variety of ways an efficient encouragement to delinquency and injustice. Of the rules thus made, made especially on that level, to be assured of their being directed to ends other than the end of justice, a man needs no more than to observe the place *in* which, in conjunction with the occasion *on* which, they are made The occasions on which they are made are uniformly of the number of those in which, men's individual interests being at stake, and their affections heated, they find themselves, while in the state of parties, called upon to make laws for the guidance of their own conduct in the character of judges.

The same minds, whose partialities, excited by the incidents of the moment, render them no less unfit than the grossest corruption

would do, to act with the authority of a legislator in the station of a judge, — these same minds, when free from the disturbance produced by the sinister interest of the moment, may, without any departure from the rules of moral probability, be expected to join with fidelity and concord in the pursuit of that general interest by which the line of public duty is prescribed.

Witness the Grenville Act: so fair and efficient a step in the improvement of that political constitution, the praises of whose excellence are so generally excessive, and beyond, to the most exorbitant extent, its merits; but of which this may with justice be said, and of much importance it is to be deemed that it can so with justice be said; — the British constitution forms a basis for building those improvements which would terminate in a perfect government — a basis the firmest by far that ever was presented by any government that had existence upon earth.

In seeing the uses of the exclusionary rule to malefactors and evil-doers of all descriptions, we have seen its uses to the man of law.

Whatsoever is seen to diminish the security against misdecision and failure of justice, and thence whatsoever is really productive of that effect, is subservient to the interest of the man of law. In the minds of transgressors and *malâ fide* suitors, it helps to fortify the opinion, that no cause whatsoever, no cause, however bad, ought to be given up as desperate. Subsequently to transgression, in the minds of those who have already transgressed, it operates as a premium for dishonest defence or dishonest demand, as the case may be: antecedently to transgression, on all minds exposed to temptation (that is, in a word, on all minds) it operates as a premium for transgression, for injustice, in every shape.

The vexation, expense, and delay, so frequently attached to the production of the inferior evidence resorted to on the exclusion of the most satisfactory species of evidence, have just been brought to view. On this occasion as on all others, lawyer's profit being both cause and effect of that triple-headed mischief, the use which the exclusionary rule is of to the man of law is self-evident.

By the vexation, expense, and delay, it adds to the quantity of lawyer's profit in each cause separately taken: by the chance it affords of misdecision or failure of justice for want of the excluded evidence, it adds to the encouragement given for dishonest defences and demands, and thence to the number of the individual sources from which that pernicious profit may come to be derived.

Meantime, although to lawyercraft, and the benefit derived from this rule by Judge and Co., the principal share in the establishment of it may be to be ascribed, — what cannot but be admitted, is, that, to the production of this effect, circumstances of a different and more laudable complexion would probably be found to have been not altogether without their influence, in the character of co-operating causes: — 1. Tyranny of the times; anxiety, and (on the ground of public utility) real need, of saving, at any price, the precious few who were at the same time able and willing to stand in the gap. 2. Multitude and extent of bad laws, the result either of improbity or folly. 3. Savageness of the people in general, and of the fraternity of lawyers in particular; propensity on their part to fasten upon an innocent man, and (especially if, on any particular account, whether political or personal, obnoxious) to treat him as, — under the lash of cross-examination, by hireling advocates, under the eye of careless or approving and abetting judges, — men are but too frequently treated in the character of extraneous witnesses to fasten upon him, and, by intimidation and misrepresentation, to wring out of venial infirmity the appearance of criminality, sometimes even the appearance and colour of delinquency out of the purest innocence.

§ 3. *Pretences for the exclusion.*

1. At the head of everything which, with or without the name of a reason, has been advanced, or is capable of being advanced, in the view of securing the attachment of the people to the exclusionary rule, let us place the old sophism, the well-worn artifice, sometimes called *petitio principii*, and which consists in the assumption of the propriety of the rule, as a proposition too plainly true to admit of dispute.

In the minds of some men (not to say the bulk of men,) if you set about proving the truth of a proposition, you rather weaken than strengthen their persuasion of it. Assume the truth of it, and build upon it as if indisputable, you do more towards riveting them to it than you could do by direct assertion, supported by any the clearest and the strongest proofs. By assuming it as true, you hold up to their eyes the view of that universal assent, or assent equivalent to universal (dissenters being left out of the account,) which, from your assumption, they take for granted has been given to it: you represent all men, or (what comes to the same thing) all men whose opinions are worth regarding, as joining in the opinion: and by this means, besides the argument you present to the intellectual part of their frame, you present to its neighbour the volitional part another sort of argument, constituted by the fear of incurring the indignation or contempt of all reasonable men, by presuming to disbelieve or doubt what all such reasonable men are assured of.

For exemplifications of the use of this instrument of persuasion — of the application of it (I mean) to the present purpose — it is altogether useless to make reference to this or that particular book or books you hear it in all discourses; you see it, as often as occasion serves, in all books and in all newspapers

2. The old woman's reason The essence of this reason is contained in the word *hard* 'tis hard upon a man to be obliged to criminate himself Hard it is upon a man, it must be confessed, to be obliged to do anything that he does not like That he should not much like to do what is meant by his criminating himself, is natural enough, for what it leads to, is, his being punished What is no ess hard upon him, is, that he should be punished. but did it ever yet occur to a man to propose a general abolition of all punishment, with this hardship for a reason for it? Whatever hardship there is in a man's being punished, that, and no more, is there in his thus being made to criminate himself with this difference, that when he is punished, — punished he is by the very supposition, whereas, when he is thus made to criminate himself, although punishment may ensue, and probably enough will ensue, yet it may also happen that it does not

What, then, is the hardship of a man's being thus made to criminate himself? The same as that of his being punished the same in kind, but inferior in degree inferior, in as far as in the chance of an evil there is less hardship than in the certainty of it Suppose, in both cases, conviction to be the result does it matter to a man, would he give a pin to choose, whether it is out of his own mouth that the evidence is to come, or out of another's?

To this, to which, in compliance with inveterate and vulgar prejudice, I have given the name of the old woman's reason, I might, with much more propriety, give the name of the lawyer's reason When a child has hurt itself, and a chirurgical operation is deemed necessary for its cure, it may be that here and there an old woman may be found weak enough to exclaim, Oh the poor dear child! how it will hurt the poor dear child! how *hard* it will be upon the poor dear child! and so on; no, it sha'n't be doctored It would be too much to say that such old women do not exist, but sure enough they would not, in any very considerable number, be very easy to be found.

But the lawyer, in disposing of the fate of those who, if they were in any degree dear to him, would not be dealt with by him as they are, has never — let us not say any *other*, — at any rate employs scarcely ever any *better* style of reasoning. The reasons most plenty with him, the only reasons that are not rare, are *technical* reasons. The reasons that with him are choice and rare, the reasons brought out only now and then, are these old women's reasons. reasons consisting in the indicating, out of a multitude of reasons standing on each side, some one only on one side

Nor yet is all this plea of tenderness, — this double-distilled and treble-refined sentimentality, anything better than a pretence. From his own mouth you will not receive the evidence of the culprit against him, but in his own hand, or from the mouth of another, you receive it without scruple so that at bottom, all this sentimentality resolves itself into neither more nor less than a predilection — a confirmed and most extensive predilection, for bad evidence for evidence, the badness of which you yourselves proclaim, and ground arguments and exclusions upon in a thousand cases

What every man knows, and what even yourselves, in spite of all your science, cannot be ignorant of, is, — that, of all men, the man himself is the last man who would willingly speak falsely to his own prejudice, and that, therefore, against every man, his own is the safest, the most satisfactory, of all evidence and it is of this best and most trustworthy of all possible evidence, that your pretended tenderness scruples not to deprive the interests of truth and justice!

You know of such or such a paper, — tell us where it may be found A request thus simple, your tenderness shudders at the thoughts of putting to a man his answer might lead to the execution of that justice, which you are looking out for pretences to defeat This request, you abhor the thoughts of putting to him but what you scruple not to do (and why should you scruple to do it?) is, to dispatch your emissaries in the dead of night to his house — to that house which you call his castle, to break it open, and seize the the documents by force

Not that, in any such act of violence, considered as a necessary means to a necessary end, there is anything to blame it is on the score of inconsistency, and that alone, that it is here worth mentioning Two means to the same end the one violent — the other free from violence The quiet one is too violent for you you embrace the violent one, and not only in preference to the other, but to the exclusion of it and this is your delicacy, your tenderness

It is not, however, true, that, even as towards criminals, if taken in the *aggregate*, the plea of humanity can be pleaded in behalf of this rule, consistently with truth. Humanity? yes, — viz the word: for as to the thing itself, if effects be considered (howsoever it may be with regard to motives and intentions,) in any practice grounded on any such rule, it is no more to be found than the thing called *justice*.

Of the man who, with the word humanity in his mouth, calls for this or that thing to be done, the expectation (if there be any determinate expectation) is this, or nothing, — viz. that, supposing the course thus recommended by him pursued, the consequence will be, that, upon the *aggregate* number of offenders who for the offence in question will have suffered within a given length of time, the aggregate quantity of suffering undergone will be less than it would have been had the course pursued been the opposite.

But, of any such rule as that here in question, the necessary effect (in so far as it has any) is, not to lessen that aggregate quantity of suffering, but to increase it. By whatsoever cause the ratio of the number of known, but yet unpunished, to the whole number of known, offenders, is increased, — in that same ratio, the known and apparent probability of punishment (in the eyes of a person having it in contemplation to engage in the commission of an offence of that sort) is diminished. But, on the mind of any given person, to produce, by means of punishment, an impression of any given degree of strength and efficiency, in proportion as the probability is diminished, the magnitude must be increased. In playing at cards or dice, in buying and selling a life-annuity, or a post-obit, there is not a proposition more incontestable.

Be the offence, be the punishment, what it may, — in proportion as you exclude this or that quibble, this or that device of technical procedure, by which a certain proportion of the whole number of delinquents are saved, and the probability of punishment in case of delinquency thereby diminished, you would put it in your power to make a correspondent and proportionable reduction in the magnitude of your punishment.

What is the same thing in other words, — it is because your law is so full of quibbles, exclusionary rules, and other points of practice, by which impunity is given, and seen to be given, to known delinquents, that (the probability of punishment being subjected to constant diminution) delinquency receives proportionable increase: and, for combating it, the only other resource remaining, and the only resource that a quibble-loving lawyer will endure to hear of, is an increase of the magnitude of the punishment. To make sure, and do at once all that can be done, the punishment which on every such occasion he runs to in preference, is the punishment of *death:* death, simple death, as being, though not the highest and most impressive which human nature is capable of being subjected to (since afflictive death — death accompanied by torture, might, to an indefinite degree, be made higher,) the highest, however, which, in this age and country, men in general would endure the mention of.

Under the influence of such humanity, this, then, is the sort of *repetend* that takes place. By the generation and application of penal law quibbles, and of impunity-giving rules, a demand (real or supposed) is produced for addition to the magnitude of the punishment: an addition, and in each case (sooner or later) *such* an addition, as consists in substituting to the last antecedently-established punishment (be it what it may,) the punishment of death. But, by the increase given to the application of the punishment of death, increase is at the same time given to the propensity and the pretence for the application of other quibbles, and other impunity-giving rules.

Under this system, that which consistency would require (not that, with such humanity, any sort or degree of consistency is compatible,) is, that for offences of all sorts there should never be any other than one sort of punishment, and that one sort death: for, so long as quibbles are in honour, and applied to delinquency in every shape, — delinquency, till the punishment be raised to this its maximum, will go on increasing. Thereupon comes the argument — "Against the act in question there exists a law, by which it is converted into an offence: to this offence a punishment stands annexed, and, this punishment notwithstanding, it was but the other day that an offence of this sort was committed. This punishment is not so great as the punishment of death: substitute to it the punishment of death: and thereupon, if the repetition of the offence be not less frequent than of late years it has been, at any rate the utmost will have been done that can be done towards rendering it so." This is exactly what, sooner or later, may be said of every offence that ever has been, or can ever be capable of being, committed: and as often as the punishment of death has been proposed to be substituted to the previously-established punishment, more than this never has been said — more than this has never been regarded as necessary to be said — more than this, in substance, has never been capable of being said.

Thus it is, that to one and the same individual, to one and the same weak-minded and narrow-minded, the same half-bigot half hypocrite lawyer, it belongs to be fond of quibbles, and at the same time to be fond of death: in regard to death, understand, of course, to be fond, not of suffering it, but of causing it to be suffered: to be suffered, or, if not suffered, threatened; and that under such management, as, by causing it not to be expected, causes the threat not to be productive of the effect pretended to be aimed at.

Such is the genesis of lawyercraft: death begets quibbles,* and quibbles beget death:

* Although the punishment of death has lately been abolished in so many cases (see Vol. VI.

inflicted or not inflicted, when death is threatened, the quiver of lawyercraft is exhausted perfection, all that is practicable in perfection, is supposed to have been attained

Under such treatment, the disease either receives positive increase, or at least does not receive anything like that relief which, under a more rational treatment, might have been afforded In either case, the mode of treatment fails, but the failure is of course ascribed, not to the unskilfulness of the physician, but to the perversity of human nature

What cannot but be admitted is, that, by the effect of this impunity-giving rule, undue suffering has probably in some instances been prevented Prevented? but to what extent? To the extent of that part of the field of penal law which is occupied by bad laws by laws which prohibit that which ought not to have been prohibited, or command that which ought not to have been commanded.

But, in the character of a remedy against the mischief of which such bad laws are productive, observe the nature and effect of this rule. Applying with equal force and efficiency to all penal laws without distinction— to the worst as well as to the best, it at the same time diminishes the efficiency of such as are good while it is only by accident, and to an amount altogether precarious and unascertainable, that it does away the mischief with which such as are bad are pregnant

Bring up a good field-piece, or, if that be not sufficient, a four-and-twenty pounder, load it with grape-shot, station it at either end of any one of the bridges, and at any convenient hour about the middle of the day, but without letting it be known what hour, fire it off as many times as may be deemed necessary and sufficient Doing this, you will do, in furtherance of justice, exactly what, in manifestation of humanity and mercy, is done by nullification *in penali*, by exclusion of what is called *self-accusing* evidence, and by whatever other rules and principles there may be, which present the like title to the appellation of *impunity-giving* institutions

Not that, if that sort of humanity were in question, which consists in the preservation of the innocent, the service done by these institutions to humanity would be anything like so great as the service which, by the field-piece or the four-and-twenty pounder, if well served (as above,) would be done to penal justice By the piece of ordnance, the number of killed and wounded must be small indeed, if among them were not found, in some proportion or other, individuals whom, in some instance or other, the penal system had had cause to place upon the list of its transgressors. By the principle of nullification, or the rule which excludes self-criminative evidence, not only are the guilty served, but it is they alone that are served: they alone, and without any mixture of the innocent For when, though unfortunate enough to have become the object of suspicion, a man is really innocent, does he fly to any of these subterfuges? Not he, indeed, if character be of any value in his eyes. for, by recourse to any of them, what is no secret to anybody is, that so sure as punishment is escaped, character is sacrificed

3 The fox hunter's reason This consists in introducing upon the carpet of legal procedure the idea of *fairness*, in the sense in which the word is used by sportsmen The fox is to have a fair chance for his life he must have (so close is the analogy) what is called *law*, — leave to run a certain length of way for the express purpose of giving him a chance for escape While under pursuit, he must not be shot it would be as *unfair* as convicting him of burglary on a hen-roost, in five minutes' time, in a court of conscience.

In the sporting code, these laws are rational, being obviously conducive to the professed end Amusement is that end a certain quantity of delay is essential to it dispatch, a degree of dispatch reducing the quantity of delay below the allowed minimum, would be fatal to it

In the case of the fox, there is frequently an additional reason for fair play By foul play, the source of the amusement might be exhausted the breed of that useful animal might be destroyed, or reduced too low. the outlawry, so long ago fatal to wolves, might extend itself to foxes

In the mouth of the lawyer, this reason, were the nature of it seen to be what it is, would be consistent and in character Every villain let loose one term, that he may bring custom the next, is a sort of a bag-fox, nursed by the common hunt at Westminster. The policy so dear to sportsmen, so dear to ratcatchers, cannot be supposed entirely unknown to lawyers To different persons, both a fox and a criminal have their use the use of a fox is to be hunted, the use of a criminal is to be tried

But inasmuch as, in the mouth of the lawyer, it would be telling tales out of school, — from such lips this reason must not be let out without disguise If let out at all, it must be let drop in the form of a loose hint, so rough and obscure, that some country gentleman or other, who has a sympathy for foxes, may catch it up, and, taking it for his own, fight it up with that zeal with which genius naturally bestirs itself in support of its own inventions.

4. Confounding interrogation with torture; with the application of physical suffering, till some act is done; in the present instance,

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p. 382, Note 13,) the "quibbles" remain undiminished.—*Ed.*

till testimony is given to a particular effect required.

On this occasion it is necessary to observe, that the act of putting a question to a person whose station is that of defendant in a cause, is no more an act of torture than the putting the same question to him would be, if, instead of being a defendant, he were an extraneous witness. Whatever he chooses to say, he is at full liberty to say; only under this condition, properly but not essentially subjoined, viz. (as in the case of an extraneous witness) that, if anything he says should be mendacious, he is liable to be punished for it, as an extraneous witness would be punished. This condition, essential in the case of an extraneous witness, is not equally so in the case of a party in the cause; since a party, by being such, stands exposed to a sort of punishment intrinsic to the cause,—viz. the loss of the cause: as where a defendant, in consideration of false responsion, evasive responsion, or obstinate silence, is concluded to be guilty: a punishment, of which an extraneous witness, not having any interest at stake in the cause, is not, on that occasion at least, susceptible.

The curious part of the story is, that the same sort of persons by whom the identity of a question and a thumbscrew is thus dreamt of, or affected to be dreamt of, are commonly the same persons who, when torture is actually applied, and applied to the worst of purposes, that of forcing juries to commit a useless perjury, are delighted with the operation, and proclaim aloud that everything is better than well.

5. Reference to unpopular institutions.

Whatever Titus did was wrong: but this is among the things that Titus did; therefore this is wrong: such is the logic from which this sophism is deduced.

In the apartment in which the court called the Court of Star-chamber sat, the roof had stars in it for ornaments, or else certain deeds to which Jews were parties, and by them called shetars or shtars, used to be kept there; or, possibly, there being no natural incompatibility, both these facts were true. Whether it was owing to the gilt stars, or to the Jew parchments, the judges of this court conducted themselves very badly: therefore judges should not sit in a room that has had stars in the roof, or in a room in which Jew parchments have been kept. Had the conclusion been in this strain, the logic would not have been very convincing, but neither would the mischief have been very great.

In the High Commission Court, the judges sat and tried causes in virtue of a commission: and they too conducted themselves very badly: therefore judges ought not to be appointed by a commision. The logic, though not less rational than in the preceding case, begins to be rather mischievous. Not to be appointed by a commission? How, then, should they have been appointed? But perhaps the commission was too *high* a one. When a judge conducts himself as he ought to do, the parchment of the commission he acts under is not above three feet high, when unrolled and set up on end: but here it was four feet. The logic wants nothing of being upon a level with what one usually sees in law-books; but still, something is yet wanting to enable it to impress conviction on a fastidious mind.

The Inquisition (meaning the true inquisition, of the Spanish sort,) that used to work with such success in the extirpation or conversion of heretics, was a court in which it was the way of the judge to inquire into the business that came before him: to put questions to such persons as, in his conception, were likely to be more or less acquainted with the matter: and this, whether extraneous witnesses or parties. Now this it is, that was and is a most wicked and popish practice. Judges ought not to put questions: be the business what it may that comes before them, it ought to be the care of judges never so much as to attempt to see to the bottom of it. Here, then, we see the true source of all the odium; viz. not merely of that which has attached itself to this abominable court, but of that which attached itself to those other abominable courts. It was not by sitting in a room with stars or parchments in it; it was not by acting under a commission too high in itself, or that lay on too high a shelf; it was not by either of these causes that the two English courts, held in such just abhorrence by all true Englishmen, were rendered so bad as they were,—but by their abominable practice of asking questions, by the abominable attempt to penetrate to the bottom of a cause.

Non-Lawyer. But we in England,—have not we had formerly without complaint, and might we not have still, our inquests of office? Have we not still our grand inquests, and our coroner's inquests, and our courts of inquiry, and our committees of inquiry, and our commissions of inquiry, and our commissioners of inquiry? and are not they, some of them at least, very good things?

Lawyer. O yes: but then, if they inquire, they do it in the way of inquest or inquiry only, not in any inquisitorial way: that is (observe of course,) not to put troublesome, vexatious questions, such as would make a man accuse himself: in short, whatever the business be, not to get to the bottom of it. This, at least, is among those things which they ought not to do: for no sooner do they make any such attempt, than they become inquisitors; popish, Spanish inquisitors, or worse: and those who, had the truth

come out against them by other means, would have been convicts, become innocent and persecuted men; victims, or intended victims, of persecution, tyranny, and so forth

Of the Court of Star-chamber and the High Commission Court taken together (for to the present purpose they are not worth distinguishing,) the characteristic feature is, that, by taking upon them to execute the will of the king alone, as made known by proclamations, or not as yet known so much as by proclamations, they went to supersede the use of parliaments, substituting an absolute monarchy to a limited one In the case of the High Commission Court, the mischief was aggravated by the use made of this arbitrary power in forcing men's consciences on the subject of religion In the common-law courts, these enormities could not be committed, because (except in a few extraordinary cases) convictions having never, in the practice of these courts, been made to take place without the intervention of a jury, and the bulk of the people being understood to be adverse to these innovations, the attempt to get the official judges to carry prosecutions of the description in question into effect, presented itself as hopeless.

In a state of things like this, what could be more natural than that, by a people infants as yet in reason, giants in passion, every distinguishable feature of a system of procedure directed to such ends should be condemned in the lump, should be involved in one undistinguishing mass of odium and abhorrence, more especially any particular instrument or feature, from which the system was seen to operate with a particular degree of efficiency towards such abominable ends? If, then, in the ordinary courts of law, the practice with respect to the admission of this source of information was wavering, or the opinion of the profession hesitating, nothing could be more natural than that the observation of the enormous mass of mischief and oppression to which it was continually made subservient, should turn the scale Of this instrument in the hand of justice, or of persons in the place of justice, what was the characteristic property? Its sharpness But at that particular conjuncture, employed as it was employed, its usefulness, great and pure as it would have been in other times, was converted entirely into mischief. its virtue was spent in the giving energy and efficiency to a system of operations hostile to the security and happiness of the body of the people In those days, the supreme power of the state was *de facto* in the hands of the king alone for as to that of parliament, it had never been anything better than a contingency, and in those days it was a contingency which it was intended, by those on whom it seemed to depend, should never happen the improbability of its happening, must in those days, in the view of everybody, have been extreme. The king's power, then, was *de facto* absolute: being employed and directed against property, liberty, conscience, every blessing on which human nature sets a value, — every chance of safety depended upon the enfeeblement of it, every instrument on which the strength of that government in those days depended— every instrument which in happier times would to the people be a bond of safety, was an instrument of mischief, an object of terror and odium, which, could it have confined itself to the particular application then made of the instrument, and not have extended to the instrument itself, would have been no other than just, and reasonable, and well grounded

As to the ecclesiastical tribunal called the Inquisition, a circumstance that seems not generally understood, is, that the procedure was little or nothing more than the ordinary procedure employed in the same countries in the higher classes of criminal cases * Bad as the practice was, what there was peculiar to it belonged, therefore, not to the adjective system, but only to the substantive laws (the laws against heresy) to the execution of which it was applied Besides the close imprisonment and the practice of torture,

* As to the English Star-chamber and High Commission, considered as an instrument for the discovery of truth, the mode of inquiry (had the substantive laws for the execution of which it was employed been legitimate) was no other than that which in many cases (as hath already been observed) is essentially necessary to that purpose, I speak of the epistolary mode applied to defendants in the equity courts and even where unnecessary and inferior to the ordinary *viva voce* mode, would in all cases be a very advantageous substitute to that of which so great a use is still made in all the Westminster-Hall courts, viz the *affidavit* mode

In the Star-chamber, the examination, instead of being performed in the epistolary mode, was sometimes performed *viva voce*, as at present in the preparatory examinations before justices of the peace. but as this unexpensive and more searching mode, how well soever it answered the personal purpose of the king, did not answer the purposes of the lawyers whom he found it convenient to employ as instruments, it was in comparison but little in use. (Powel's Attorney's Practice) To the king's purpose, the procedure the best adapted would have been the natural and expeditious and searching procedure of the courts of conscience. to the purposes of his long-robed instruments, this unexpensive, and therefore to them unprofitable, mode, would have been altogether inapplicable; another mode there was, that suited their purpose exactly, and that was the dilatory, scribilatory, and profitably-expensive mode of the courts of equity. By the adoption of this amendment, the two objects were consolidated: the royal falconer, after a prolongation of the sport, got his prey; the hawks were rewarded with their portion of the entrails.

which was common to both, there was indeed, in the forms employed by the ecclesiastical tribunal, a sort of theatrical exhibition, a sort of preaching to the imagination through the medium of the eye, beyond anything that in that way has ever been applied to non-ecclesiastical offences. But this, instead of reproach and odium, would, if viewed in the character of a means to an end (abstraction made of the end,) be considered as an exertion of ingenuity worthy of praise.

Are not Romish inquisitors men? — do not they eat and drink? Is that a reason why Protestants should do neither? In all courts, well or ill organized, in which justice, or what passes for it, is well or ill administered, must not there be a multitude of features in common? The business is, to distinguish the good ones from the bad; and where, upon the whole, the result appears vicious, to observe in what part of the legal system the defect lies, the substantive, or the adjective: whether the means employed are in themselves bad, or bad only in respect of the badness of the end.

If the ends pursued are mischievous, the means employed in the pursuit of them cannot, in so far as they are fit for the purpose, but be likewise mischievous. But upon which of the two objects, in this case, is the mischief to be charged? Not upon the means, surely, but upon the ends. Of the means, nothing more can rationally be required, than that they shall be such as shall not be productive of any mischief, other than that which results from their subserviency to the ends. If you are determined upon war, take care that it be not without good cause: but think not, — no man that ever acted in the character of a statesman ever yet thought, was ever weak enough to imagine, so much as in a dream, — that the strength of his army could ever take anything from the goodness of his cause.

The perfection of a sword is in its sharpness: the sharper it is, if employed against friends, the more mischief it would do. would this be a reason for discarding the use of sharp swords, and using none but what had been blunted? No! the dictate of reason is, — let your sword be sharp, the sharper the better, but take care not to wound a friend with it.

In the hands of an assassin, as in the hands of a constable, an oaken staff will give a harder blow than a deal one; but on that account would it be reasonable to say that, bulk for bulk, and shape for shape, an oaken staff was a worse weapon than a deal one?

What cannot be denied, is, that if it were possible to keep all oaken staves out of the hands of malefactors of every description, putting deal ones in their room, and giving to constables the exclusive use of oaken staves, the effect would be a desirable one. Pursuing the allusion, — to give the benefit of the admission of self-convicting evidence to him whose aim it is to give execution to bad laws, would be, it may be said, to take the deal staff out of the hand of the malefactor, and add to his power of doing mischief by the substitution of the oaken one. But there would be the greatest possible incongruity in saying, such and such laws shall not have the benefit of self-convicting evidence, such and such others shall. The laws to which this benefit is denied, are they good laws? then why put it out of your power to execute them? Are they bad laws? then why are they suffered to subsist?

Seeing the two descriptions of persons whose interest is served by the exclusion put upon this species of evidence, viz evil-doers of all sorts, and, under the technical system, lawyers of all sorts, in the character of their natural accomplices, partners, and abettors, — we see the two descriptions of persons in whom the exclusionary rule beholds its natural and indefatigable adherents, advocates, and supporters. But in the fraternity of lawyers, we behold the only persons who are in the habit of speaking — the only persons who, if their words are to be taken for it, ever are or can be sufficiently well qualified to speak, in the character of censors, in the way of approbation or disapprobation of any existing rule of law: the persons of whom, speaking of the matter of fact, it must be confessed (how much reason soever there is for wishing that it were otherwise,) that it is of their voices that on this subject the public voice is composed.

Here then, considering the propriety of the rule as a question to be tried at the bar of the public, here is a question to be tried, and to be tried and decided upon scientific evidence: and the persons of whose testimony this body of evidence is composed, are all of them persons who, considered in the character of witnesses, speak under the bias of a sinister interest.

These self-hired witnesses, speaking thus by thousands, all of them in the same strain — and amongst them so many, each of whom is in possession (and in the continual exercise) of the faculty of giving that sort of official judicial testimony which has been rendered absolutely conclusive, no testimony on the other side being suffered to be delivered, — can it be matter of wonder, if the judgment of the unbiassed part of the public should by such a torrent be overborne and misled?

Again, — can it be matter of wonder if a non-lawyer, making, in the character of an occasional speculator, an accidental excursion upon this ground — upon ground lying thus within the acknowledged demesne of lawyers — should join without reflection in the

cry, recognising (as is so natural) in the unanimous suffrage of such a multitude of counsellors, the voice of truth, as well as the means of safety? And thus it is that in this, as well as so many other parts of the field of jurisprudence, the public voice is composed the principal parts by a set of hired performers; the chorus by a band of dupes in the character of *amateurs*.

§ 4. *History of the rule excluding self-criminative evidence*

The authorities on this subject present, as usual, darkness visible: but, where the subject presents nothing better, even to see that everything is dark, is more satisfactory than not to see.

The earliest *dicta* which the industry of Viner could discover, are of no earlier a date than the thirty-second of Elizabeth. Here we behold, and for the first time, the maxim which, with its *variantes*, has since become so famous: *Nemo tenetur seipsum prodere*, in later times, *accusare*.

It presents itself in two almost contiguous cases: the first, according to the date given to it, is in the thirty-second year of Elizabeth, in the Common Pleas, the report by Leonard: the other, in the thirty-second and thirty-third year of the same reign, in Michaelmas term, in the King's Bench, two reporters here, Cooke, afterwards judge, and Serjeant Moore.

In both cases, it was an impertinence: in both cases, the assertion conveyed by it was a notorious falsity. In the only case in which a decision appears to have been given (for in the earliest, the Common Pleas' case, time was taken for decision, and none reported,) the decision could not have turned upon the rule.

In both cases, the shape in which the cause came before the court was that of a motion for a writ of prohibition to be directed to the ecclesiastical court, on the ground of prætergression of jurisdiction: in both cases, the alleged prætergression consisted in sustaining a suit for incontinence, proceeding therein by an endeavour to examine the defendant upon his oath: in the court in which a decision was pronounced, the prohibition was granted.

But in that case the decision had no need of any such, or any other, general maxim, true or false. In any other sorts of causes than the two particularly specified (viz. matrimonial and testamentary,) administering an oath to the defendant was a practice expressly interdicted to *that* court, by two writs that are still to be found in the Registrum Brevium, the book of the highest authority of any that compose the library of jurisprudential law.

Yet, in neither case is any intimation given of any reference, made by either court or counsel, to this most irrecusable of all authorities: neither in the case in which it was conformed to, and the prohibition issued accordingly, nor in the prior case in which nothing was done. In this prior case, the reporter (Leonard) gives indeed a reference, but apparently as from himself, and then not to that authoritative repository of judicial documents, but to Fitzherbert's Commentary on it.

Being probably as yet without a precedent, the application that had been made to the inferior court, the court of Common Pleas, in the case above referred to, had produced nothing but doubts. The application thus made to the superior court, the court graced in intendment of law by the presence of the king *himself*,—its subordinate having no presence higher than that of the *king*, without any such adjunct, to boast of,—had a more successful issue. Heartened up by the authority and the Latin of her Majesty's attorney-general, the great Sir Edward Coke, they pronounced boldly that no such *proditio* should take place.

Leaving out of the question technical and supernatural causes, and looking out for natural psychological ones, two present themselves as competent, one or both of them, to the production of this effect. One was, jealousy of the power of these spiritual rivals,—another, a sort of personal and prudential apprehension of the lengths to which such impertinent curiosity, if unchecked, might extend itself, on ground of such peculiar delicacy.

1. In their anxiety to obtain custom, and to make the most of it when obtained, the courts of common law had concurred, in the manner above explained, in giving encouragement to mendacity, by exempting from the obligation of an oath, and thence from the punishments (religious, moral, and at length political*) attached to the breach of it, the testimony of parties for or against themselves. Equity, spying in this deficiency an inlet opened to successful rivalry, had taken upon herself to withdraw this licence from the defendant's side of the cause, thereby giving to the plaintiff the till then unexperienced advantage of the defendant's self-disserving testimony. The jurisdiction of equity had not, however, ventured to extend itself beyond the civil class of causes, nor in that to the whole extent of the field of jurisdiction.

The advantage thus possessed by equity, one of the branches of English Rome-bred judicature, had all along been possessed by another branch, the ecclesiastical. But from some uncertain, though at any rate early period, a resolution had been taken by the common-law courts, that the jurisdiction of the ecclesiastical courts, so far at least as it was to be enforced by the examination of par-

* In the Star-chamber, from the time of Hen. VII.

ties upon oath, should not extend to any other causes than such as came under the denomination of testamentary and matrimonial causes. In the Registrum Brevium, a writ, accordingly, is to be found, in which the limitation thus put to the jurisdiction of these courts is assumed.* Moreover, Fitzherbert, in his Commentary on the Registrum Brevium, takes notice of this same limitation and these same terms.† Not that the limitation has been adhered to in practice: for to this hour, the jurisdiction of those courts, together with the power included in it of taking such examinations as above, has a much wider range.

Ever since an early period of the reign of Henry VII., a court had existed, long known by the name of the Court of Star-chamber (a court of criminal jurisdiction, and that to a vast extent,) in which the power of examining the defendant upon oath had all along been exercised ‡

During the whole of the reign towards the close of which the oracle was delivered, this court had been a busy one. In every one of the several reports, it is delivered in the form of a general or universal proposition; no exception, or intimation of any exception, being annexed to it. Taking it thus as it stands, it was, in respect of verity, exactly upon the footing of a proposition denying that the sun ever shone at noon-day.

At that time of day, the Court of Star-chamber, though since abolished, rested upon as firm a foundation as any other of the courts: the decisions pronounced were as uncontested law, as those of any other court: in that character they are reported by all the reporters, indiscriminately with those of the several other courts. Being, under the tyrannical and extortious reign of Henry VII., instituted to serve as a new and more powerful instrument of the crown, unclogged by juries, it was all along an especial favourite.

Against the power of such a court, a power the exercise of which was every day's practice, it may be imagined of what use or avail could be this or any other proposition, though couched in ever such good Latin, denying the existence of it.

The oracle is of the rhetorical cast, which is as much as to say, in the natural style of oracles: and having, as it was probably designed to have, any one of half a dozen meanings, whichever happens to be most convenient to the purpose, it is in proportion guarded against the misfortune of seeing its truth disproved. But if the import of it be, that no question shall be put to a man, the answer of which, if true, may tend to his conviction, the truth of it stands further disproved by the then and still existing every day's practice of another sort of court. I speak of the court established by the statute of Philip and Mary,‖ the court consisting of a single justice or any number of justices of the peace, for the purpose of taking the preparatory examination of the defendant and others, antecedently to the trial by jury, in the case of felonies. At the institution of this preparatory judicature, the Star-chamber, with its practice of examining the defendant, being in full vigour, and no restrictive direction given, what could be the intention of the legislature but that the mode of examination pursued every day in the Star-chamber (not to speak of the nursery-chamber, and every other room in which common sense was listened to) should be pursued? The examination of the supposed felon was to be taken: but to what end take his examination, or the examination of any other person, but to find out the truth — meaning, of course, the whole truth? "The evidence you shall give, shall be the truth, the whole truth, and nothing but the truth:" such is the direction given, probably at that time, certainly at the present time, to every sort of person when examined in the character of a witness. What reason for supposing it so much as possible, that, in the reign of Philip and Mary, when (in imitation of the course which the retainers of the Spanish monarch had seen pursued all over Europe) direction was given for extracting the testimony of the defendant, any wish so silly should have been entertained as that so much of the truth as should tend to his conviction — that is, to the only direct end and object of the suit — should be left out of it?

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* Registrum Brevium, fol. 36. 6 tit. *Prohibitiones.*

REGULA. Prohibitio ne laici ad citationem episcopi conveniant ad recognitionem faciendam Attachiamentum inde.

Rex vicecomiti salutem. Præcipimus tibi quod non permittas quod aliqui laici ad citationem talis episcopi, aliquo loco conveniant de cetero, ad aliquas recognitiones faciendum vel sacramentum præstandum, nisi in casibus matrimonialibus et testamentariis. T. &c.

Rex vicecomiti salutem. Pone per vadium, &c. talem episcopum, quod sit coram justiciariis nostris, &c. ostensurus quare fecit summoneri, et per censuras ecclesiaticas distringi laicas personas, vel laicos homines et feminas, ad comparendum coram eo, ad præstandum juramentum pro voluntate suâ, ipsis invitis, in grave præjudicium coronæ et dignitatis nostræ regiæ, necnon contra consuetudinem regni nostri. Et habeas ibi, &c.

† Fitzh. Nat. Brev. p. 91. [41.]

‡ Ann. Dyer, 288: Easter, 12 Eliz.

‖ The 1 & 2 Ph. & M. c. 13, authorized and required justices of the peace to take down in writing the examination of any prisoner charged with manslaughter or felony, as well as of the witnesses in support of the charge. But as this only applied to cases where the justice had authority to admit the prisoner to bail, the 2 & 3 Ph. & M. c. 10, was passed to enable the justice to do the same thing, whether the prisoner was admitted to bail or not.—*Ed.*

Oh! but (says somebody) the practice actually is, under this act, to be cautious of extracting from the defendant any testimony the tendency of which may be to his prejudice, and even, lest any such testimony should escape him unawares, to give him warning to keep his lips well closed. I can very easily believe it: viz. so often as, and no oftener than, in the eyes of the examining justice, the general praise of humanity, and the popularity to be gained by it, is of more value to him than the advantage, public and personal, attending the discovery of the truth in that individual instance. But the question at present is, not what is the practice of modern times, but what was the practice of those early times, viz. in the reign in which this effusion of learned rhetoric is first known to have made its appearance? To understand this, if it be worth understanding, turn to the State Trials, turn to the case of Udall, the puritan minister,* prosecuted and teased to death, in the style of the Spanish Inquisition, in those days of supposed English liberty. Observe there eight personages, and among them two peers and great officers of state, a bishop, a chief justice of the King's Bench or Common Pleas, the chief justice taking the lead (between three and four months before the emanation of this writ,) all pressing him, urging him by threats and promises to take an oath, for the purpose of having his testimony extracted from him: he saying that he had already been punished upon such testimony, and (that he might not fall into the same scrape again) declining to take the oath.

The guilt imputed consisted in the writing and publishing of a book, in which the truth of his religious persuasion was maintained. Assuming this to be guilt, his guiltiness is out of all dispute: in the relation we have of the proceedings (for it is his relation) he avows it. What evidence more satisfactory could have been given of it, than his inability to deny it with any prospect of success? Here, then, was no injustice: of what injustice there was (and sure enough there was no want of injustice,) the seat was in the substantive branch of the law, it consisted in the converting into a capital crime the act of him who makes known, to use the words of Scripture, "the reason of the faith that is in him."

Thus, then, is it with this famous aphorism: at the time when first delivered, it was sent out in diametrical opposition to notorious truth. But having once found its way into the books, there it lay *in petto*, in a dormant state, ready, under a favourable set of existing circumstances, like a fly bottled up in spirits, to be revived at any time. When first brought out to view, we have seen it in the condition of "the stone which the builders rejected." we see it now triumphant, in the state of "the headstone of the corner."

At the time when brought out, to what purpose was it brought out? To the purpose of displaying the rhetoric and the latinity of the phœnix of the law. To the purpose of the cause, it was altogether useless: the object of the application was, to quash the proceedings of the ecclesiastical court, on the ground of excess of jurisdiction: to prove the excess, nothing more was necessary than a reference to the lawyer's gospel, the register of writs. What could have occasioned the time taken for *advisation*, is beyond conjecture.

But though, in the unlimited latitude given to it, the maxim was widely and notoriously untrue, — yet, from that bad authority, and the good but unnoticed authority (the writs in the register,) taken together, there seems reason enough to conclude, that at common law, on all trials in which juries bore a share, the practice of administering an oath to the defendant, and therefore putting questions to him (and particularly in criminal causes,) had never been in use. For in both the writs, the stress of the censure is laid on the administration of the oath, and in the latter it is expressly stated as being contrary to the custom of the nation.

If, then, the application of it had been confined to that part of the law designated on some occasions by the name of the common law, — viz. the practice of the common-law courts, — the truth of the maxim appears indubitable, at least so far as concerns the non-administration of an oath to the defendant, in cases deemed to belong to the class of criminal cases, and subjected to the cognizance of a jury.

But in the maxim, nothing is said about the oath: it goes further, and, in as far as any determinate signification can be put upon it, it puts an equally decided negative upon the practice of putting particular questions to the defendant, with or without the oath. But on this head we are left altogether to seek for evidence.† Because no oath was administered to the defendant, it follows not by any means that no particular questions were put to the defendant. In capital cases, to the witnesses called by the defendant no oath was administered till more than a century after,† yet witnesses for the defendant,

* State Trials (Hargrave's,) vol. i. pp. 167—188; 32 Eliz. July 24, 1590.

† The 4 Jac. I. c. 1, allowed the prisoner's witnesses to be examined on oath, in those cases where felonies had been committed by Englishmen in Scotland; but it would appear, that this innovation was carried by the Commons in spite of the efforts of the Crown and the House of

and those, too, speaking in answer to particular questions, could not but have been heard.

In those dark times, in which moral conduct was so much worse, and terror derived from supernatural sources so much stronger and more prevalent, than at present, the ceremony of an oath appears to have been a tremendous bugbear; so tremendous, that, by this consideration concurring with others, a doubt presents itself whether originally an oath used to be administered at all to witnesses in any causes, civil or criminal, on the plaintiff's any more than on the defendant's side.

In the treatise penned by Chief Justice Britton, under Edward I., and, upon the face of it, purporting to constitute a code of law sanctioned by that king's authority, much is said of perjury. But the crime there spoken of is, throughout, the crime of the judge, or other official person; nowhere the crime of the witness.

Subsequently to the statute of the fifth of Elizabeth (the first statute by which punishment was annexed to testimonial perjury,) cases relative to perjury occur in plenty in the books; antecedently to that point of time I cannot find one.

Investigating a point of this sort is groping in thick darkness. Books of reports, confined in their subject-matter to transactions at trials before a jury, are but of yesterday: in no instance, in any of the report books, containing the accounts of legal transactions of a date prior to the above, is any account of any such trial to be found: add, nor (in relation to any of the points here in question) of any transaction carried on in the course of any such trial.

Of an account of the proceedings in any trial before a jury, of a date prior to that here in question, the only example extant is of the date of 1554; about nine years prior to the date of this statute. It is the trial of Sir Nicholas Throckmorton for treason, in the first year of Queen Mary: for treason supposed to be committed by participation in the insurrection for which Sir Thomas Wyat had suffered death. It is reported from Hollinshed's Chronicle; and the discourses (as reported) wearing the same dramatic form as on a modern trial, the words appear upon the face of them to have been taken down, as if in short hand, from the mouths of the interlocutors.

Besides a variety of interesting particulars, having no immediate relation to the present subject, it affords very material information in relation to two points that have here been brought to view.

1. In the first place, not only is the defendant heard in his own defence, at his own instance, but questions upon questions are put to him without reserve, in the same manner as if to any extraneous witness: questions, having as plainly for their object the extracting answers of a nature to criminate him, and lead to his conviction, as any questions which a man, aiming professedly at that object, could devise.

Answer given directly and in detail: not a question objected to: no complaint of the illegality, or so much as the hardship of the practice.

2. In the next place (what bears directly upon the point here in question,) it affords no slight reason for suspecting, that at this time (in capital cases at least) the practice of administering an oath to a witness for the prosecution, was either a novel proceeding, or a ceremony the performance of which was optional on the part of the judge.

A written confession made by Cuthbert Vaughan—a man already convicted of the same treasonable conspiracy as that of which the defendant Throckmorton stood indicted (Vaughan still living and producible,)—had been read in the first instance; a proceeding alike repugnant to the manifest principles of reason and justice, and to the present practice. Then ensues the following dialogue.*

"*Attorney-General.* Why, will you deny this matter? . . . . You shall have Vaughan to justifie this here before you all, and *confirm it with a booke oth.*

"*Throckmorton.* He that hath said and lyed, will not, being in this case, stick to sweare and lye.

"*Then was* Cuthbert Vaughan *brought into the open court.*

"*Sandal* or *Sandell* [Clerk of the Crown.] How say you, Cuthbert Vaughan, is this your own confession, and will you abide by all that is here written?

"*Vaughan.* Let me see it and I will tell you.

"Then his confession was showed him.

"*Attorney.* Because you of the jury the better may credite him, I pray you, my lords, let Vaughan be sworne.

"Then was Vaughan sworne on *a booke* to say nothing but the truth."†

Lords. Com. Jour. 4 Jan. 1607; 30 Jan. 1607. It was not until the 7 Will. III. c. 3, that this privilege was granted to prisoners, in cases of treason within the act. Finally it was extended, by the 1 Ann. st. 2. c. 9, to *all* cases of treason and felony. In misdemeanours, defendants always had this privilege. 2 Hawk. c. 46. §§ 170–172.—*Ed.*

* State Trials (Hargrave's,) i. 67.

† I mention the above but as a suspicion, and no more. What is beyond dispute is, that the ceremony of putting the convict witness to his oath was considered as optional. But it might be that it was not considered as optional, any otherwise than as attached to the act of producing

Written confessions and hearsay evidence produced of the supposed testimony of other persons, producible and yet not produced. Exclusion put, and without the shadow of a pretence, upon the testimony of a person then present, and whose testimony had been called for by the defendant Acquitting him, the jury were prosecuted for it in the Chamber, and punished by ruinous fines

Execiably flagitious in these and other respects, the proceedings were not the less legal. If the station of judge does not give legality to the proceedings of him who acts in it, how can any proceedings be legal? — Here we have the chief justice of the King's Bench, another judge of the same court, a judge of the Common Pleas, a master of the Rolls, and a master of the court of Wards and Liveries, all learned, in the law sense, besides a couple of peers, and as many privy counsellors, the lord mayor of London, and a knight; all sitting at Guildhall as commissioners.

Illegal? Oh yes, if irreconcilable to an antecedent series of uninterrupted practice but in this instance there is not a single case to which it can be opposed. It is the only one we have *

No practice could come in worse company, than the practice of putting adverse questions to a party, to a defendant, — and in a criminal, a capital case, did in that instance. If, however, the practice be itself subservient to the ends of justice, the having been resorted to in company with others of an opposite tendency, is a circumstance which, how natural a cause soever for reprobation, can never be a just one

Where no oath has been taken, false and mendacious testimony there may be in any quantity, but perjury there cannot be The causes have been seen, by which a suspicion at least is induced, that the practice of administering oaths to witnesses, and consequently the possibility of committing testimonial perjury, was, at the time of passing the earliest of the statutes relative to this offence, of no very ancient date If so, it could not be true, that "perjury" in a witness was "punishable" (to use the words of Lord Coke) "by the common law"†

True it is, that in that same passage he gives us the history of a case (a Star-chamber case,) tenth of James I, A.D 1612, in which it was resolved that perjury in a witness was punishable at common-law But the very fact, that a resolution to that effect was at that time necessary to be passed, serves, I must confess, to strengthen the suspicion suggested by the former considerations, that it was not true If, antecedently to the statute, the punishment of perjury had (elsewhere at least than in the Star-chamber) ever been exemplified, the occasions would have been too frequent to leave the matter involved in any such doubt as it could require an express resolution to remove

To what purpose, then, be at the pains o resolving that perjury was punishable at common law, fifty years after the passing of the statute that had been made to punish it? — The answer is, — because (as we learn from Lord Coke in the same place) upon taking measure of the statute about fourteen years before, it had been found too narrow ‡

Among the various devices in use with English judges for stealing legislative power,

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the man to be examined in the character of a witness; and that, supposing him produced and about to be examined in that character, the performance of the ceremony was indispensable

Such is the construction that a reader of modern times, whose surmises and expectations are influenced by the invariable tenor of modern usage, would naturally be led to adopt in preference.

On the other hand, the passages which appear to lend more or less countenance to the opposite interpretation, are not altogether without their weight.

"You shall have Vaughan to justifie this. and confirm it by a booke oth." "Here we see the proffered justification, *i. e viva voce* testification, mentioned in the first place, and of the oath a distinct mention made, as if it were a security that might have been superadded or not to the security afforded by the confrontation and the examination; just as the act of producing the man for these purposes might itself have been performed or declined at pleasure.

So much for the *proffer* made of the ceremony: observe now the account given of the *performance* of it. "Then was Vaughan sworne on *a* booke to say nothing but the truth" Upon the face of this account, has not the ceremony somewhat of the air of a novel practice? not *the* book, but *a* book. By the article *the*, an implied reference would have been to usage — to usage as established; but whether invariably adhered to or not, would still have been another question. But the article is not *the*, but *a:* as if the sort of book, not being fixed by usage, was scarcely known. In a modern trial, now that the previous administration of an oath is a practice so completely in course, is any such language ever made use of for the expression of the fact?

* Sir Edward Coke, eminent already, though not yet in office, was the counsel by whom, in one at least (viz. the latter) of the occasions above mentioned, the impressive maxim, *nemo tenetur seipsum prodere*, was displayed. He was already in existence, though not more than five years old, when this trial (we have seen how remarkable a one) took place.

Saturated as he was, and super-saturated, with law learning, was it natural that a case of such importance, a case in point, in the history of his own time, should have been a secret to him? But Coke, as inaccurate as he was garrulous, was ready at any time to entertain the public with the first runnings of his thoughts

† 3 Inst. 164.

‡ Coke's Rep. v. 99. Flower's case.

this may be mentioned as one: when a statute, which as far as it goes is to their liking, is found not large enough, or has been unmade by the authority that made it, they fill up the deficiency with an imaginary mass of common-law. Common-law, a creation of their own imagination, forms thus a sort of *plenum*, upon which, as often as a vacuity is to be filled up, they draw at pleasure.

§ 5. *Of self-onerative, self-disgracing, and self-discrediting evidence.*

1. *Self-onerative* evidence.

The distinction between *self-criminative* testimony and *self-onerative* is here employed for the purpose of its corresponding to a distinction to which, in the technical system of procedure, so many important consequences have been attached: I mean, the distinction between *criminal* cases and *civil* cases.

It is on this occasion that self-criminative evidence calls for a distinction of no small practical importance: — 1. Testimony self-criminative to the effect of ultra-pecuniary punishment; and 2. Testimony self-criminative to the effect of punishment not more than equivalent to pecuniary: — a distinction which seems sufficiently explained by the terms in which it is here expressed.

Unless it be where, and in so far as, the testimony comes under the appellation of *self-disgracing* or *self-discrediting*, — self-criminative evidence, when in its penal effects limited to punishment not ultra-pecuniary, will (it is evident) to that or any other purpose, stand on no other footing than testimony simply *self-onerative*. To the extent, therefore, of that part of the scale, the two species, *self-criminative* and *self-onerative*, coincide.

If, on the score of any injury, or other transgression, the delinquent is adjudged to pay in each of two cases a determinate sum (say £10,) his unwillingness to subject himself to that obligation will not be less, in the case where the money, when taken out of his pocket, is put into the pocket of his personal adversary, the party injured, than in the case where it is put into the pocket of another party, with whom he has no quarrel; as, for example, the sovereign, whether for his own benefit, or for the benefit of the community at large. On the contrary, if there be a difference, it is in the case where the amount of the quantity of the matter of wealth lost to himself is so disposed of as to add to the enjoyment of his adversary, — it is in that case, that his unwillingness to deliver the testimony which is to be productive of this effect, will naturally rise to the highest pitch.

If, — in the case where the effect of the conviction, if brought upon himself by his testimony, would be to subject him to the payment of the £10 to the use of a person unobnoxious to him, — his testimony, even on the score of the unwillingness and vexation supposed to be attached to the delivery of it, were to stand excluded; while, in the case where the effect of it would be to subject him to the payment of an equal sum to the use of a person more or less odious to him, his testimony (notwithstanding the at least equal unwillingness and vexation that might well be supposed to be attached to the delivery of it) were *not* to stand excluded; flagrant surely would be the inconsistency with which, in the judgment of every mind not prepossessed and perverted by technical ideas, an arrangement to such an effect would appear chargeable. Give now to the first of the two cases the appellation of a *criminal* case — to the other, the appellation of a *civil* case: will the real inconsistency thus seen to exist between the two arrangements of law, be at all diminished by these two words?

Among the different modifications of self-prejudicing evidence above distinguished, the case in which the pretence for the exclusionary rule is most plausible, is evidently the case where the testimony is self-criminative, to the effect of *ultra-pecuniary* punishment — where the punishment, to which by the testimony in question a man exposes himself, rises to a degree of afflictiveness above the utmost to which pecuniary punishment, in the highest degree in which a man can be made susceptible of it, is regarded as equivalent.

But even in this case it has been shown, that, by the vexation (be it what it may) attached to the production of the effect by means of evidence of this particular description, in contradistinction to other evidence at large (*i. e.* to extraneous evidence,) no sufficient or proper ground for the exclusion of the evidence can ever in any instance be constituted. *A fortiori*, then, neither can it, in the case where, in respect of the prejudicial effect of it to the deponent, the evidence is simply self-onerative, or no more than equivalent to self-onerative.

2. *Self-disgracing* evidence.

On the subject of self-disgracing evidence, a distinction must again be noted. If, in the case where the evidence is self-criminative, exposing the deponent to punishment (*i. e.* to suffering, on account of some transgression of the law of the state, or of the received rules of morality,) the effect of the punishment (whether in respect of the transgression to which it is attached, or in itself) is to subject a man to disgrace; — a question may be started, whether the effect of such disgrace be, or be not, to raise the punishment above the level of the most onerous pecuniary obligation. But, for the practical purpose of determining whether the evidence in question ought or ought not on this account to be excluded, the inquiry would be purely speculative and useless; it being already understood,

that by no degree of magnitude on the part of the punishment can a sufficient ground be formed for the exclusion of self-criminative evidence, howsoever modified

A use that has been made of the appellative *self-disgracing* is this where the offence to which the punishment is attached is of a disgraceful nature,—by whatever testimony a man exposes himself to suffer as for that offence, he exposes himself of course to the disgrace attached to it *

Thus far, then, self-disgracing testimony coincides with, and is included under, self-criminative But suppose the punishment already inflicted Here we see a case in which, in the course of a man's testimony, the fact of his having suffered this punishment, and thence of his having committed this transgression, may be brought to view Here, then, his testimony, though it cannot (to the effect of its being considered as exposing him to suffer punishment of a disgraceful or any other nature) be ranked with propriety under the head of *self-criminative* testimony, may, with not the less propriety, be termed *self-disgracing* To distinguish it from the case where, by the same means to which a man's testimony exposes him to disgrace, it exposes him to punishment in other shapes,—it may be termed, *simply* self-disgracing

If, by testimony which, besides being self-disgracing, is self-criminative, no proper ground for exclusion can be constituted,—much less can any such ground be constituted by testimony which is self-disgracing simply, self-disgracing without being self-criminative Not so, however, says English law †

A man is produced as a witness on either side. on a former occasion he had been convicted of an offence, of which, if ascertained, the effect would be to diminish his credibility—to weaken the force of the persuasion of which his testimony might otherwise be productive. Shall the question be put to him, whether it be true that, on the occasion mentioned, the conviction in question took place? No; says a rule of English law. No? Why not? Because this is making a man disgrace himself—making a man expose himself to shame And why not make him expose himself to shame, if he has done what by the supposition he has done—that to which the opinion of mankind, following in this respect the finger of the law, has annexed disgrace—properly and deservedly annexed it? Oh! (says the prejudice) because a self-disgracing, or call it a self-degrading answer, is a sort of self-accusing, self-convicting answer if it be not exactly the same thing, it is analogous to it—it is like it, which is enough for us

Still the same delusion, still the same shortsightedness, still the same inconsistency and self-contradiction The witness has been convicted, say of perjury if his disgrace be offered to be proved by other evidence—by such evidence as the law chooses to receive (say, by the record of his conviction,)—if this be the case, it is all well the evidence cannot be disallowed It is not to the act of disgracing him that the prejudice opposes itself, it is only to the channel through which the disgrace is conveyed Disgraced he may be disgrace him you may, and welcome—only he must not be disgraced out of his own mouth

In this case (as in the case of self-convicting evidence), if so it happens that he has disgraced himself in this same way at some other time,—if any other person affirms that in his hearing he has acknowledged the having undergone any such conviction, or the penal consequences of it,—evidence of this loose extrajudicial confession may be produced and exhibited to his face It is not that the fact is not to be proved, but it is not to be proved any otherwise than in a bad way it is not to be proved by immediate evidence—it is only to be proved by unoriginal, by hearsay evidence it is not to be proved by testimony the whole of which is covered by the sanction of an oath—it is only to be proved by evidence of which the half only is covered by the sanction of an oath

To what end seek to exempt a man from this accidental shame? It is a suffering that arises out of his delinquency,—and in the nature of the case will bear a proportion (as exact a one as can usually be obtained) to the degree of his delinquency by the example it affords, it will render itself subservient to the main end and purpose of punishment—the deterring others. In trials in general, publicity is a circumstance not deprecated, but aimed at, and generally approved. Beneficial as it is recognised to be on all other occasions, what should render it

* So, likewise, even where, although in itself the offence imports no disgrace, yet, in consequence of the power of association over the imaginations and affections of mankind, the punishment attached to the offence is of itself productive of that effect.

† If a man has already been tried for any offence, he must answer the question But if the answer to any question may subject the witness to future punishment, he may answer the question or not, as he pleases; and he generally receives a caution from the judge. In the case of Cant, tried for a capital offence, at the last October Sessions of the Central Criminal Court, a witness was called for the defence, for the purpose of proving that he himself was the person who had committed the crime in question. After receiving an admonition from the judge, he did answer the question, and admitted that he had done the act, although, according to his account, under circumstances that took away the criminality of it. The jury, however, disbelieved the witness, and convicted the prisoner.—*Ed.*

otherwise than beneficial on this? The evil, then, is no other than a part, though an accidental part, of the evil of punishment, — that evil which, by the supposition necessarily involved in the institution of the penal law, is outweighed by a greater good. The publicity of punishment is one of the constant and applauded aims of the law upon all occasions: it is only by that part of it which is public and known, that the punishment does any good: so much of it as is unknown, is so much pure evil, so much misery in waste. The publicity of its punishments is one of the constant aims of the law on all occasions. on the particular occasion in question it is attended with a particular use, over and above every use with which in general it is attended: to what end, with what sort of consistency, seek on this occasion to cover that shame, which on all other occasions it is the object of the law to uncover? To what end seek to cover it now, — now when the uncovering of it is demanded for a particular useful purpose?

The inconvenience of the rejection is this: either you cannot prove the fact at all — or if you do prove it, you prove it by evidence the production of which is attended with an additional and useless expense.

The witness in question is, by the supposition, on the spot: get the evidence from him, you get it without any additional expense or vexation in any other shape. If it is not from him that you get it, and yet you get it notwithstanding, the evidence you get of it is a *record*: a great mass of parchment, which, or a copy of it, is to be lugged into court, at I know not what expense. To avoid loading this guilty person with an ideal suffering, you impose a real suffering upon some innocent one. Better for the party perhaps, to let the suspected evidence go for unsuspected, than to purchase the faculty of throwing the suspicion on it at so heavy an expense.

This is not all. Perhaps the record is not producible: there is no time for it. The stain upon the character of the witness does not come to the knowledge of the party till a few days before the day appointed for the trial: the trial cannot be put off for this purpose, or not without a disproportionate expense: and the interval between the day of the discovery, and the day appointed for the trial, affords not time sufficient for the production of the necessary parchment.

Two errors are here combined — two opposite excesses. When the fact of the conviction is suffered to appear, the witness is rejected absolutely: when the truth is thus prevented from coming to light, the tainted testimony is palmed upon the jury for sound. What says reason all this while? That in this case, as in all others, the testimony should be suffered to make its way to the ears of those to whom it belongs to judge, but not without the cause of suspicion stamped upon it: that they should be free to hear it, and free when they have heard it, to bestow upon it such credence as shall appear to them to be due to it.

But cases are not without example, in which, although no punishment at all be attached to the act, or none the application of which could with propriety be trusted to a promiscuous hand, disgrace is nevertheless attached to it. Take for example fornication, especially on the part of a female never married, and of character otherwise unspotted: take, again, adultery, especially on the part of the wife, whose infidelity, but for the testimony in question, might have remained unsuspected, and the peace of the husband undisturbed.

In a case of this sort, no good being attached to the disclosure, but so much pure evil, — the vexation (abstraction made of the demand produced for the testimony, by the cause for the purpose of which it is proposed to be called for) would be not barely preponderant, but pure, without anything in the opposite scale to weigh against it.

Shall it, then, be exacted, or excluded? The answer depends upon the principle already laid down in a former place. Exacted, if the mischief from misdecision for want of the evidence would be preponderant over the mischief consisting of the vexation produced by the disclosure: excluded, if the preponderance be on the other side. Exact it, if (for example) but for the benefit of this evidence, the defendant (the prosecution being capital, and he innocent) will, over and above the disgrace attendant on conviction, be unjustly put to death: exclude it, if the question be no more than whether the defendant be liable to pay a penalty, or an alleged debt, to the amount of a few shillings.

In the two opposite cases here exemplified, the propriety of admission in the one case, of exclusion in the other, will scarcely raise a doubt. Between these two extremes to draw a line of demarcation, will be (as already observed) a task, to a certain degree for the legislator, and, where his means of discrimination terminate, for the judge.

3. *Self-discrediting* evidence.

The range of *self-discrediting* testimony is yet more narrow. The term may serve to signify self-disgracing testimony of any kind, so far as it is considered as productive of this particular effect.

Far from constituting of itself a proper ground of exclusion on the score of vexation, it is not in the nature of it to contribute anything to the formation of any such ground on that score. Vexation — all the vexation which it is in the nature of such testimony to be

productive of in the breast of the deponent, consists in the disgrace. As to his testimony's being believed or not believed (it being by himself that whatever evil consequences may result from it are to be borne,) if it were not, in any part of it, to be believed — if, in respect of its effect, it were in so complete a degree self-discrediting, — his vexation would be but so much the less But such (as every one sees, and as we have seen already) is not the effect of acknowledged untrustworthiness on the part of the deponent, where it is on his own shoulders that the burthen of the decision falls. On the contrary, the more untrustworthy he appears as to other points, the surer everybody is, that whatever part of his evidence is understood by him to operate to his own prejudice, is true.

§ 6. *Case of evidence self-disserving* aliâ in causâ, *considered.*

It may happen that the cause by means of which the deponent exposes himself to the mischief attached to the self-prejudicing evidence, is not the cause in hand, but another cause, viz. a cause already in prospect, or a cause liable to be produced by the disclosure made by the evidence

In respect of the quantum of vexation, the variation here in question will make no difference.

But, compared with the opposite case (with the case in which the mischief consists in an unfavourable termination of the suit actually in hand,) the reasons in favour of admission, the reasons against the exclusionary rule, operate in this case with redoubled force

Against the evil of the self-regarding vexation produced by the self-disserving testimony of a *party*, there is no other good to be set than the advantage attendant on a right decision, instead of misdecision or failure of justice, in that *one* cause But in the case where the proposed deponent is an *extraneous witness*, — in addition to that same lot of advantage (in so far as the testimony is in this respect efficacious) there comes the advantage attendant on a right decision, instead of misdecision or failure of justice, in *another* cause: to wit, the additional cause to which it is the tendency of such disclosure to give birth.

Prosecution for robbery. John Stiles examined in relation to it, in the character of an extraneous witness A question is put, the effect of which, were he to answer it, might be to subject him to conviction in respect of another robbery, attended with murder, in which he bore a share. On the ground of public utility and common sense, is there any reason why the collateral advantage thus proffered by fortune to justice should be foregone? Refusing to compass the execution, or better means can you ever hope to compass it?

The punishment he will incur, if any, will be a distinct punishment, for a distinct offence; an offence which, at the institution of the suit, was perhaps never thought of.

Be it so: and should this happen, where will be the mischief? wherein consists the grievance? That a crime, which, but for the accident, might perhaps have remained unpunished, comes, by means of this accident, to be punished Of the penal law in question, nothing being known but that it is a penal law, is it thereby known to be a bad one? and to such a degree a bad one, that the execution of it is a grievance? Is the state of the law then such, that a law taken at random is more likely to be a bad one than a good one? a nuisance than a security? Or is a law the less likely to be good, the more likely to be bad, because it is by this accident, rather than any other, that the transgression of it happens to be brought to light?

This increase of reason, this reduplication of advantage, extends itself (it is evident) with proportionable force from the top to the bottom of the scale of good on one hand, of evil on the other, attached to self-prejudicing, to self-disserving, evidence. to all degrees of self-criminative — to all degrees of self-operative. to all suits called criminal — to all suits called civil

But what shall we say, if, by a summons to appear as a witness in a cause (penal or non-penal) between other persons, an individual is purposely entrapped, and, being (in obedience to that summons) actually in court, is interrogated concerning a distinct offence supposed to have been committed by himself, and, in consequence of his answers, stopped and consigned to durance. What? Why, — that, so a delinquent be but brought into the hands of justice, just as well may it be by this means as by any other. Truth is not violated — fiction is not employed no false tale is told — no falsehood here defiles the lips of justice

Nor, though possible, is the case likely to be frequent The question must be relevant, pertinent to the cause actually in hand, or an answer will not be (for it ought not to be) allowed to be given

The suit not as yet in hand, may possibly have been the principal object in view in the summons. But what if it be? If, instead of being, in this way, stopped when appearing to give evidence in another suit, the witness had been arrested in consequence of a direct charge made upon him on the ground of such his offence, — in what respect would his guilt have been increased, or his suffering, in respect of it, diminished?

Even now, it occasionally happens that a

a cause to which he is not a party, appears accordingly, and, being deemed guilty of perjury, is committed.

But even under the supposition that the admission of *indirectly* elicited self-convicting evidence were, as such, improper; still, if the admission of *directly* elicited self-convicting evidence be proper, no distinct mischief can be chargeable to the account of self-convicting evidence when indirectly elicited. Why? Because, admitting the propriety and consequent existence of the practice of admitting self-convicting evidence, a regulation excluding the faculty of extracting self-convicting evidence incidentally, would not operate as a bar to the supposed mischief: since the evidence in question, if not extracted out of the cause in which it happens incidentally to present itself, might always be obtained; viz. by a distinct suit instituted on purpose: and with the same mischief and suffering to the party prejudiced,—viz. the delinquent; though not with the same convenience in respect of dispatch, and in respect of the throwing those fuller and ulterior lights that might thus be thrown upon the offence first pursued, by other offences that happen to be connected with it. In a word, supposing direct evidence of this kind to be admitted,—then, if you exclude incidental, whatever effects may be apprehended from it, of a kind which are (with or without reason) regarded as inconvenient, will still be produced, but with additional inconvenience.

An effect (for example) which certainly might, by design and contrivance, be brought into existence by incidental self-convicting evidence, is, that of instituting a sort of feigned suit, penal or non-penal, for the purpose of bringing to light, not the facts belonging properly and directly to the avowed cause of action, but others, of a complexion differing to any degree of remoteness. Suppose, for example, a project formed for bringing down disgrace and punishment on the head of an individual, by means of questions to be put to him, in the character either of a defendant or a witness, in a cause to be instituted on purpose; drawing thus out of his mouth the confession of some crime, or disgraceful act, for which he has not been prosecuted. May not this be done? Yes: but not with any advantage to the party whose invention is supposed to be thus employed, nor with any disadvantage to the party against whom it is supposed to be employed. Why? Because in this there is nothing more than what might be done in a direct and ordinary way, by a suit instituted on purpose.

In every point of view, then, in which it can be considered, the practice in question appears to stand clear of objection. In the first place, because the result supposed to be produced, cannot, with any propriety or consistency, be reckoned in the number of undesirable results: in the next place, because, though it were, no ulterior facility is afforded for the production of this supposed undesirable result: no new or ulterior facility is afforded, beyond what would exist without it.

Under the systems of procedure derived from the Roman law, and in particular under that formerly pursued in France, self-convicting evidence being allowed to be extracted in the direct way, so is it in the incidental and occasional way above described. The result is in the highest degree favourable to the interests of justice. At a very early period of my studies, accident having conducted me to the collection of remarkable trials known by the name of the *Causes Célèbres*, comparing what I there observed with such observations as it had fallen in my way to make in relation to trials (and especially in criminal causes) conducted in the English mode, one very striking point of diversity caught my eye. In the English mode, when any plan of deep and extensive artifice and villainy presented itself, it was only into here and there a corner of it that the light of discovery appeared to have been thrown: a multitude of circumstances remained still involved in darkness: a multitude of particulars still remained, in respect of which, the mind of the inquirer remained unsatisfied: he who should propose to himself to draw up a complete history of the criminal transaction, would find materials continually wanting—would, in a word, find the task impracticable. Why? Because, out of a multitude of delinquencies committed, the inquiry was, by the narrowness of the path chalked out for the course of procedure, confined to one: because, by this or that arbitrary and irrational rule, a seal was put upon the lips of those who knew most about the matter.

In the French mode, on the other hand, every transaction appeared to be sifted to the bottom; no doubt remained: all the actors—all the sufferers—were brought upon the stage; proximate causes, remote causes, concomitant circumstances and consequences, all stood before the reader at a view.

In the same proportion in which the faculty and practice of reaping the collateral advantage now and then presented by the self-disserving testimony of an extraneous witness, is beneficial to the interests of society, it is prejudicial to the opposite and adverse interest,—the interest of the professional lawyer, under every system—the interest of the official as well as of the professional lawyer, under the fee-gathering system.

It defrauds him (that is, if admitted, which he has taken care it shall not be—it would defraud him,) and in a double way, of his due. In the suit already in hand, it defrauds him

of the several advantages already enumerated under the head of the *uses* of the exclusionary rule to the man of law. By means of the effect with which it may be, and (when the testimony thus obtained is sufficient to warrant the decision it points to) ought to be, attended, it defrauds him of the whole of the profit that might have been extracted from the additional suit, had it commenced and been continued in the regular and ordinary course. It produces to the community at large the benefit of two suits, with the delay, vexation, and expense, and consequently with the lawyer's profit, of no more than one

This being the case, it may without difficulty be imagined how sincere an abhorrence the idea of a practice thus informal and irregular excites in their inflexible and learned breasts: with what heroic firmness they adhere, on this doubly important ground, to the exclusionary rule: with how tender a sympathy they contemplate, as if it were their own, the peril of the malefactor, or other evil-doer—in whatever degree, and on whichever side of the cause, their customer, their partner, their best friend

CHAPTER IV.

INCONSISTENCIES OF ENGLISH LAW IN REGARD TO SELF-DISSERVING EVIDENCE

THIS rule, this exclusionary rule, which grounds itself on the evil of vexation, would not be a rule of jurisprudential law (more particularly of English jurisprudential law,) if it had not its exceptions: and these exceptions (no intimation being given of them in the rule) forming so many contradictions, and the reasons of them (not being good but on the supposition that there are no reasons, or none but bad ones, for the rule) forming so many inconsistencies

In a former place there was occasion to mention, in the character of so many uses to justice attending the admission of self-prejudicing testimony (that is, of questions leading to the extraction of it,) that thereby the receipt of two other species of evidence from the same source—evidences equal at least in vexation, inferior in instructiveness, safety, and trustworthiness—would in general be saved. These were—1 Papers (such as letters or memorandums) containing a discourse supposed to be that of the party, and 2 The supposed extrajudicial conversation supposed to be held by the party, on any occasion not being a judicial one, and reported by another person in the character of a judicial witness.*

Useful, in case of necessity, for the purpose of strengthening or weakening the opinion of the trustworthiness of the immediate evidence from the same source,—useful, though less safe, in the character of succedanea to it when it is not to be had,—who does not see how bad a substitute these unsanctioned and uncross-examinable evidences make, for the mass of immediate testimony from the same source? when it is to be had, and under the same securities for its correctness and completeness (viz. oath, or what is equivalent, and counter-interrogation) as in the case of an extraneous witness

These secondary and inferior species of evidence are accordingly admitted but upon what terms? Upon the terms of their not receiving the confirmation, infirmation, explanation, or completion, that could have been applied to them by the immediate evidence from the same original source. Upon condition of their being freed from that check—of the judge's refusing to himself the benefit of that security against deception and misdecision—and no otherwise.

1 First contradiction to the exclusionary rule—admission of the supposed casually and extrajudicially written discourse of the person excluded, to whom, for fear of vexing him (he standing or not standing there,) no questions are permitted to be put

2 Second contradiction to the exclusionary rule—admission of hearsay evidence, purporting to contain the casually and extrajudicially spoken discourse of the person to whom, for fear of vexing him (he standing or not standing there,) no questions are permitted to be put

Of the vexation, for the avoidance of which such sacrifices have been made,—sacrifices not *to*, but *of*, the interests of truth and justice,—an estimate may now be made It is the difference between that which a man feels when the testimony, in consequence of which he sees himself exposed to suffer, whatever it be, issues on the occasion in hand immediately out of *his own* lips or from his own pen,—and that which he feels, when—testimony to the same effect, exposing him to the same suffering, neither more nor less, having happened on some preceding occasion to escape from his own lips or his own pen,—he hears or sees it brought out against him on the occasion in hand, from the lips or the pen of some *other* person,—the difference between what he feels at hearing brought out against him information which dropped from him at a time when he was off his guard, and knew not the use that would be made of it,—and that which he feels at the yielding the same information at a time when he is completely upon his guard. Now then, what is the real value of the mischief, in contemplation of which an amendment has been made on the maxim, *fiat justitia, ruat cælum—justitia* being erased, and *injustitia* substituted?

But it is a weight added to a man's afflic-

* *Vide supra*, p. 447.

tion (it may be said) to have the proof that is to subject him to punishment drawn out of his own mouth. A weight? No, not of a feather. What is this burthen, compared with the burthen imposed without remorse upon individuals completely innocent—upon the individuals convened as witnesses? The suffering—the real suffering—is that which is inflicted by the punishment itself: a suffering, the infliction of which is by the supposition (speaking with reference to the aggregate interests of the community) a desirable event. In that, and that alone, consists the real affliction. As to the supposed addition—a mere metaphorical quantity—except in the mind of the rhetorician it has no existence.

You are sure of being convicted: by what sort of evidence would you choose rather to be convicted? By the evidence of other people without any of your own, or by evidence of other people's and your own together?—Were a question of this sort put to a malefactor, would it not be matter of perplexity to him to choose? Would not a pot of beer or a glass of gin, on whichever side placed, be sufficient to turn the scale?

But allowing, for the sake of argument, that there is a difference between the pain in the one case and the pain in the other—for my own part, I can see none—but if there be, can it be assumed as a competent and sufficiently broad and solid ground for the establishment of a rule of law? Is there anything here capable of being set against the mischiefs of impunity? the mischiefs of the offence (be it what it may) which the law in question—the law which the rule of exclusion in question seeks to debilitate—is employed to combat?

Justice out of the question (which certainly has nothing to do in it,) refer the matter to mercy—whatever be meant by mercy—and ask, whether a malefactor be the less deserving of mercy, because it so happens, that, without putting any questions to himself, evidence sufficient for conviction happens to come in from other sources?

In England, society exists; therefore English law *must* have given admission, either to the makeshift or to the regular evidence from that same source. It excludes the regular—it admits the makeshift. Observe, then, the result of this prodigious scrupulosity, of this sentimental tenderness:—a preference, and that an exclusive one, given to inferior evidence.

Lawyer. Inferior? Ay, in your estimation.

Non-Lawyer. Yes: But I speak not of my own estimation only, nor of the estimation of men in general only, but of your own. Suppose it the case of an extraneous witness—a person whose testimony it is proposed to call in, he having no share or interest in the cause. Do you in that case accept of a letter or memorandum of his, or a supposed extrajudicial discourse of his, in lieu of the judicially delivered testimony of his own hand, or the immediate evidence of his own lips? Do you in this instance exclude the regular, open the door to the makeshift evidence, from the same source? Not you, indeed: far from excluding the regular evidence, you do not admit the makeshift: far from giving an exclusive admission to the makeshift, you do not (unless incidentally, for infirmation or confirmation) give it any admission at all.

3. In the short and disastrous reign of Philip and Mary, came out the statute* so often mentioned, in virtue of which, in cases treated as criminal, and where the punishment rises to that of felony, justices of the peace, acting singly, are empowered to resort to the mouth of the defendant (the supposed transgressor) for information on the subject of the offence.

Not a syllable can he utter that may not have—that was not designed at least to have in case of his having been guilty—the effect of self-criminative evidence. Not a minute after any such question put to him can he remain silent, but his silence (at least if the use were made of it that might, and ought, and was intended to be made of it) would, in like manner, have the effect of self-criminating evidence.

Contradictory, however, as this statute is, when compared with the jurisprudential rule, the charge of inconsistency (it must be confessed) extends not to this case. The rule was the work of the man of law seeking his own ends: the exception—a sprig of common sense, imported from the continent of Europe, and planted in a bed of nonsense and hypocrisy, by which it has been nearly choked—was the work of the sovereign, seeking the welfare of his people through the ends of justice. Happy the nation, had no worse importation taken place under the auspices of Spanish influence!

Third contradiction to the exclusionary rule:—preparatory examination of suspected felons, under the statute of Philip and Mary.

Thus far we have seen the contradictions given to the rule, when the punishment, to which the man exposes himself by his self-criminative evidence, is ultra-pecuniary; rising, in its lowest degree, above the highest level to which pecuniary punishment is capable of extending itself.

Observe, now, the contradictions which it has received in the case where the punishment is not ultra-pecuniary,—*does not*, in its highest degree, rise, in point of afflictiveness, above the level of pecuniary punishment.

* 2 & 3 Philip and Mary, c. 10.

But in the case where, in how heavy a degree soever onerous, the heaviest obligation to which the party stands exposed does not wear the name of punishment, — *self-onerative*, self-onerative simply, is the name that has been given to the evidence. The cases embraced by self-criminative evidence exposing the party to punishment not beyond pecuniary, and the cases embraced by evidence simply self-onerative, are therefore, to this purpose at least, the same cases the rules and practices, therefore, that operate in contradiction to the rule excluding self-onerative evidence, are so many contradictions to the rule by which self-criminative evidence, to the effect of punishment not ultra-pecuniary, stands excluded

4. A motion for an information (a criminal information) is a suit instituted to know whether a suit shall be instituted a suit carried on upon the worst evidence that can be found, to know whether a suit for the same cause shall be carried on upon good, or less bad, evidence. a suit carried on upon premeditated, preconcerted, uncross-examinable evidence, to know whether the same suit shall be carried on upon unpremeditable, unconcertable, cross-examined evidence.

When the prosecution is in this mode (and there are few crimes short of capital, the prosecution for which may not be carried on in this mode,) the principal piece is never suffered to be performed before a single judge, for the benefit of justice, till in this style a prelude to it has been rehearsed at his majesty's theatre in Westminster Hall, for the benefit of the lawyers

Lawyer. Nay, but what is this to the purpose? Here no questions are asked the defendant says what he pleases

Non-Lawyer True, sir, no questions are put in the form of questions, but allegations have been made — allegations, which, to the purpose here in hand, howsoever imperfectly calculated for the complete and correct discovery of truth, have the effect of questions By the affidavits of those willing witnesses whom he has procured to join with him, the prosecutor has made his charge The defendant delivers in his affidavit or not, as he thinks fit: but (the rule having been made upon him to show cause) so sure as he omits to deliver in an affidavit, so surely, in this preliminary suit, is he cast If he pleases, he may be silent, taking the consequences, and so he may be, though the exclusionary rule were abolished

Of a complete abolition of the exclusionary rule, what (at least in the case of a party) would be the effect? Not compulsion, the exaction of an answer; but simple permission — permission to put questions: he to whom the question is put, answering or not answering, at pleasure.

Are you an equity draughtsman? You are not to learn, then, that in equity, an allegation, a *charge*, is everything — a question, nothing. Is the fact made up into a charge? Question or no question, interrogatory or no interrogatory, an answer is compelled, and compelled by means far more rigorously coercive Is an interrogatory put without a charge for its support? It is as if nothing had been said

Lawyer. But can you say the obligation upon him to answer is equally coercive in this case, as before a jury at the assizes, the Old Bailey, or Guildhall?

Non-Lawyer Oh yes; that I can. The obligation to speak true, no on the contrary, if he be guilty, he has every encouragement that can be given to him to engage him to speak false, and upon his oath — to engage him to commit perjury 1. Time for premeditation; 2 Attorneys and counsel to instruct and assist him in the arts of evasion; 3 Time for concerting a story with co-affidavit men and co-perjurers, if he can get any; 4. No questions asked, 5 The assurance that if he swears hard enough, his own testimony, though with the testimony of the prosecutor in the teeth of it, will be conclusive, and save him from all further trouble Truth, therefore, if guilty, he has every encouragement not to speak but something he is bound to say, or condemnation ensues. If the charge be strong enough, to one or other obligation he stands bound continually — either to criminate himself, or to perjure himself.

Lawyer Condemnation! why talk of condemnation? Is not the trial, the inquiry by the result of which he may be either convicted or acquitted, yet to come?

Non-Lawyer. Yes, in the case of an information But be pleased to go on to the next article

5 There are a class of suits which, though not much less frequent than the denominated ones, have never yet received a name; let us call them *Motion Causes* The demand, — instead of being stated by the pen of one sort of lawyer, in the form of a written instrument, an indictment, an information, a declaration lodged in an office, — is stated by the tongue of another sort of lawyer, in a harangue made in open court, called a motion. Instead of being tried on *viâ voce* evidence, the question in this case is tried solely upon *affidavit* evidence.

On an information, after having had the advantage of being condemned once on bad evidence, a man may have the privilege of being condemned again upon better evidence. But in a motion cause, condemned once, he is condemned for good and all if condemned at all, he is condemned upon the bad evidence.

Of these motion causes, some are considered as criminal causes, some as civil causes.

Criminal causes: for example, motions for attachment; motions that the defendant may answer the matters of the affidavit. Civil causes: for example, motion to set aside proceedings for irregularity; motion to set aside an award that has been made a rule of court.

Under the head of motion causes may be ranked (to this purpose at least) petition causes: the causes by which masses of property are disposed of to any amount, in the case where the possessor has been aggregated to that class of insolvent debtors who have been styled bankrupts. In these cases, whatever motion the ears of the judge are entertained with, is preceded by a written instrument called a petition, which gives him little trouble. In these cases, the evidence by which the cause is decided being purely affidavit evidence, they present, in this respect, no difference to distinguish them from the aggregate mass of motion causes.

6. Another occasion on which self-disserving evidence, and that self-criminating, is not only allowed to be called for, but compelled, is that on which the evidence is extracted from a defendant by the subordinate judge called the master, by means of ready written questions, called on this occasion *interrogatories*.

So seldom does the occasion for this operation present itself, that it would not have been worth mentioning, except that it may be seen that it has not been overlooked.

In the case of an information, the second inquiry before a jury comes on of course, if, —on motion for leave to file the information, and the first inquiry—affidavit inquiry (if an inquiry it can be called, on which no questions are asked) in consequence,—the rule to show cause is followed by an absolute rule, leave granted, and information filed. If the second inquiry comes of course, the cause cannot, to the disadvantage of the defendant's side, be determined without it.

In the case of an attachment, unless it be in one out of several hundred (not to say thousand) causes, the first inquiry is the only one; the fate of the defendant is determined by it.

But in a case that has been known now and then to happen, after the fate of the defendant has been determined on the ground of the affidavit evidence, with or without extraneous witnesses on both sides, the defendant alone is subjected to a second inquiry, performed by the ready written questions as above mentioned.

On an occasion of this sort, no more reserve is used than would have been used had the rule *nemo tenetur seipsum prodere* never been heard of. If time is given him to study his answer, and a copy of the interrogatories given him for that purpose, he is thereby examined in the way a defendant is examined in the civil suits called equity suits. If answers are required of him on the spot, he is thereby examined as extraneous witnesses are examined, on the occasion of these same equity suits.

7. Must it be mentioned? Yes, it must; how frequent soever may be the need of mentioning it on other occasions:—or the catalogue of the inconsistent infringements of this rule will not yet be complete. In cases of indictment and information, if the defendant has been convicted by his own default, or by a jury upon the good evidence, the appetite of the partnership is not yet satisfied: the chain of inquiries is not yet regarded as complete, without a third inquiry, in which the cause is tried over again upon the bad, the affidavit, evidence. I speak of the supplemental inquiry, carried on antecedently to, or upon, his being brought up for judgment.

By the same evidence by which the same cause is thus tried over again for the third time, another cause (it frequently happens) is tried for the first and last time,—another cause, of which no jury has had cognizance. I speak of the charges so frequently brought against the same defendant, for misbehaviour alleged to have taken place at a time subsequent to that of his conviction by the jury for the former cause.

Such is the respect really paid to that most useful of all stalking-horses, an English jury: the gorgeous idol, under whose convenient mantle so many abuses lodge themselves. Such is the respect really paid, even in criminal causes, to the accommodating maxim —to the flexible, the truly Lesbian rule, *nemo tenetur seipsum prodere*.

On every man, obligation to betray himself: to every man, encouragement at the same time to perjure himself. Such is the state of things, as often as, in regard to a disputed question, affidavit evidence is received.

8. Coeval, or not much short of coeval, with the practice on jury trials which admits not of the putting a question to either party in the cause, is the practice of the equity courts, by which, to so great an extent, the proceedings in the causes in which juries are employed are obstructed or overruled:—not to speak of the wide-extending class of demands of which equity alone takes cognizance, the all-sufficient power of common law not affording to these rights so much as the semblance of a remedy.

But in no one instance whatever was any cause heard in equity, but—in and by the very instrument (the bill) in and by which the demands of the plaintiff are signified—the defendant is called upon to betray himself, as truly as it is possible for a man to be called upon to betray himself. The questions

being put in writing, time is indeed given him to meditate and concert safe perjury, as in the case of affidavit evidence. Answer he must, or, when he has been plagued and squeezed sufficiently in other ways, his silence is taken for an answer in the affirmative; the bill is taken *pro confesso*, and that which to his prejudice the plaintiff prays may be done, is done.

Lawyer. But equity causes are but civil causes. Admitting this to be the practice in equity, it is not, for this instance at least, the less true, that no man is bound to criminate himself.

Non-Lawyer. True, equity causes are but *civil* causes: so that, by the effect of the question put to him, a man is not exposed to lose more than his whole estate. But of that estate the value may amount to any number of hundreds of thousands of pounds, sums which now-a-days are running on to millions. In a cause denominated a criminal cause, did you ever, in the whole course of your practice, know an instance of a man's suffering a loss to the amount of two thousand pounds? Were the option your own, to which of two losses would you give the preference: to a loss of £2,000, to be taken from you in a cause called a *criminal* cause, or to a loss of £200,000, to be taken from you in a cause called a *civil* cause?

Contradictions in substance are not to be reconciled by words. The jurisdiction of the courts of equity is *civil* merely be it so; for *civil* is but a word. But if *vexation* or *no vexation* is the issue — if feelings themselves, not the words employed in speaking of them, are to be regarded, — the quantity of vexation to which a man may thus be made to subject himself by his testimony, when extracted from him by this court of purely civil jurisdiction, surpasses by a great deal the utmost quantity of vexation of the same kind, to which he could be subjected were his testimony extracted from him with a view to punishment, to be inflicted upon him under the name of punishment, in a court of criminal jurisdiction, where either *attachment* or *information*, and in perhaps the greater part of the cases in which *indictment*, is the name given to the suit.

Taking the ends of justice for the standard, here we see a tissue of inconsistencies. Viewing as the sole ends in pursuit the established ends of judicature, all inconsistency vanishes.

The parties examining one another *vivâ voce*, and at the outset, in the presence of the judge, as in a court of conscience, — so far, no pretence for fees, no more than in a court of conscience: no delay, no pretence for delay, no motives for producing delay, no more than in a court of conscience. Set them to fight with affidavits manufactured by attorneys, fees spring up in plenty. Affidavits the seed, perjuries and fees, like rye-grass and clover, spring up together.

Set them to examine one another in the epistolary style, as in and by a bill in equity (that is to say, a pair of bills, a bill and a cross bill,) the examination takes up twice or three times as many months, as in a court of conscience it would have taken minutes. The prolific examination, crawling on for ten, fifteen, or twenty months, fees pullulating from it all the time. A suit in equity, perhaps, to do nothing but get the evidence; and then a suit at common law, six, twelve, or eighteen months, to give employment to the evidence.

CHAPTER V.

EXAMINATION OF THE CASES IN WHICH ENGLISH LAW EXEMPTS ONE PERSON FROM GIVING EVIDENCE AGAINST ANOTHER.

§ 1. *The exemption improper.*

If the testimony of a party to his own prejudice ought to be compellable, so ought that of any other person. If the vexation of which it might be productive to Reus to contribute by his *own* evidence to subject himself to the obligations of justice, affords no sufficient reason for the dissolving of these obligations, — still less can any good reason be drawn from the vexation resulting from that same source, for depriving justice of the benefit of any *other* testimony.

This sort of second-hand vexation, reflected from the former, must be of one or other of two descriptions: the seat of it, in the bosom of one or other of two persons.

Is it in consideration of the vexation that Reus himself would suffer, from the prejudice that might accrue to him from the evidence of Amicus, — is it for this reason, that justice should be deprived of the benefit of Amicus's testimony?

But it will hardly be said, that a man's sufferings will be greater, at seeing evidence to his prejudice extracted from another bosom, than at feeling it extracted from his own.

Is it in consideration of the vexation that Amicus would suffer, from the thought of the prejudice that might accrue from his evidence to Reus, — is it for this reason that justice should be deprived of the benefit of the testimony of Amicus?

But it will hardly be said, that a man's sufferings will be greater at the idea of an evil considered as about to befall another person (whether from his own instrumentality, or from any other cause,) than at the idea of the same evil — of an evil the same in magnitude (probability and proximity considered,) as about to fall upon himself.

Secus, if Reus and Amicus were Nisus and

Euryalus. But Reus and Amicus are not Nisus and Euryalus; they are average men. It is not to fabulous, nor yet to extraordinary characters, but to ordinary ones, that the provisions of the legislator ought to be adapted.

Suppose such a plea admitted; observe the consequence. By what criterion shall the degree of sympathetic sensibility on the part of Amicus be determined? By what sure token, open to the eyes and estimation of the judge, shall it be discovered that the fate of Reus is in any degree an exciting cause of the affection in question, in the breast of Amicus? From the ties of blood? The presumption is strong; but unhappily not so strong as to be conclusive. From any other ties? The presumption is weaker and weaker *ad infinitum*.

Admitted, the plea would put into the hands of the judge, at least with the concurrence of the proposed witness, the faculty of excluding or admitting any man's testimony at pleasure. The sentimental candidate for exclusion, what in this case should he do?—should he speak, and weep, and faint for himself? or fee counsel to speak, and weep, and faint for him?

§ 2. *Lawyer and client.**

English judges have taken care to exempt the professional members of the partnership from so unpleasant an obligation as that of rendering service to justice. "Counsel and attorneys . . . . ought not to be" (say rather *are not*) "permitted to discover the secrets of their clients, though they offer themselves for that purpose."†

On which of the two above-mentioned grounds does the exemption rest in those learned bosoms? Is it that the client would suffer so much more from being hurt by his lawyer's testimony than by his own? or that a man is so much dearer to his advocate and his attorney, than to himself?

The oracle has given its response:—"The privilege is that of the client, not of the attorney."‡

When, in consulting with a law adviser, attorney or advocate, a man has confessed his delinquency, or disclosed some fact which, if stated in court, might tend to operate in proof of it, such law adviser is not to be suffered to be examined as to any such point. The law adviser is neither to be compelled, nor so much as suffered, to betray the trust thus reposed in him. Not suffered? Why not? Oh, because to betray a trust is treachery; and an act of treachery is an immoral act.

An immoral sort of act, is that sort of act, the tendency of which is, in some way or other, to lessen the quantity of happiness in society. In what way does the supposed cause in question tend to the production of any such effect? The conviction and punishment of the defendant, he being guilty, is by the supposition an act the tendency of which, upon the whole, is beneficial to society. Such is the proposition which for this purpose must be assumed. Some offences (it will be admitted by everybody) are of that sort and quality, that the acts by which they are punished do possess this beneficial tendency. Let the offence in question be of the number: it is of such only as are of that number that I speak. The good, then, that results from the conviction and punishment, in the case in question, is out of dispute: where, then, is the additional evil of it when produced by the cause in question? Nowhere. The evil consists in the punishment: but the punishment a man undergoes is not greater when the evidence on which the conviction and punishment are grounded happens to come out of the mouth of a law adviser of his, than if it had happened to come out of his own mouth, or that of a third person.

But if such confidence, when reposed, is permitted to be violated, and if this be known (which, if such be the law, it will be,) the consequence will be, that no such confidence will be reposed. Not reposed?—Well: and if it be not, wherein will consist the mischief? The man by the supposition is guilty; if not, by the supposition there is nothing to betray: let the law adviser say everything he has heard, everything he can have heard from his client, the client cannot have anything to fear from it. That it will often happen that in the case supposed no such confidence will be reposed, is natural enough: the first thing the advocate or attorney will say to his client, will be,—Remember that, whatever you say to me, I shall be obliged to tell, if asked about it. What, then, will be the consequence? That a guilty person will not in general be able to derive quite so much assistance from his law adviser, in the way of concerting a false defence, as he may do at present.

Except the prevention of such pernicious confidence, of what other possible effect can the rule for the requisition of such evidence be productive? Either of none at all, or of the conviction of delinquents, in some instances in which, but for the lights thus obtained, they would not have been convicted. But in this effect, what imaginable circumstance is there that can render it in any degree pernicious and undesirable? None whatever. The conviction of delinquents is the very end of penal justice.

Observe the inconsistency between the rule in the case of the particular species of contract in question, and the rules observed in general in respect to contracts. Of contracts

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* See farther, Vol. VI. p. 99.

† Bull. N. P. 284. from Str. 140. Lindsay v. Talbot. ‡ Ibid.

in general the fulfilment is beneficial to society: of contracts in general the fulfilment is accordingly enforced. But there are some contracts the fulfilment of which would be pernicious to society: every crime, every offence, supposing the prohibition put upon it by the law to be well grounded, affords an example; viz. that of a contract for the joining in the commission of such offence. The contract between a delinquent and his law adviser, is a contract which has for its object the enabling the delinquent to escape the punishment which is his due With what consistency, to what end, would the law seek to enforce a contract to such an effect? Suppose a like contract between a delinquent and his jailer—a contract, the object of which shall be to enable the delinquent to escape Does the law seek to enforce this sort of contract? No, not anywhere But why not? It might, with as much reason as in the other case

If the law adviser, of his own motion, the law neither commanding nor forbidding him, were to offer his testimony for the purpose of promoting the conviction of his client, the imputation of treachery would have, if not a good ground, at any rate a better, a more plausible ground. But the question is not, whether the lawyer shall thus offer his testimony, but whether the law shall command it, or authorize him, nay force him, to refuse it.

Compare the law in this case, with the law in the case of treason—misprision of treason If, knowing of an act of treason committed, a man forbears to give information of it, such forbearance is punished, and certainly not without reason, as a high crime In the case of the law adviser, the rule now under consideration would probably be deemed applicable to the crime of treason, as well as to all others The law in this case finds a man in whom it protects that very species of conduct which it punishes in every other man and that species of conduct a mischievous one, one of which the effects cannot but be pernicious To what end, with what consistency, can the law find out a man to receive with safety, and even under an obligation of concealment, that confidence, that pernicious confidence, which it punishes in every other man?

Another inconsistency. To confidents taken from other professions, neither the obligation nor the permission of secrecy, as against justice, extends. A physician, a surgeon, is compelled to disclose what may operate towards the conviction of his patient.

To the credit of the judges of latter times, this superstition appears to have been not much to their taste: by decision after decision they have pared it down and narrowed it, to a very considerable degree. From a counsel, from an attorney, evidence may be extracted of facts which came to their knowledge before they were retained:* of facts disclosed to them by the client after the suit was at an end by compromise:† of facts which, though falling under their cognizance no otherwise than in consequence of their professional intercourse with their client, were not directly communicated and confessed by him ‡ of facts which, though coming to their cognizance in consequence of such intercourse, might (it is said) have come to their cognizance without it ‖

In a word, so fine has the hair been split, that, when an attorney has been consulted with, not (it is said) as an attorney, but only as a friend, evidence of the facts that come under his cognizance has been extracted from his mouth § Quære, by what sign to know when it is the attorney who is present, and when it is the friend? In the case of the counsel, there might have been less difficulty: the professional robe, by being off or on, might distinguish the counsel from the friend.

Hawkins,¶ speaking to the question, "What kind of receipt of a felon will make the receiver an accessary after the fact?" says, "It seems agreed that, generally, any assistance whatever given to one known to be a felon, in order to hinder his . . . suffering the punishment to which he is condemned, is a sufficient receipt for this purpose." (By the word *condemned*, he means no more than doomed by the general disposition of the law, not *condemned* in consequence of a particular prosecution instituted for in all the examples he gives, the assistance spoken of is given before prosecution) The lawyer who, knowing from the confession of his client that such client has committed a felony, enables him by his counsel to avoid "suffering the punishment to which he is condemned," is, according to the above definition, an accessary to such felony, viz an accessary after the fact In practice he certainly would not be deemed so What I mention the case for, is to show the inconsistency In the case of the law adviser, the "policy,"** as it is called, of the law, is to protect that sort of man in affording to a crime that very sort of assistance, the giving of which it punishes in any other sort of man—punishes, and even to such a degree as to treat him as an accomplice In a case like this, it would certainly be too much to punish the law adviser as an

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* Hawkins, § 84. † Ibid. § 90.

‡ Viz. that a deed erased had been in a different plight. Ibid. § 86

‖ To prove that the client was the same person who took an oath, for which he is under an indictment for perjury: so also to prove the handwriting of the client to a note or other instrument.

§ Hawkins, § 91.

¶ Cap. 29, § 26, vol. iv. p. 209.

** Leach's Hawkins, iv. 434: b. iv. c. 46, § 84.

accomplice, for lending his advice (which is his mode of assistance) to a guilty client, or for not spontaneously disclosing such lights towards the ascertainment of his guilt, as it has happened to him to collect. It might deter the lawyer from lending his assistance to an innocent person when accused, by the fear of being involved in the punishment in case of his proving guilty. But to what use, or with what consistency, forbid his disclosing any such proof of guilt, even though called upon so to do?

A distinction, which seems an important one, is one of which I see no traces in the books. The confidence supposed to be reposed in the law adviser,—is it reposed after prosecution, for the purpose of the guilty party's being enabled to escape the punishment due to his guilt? or is it reposed before prosecution—reposed (suppose) while the offence is in contemplation, and in the view of learning the means of committing it with impunity and success? In the former case, the relation of the law adviser to the offence, in case of criminal consciousness on his part, is that of an accessary after the fact; in the other, that of an accessary before or during the fact; that sort of accessary who, in the technical language of the law, is in many cases termed a principal. I say, in case of criminal consciousness: for, from the circumstance of an attorney's having it in his power to give evidence, the effect of which, added to other evidence, may be to give birth to the conviction of his client in respect of a crime or other offence,—it does not follow by any means that there must have been any criminal consciousness on his part; that the picture of the transaction should have been present to his mind, clothed with all those circumstances the union of which is necessary to the constituting it a crime. In case of perjury (for example,) the attorney may have learnt from his client the existence of a fact incompatible with another fact, the existence of which the client has averred upon oath, but without having heard of his ever having made any such averment: or, *vice versâ*, he may have been privy to the making of such averment upon oath, without having ever received information, either from the client or anybody else, of the existence of the fact by which such averment is demonstrated to be perjurious.

"A counsel, solicitor, or attorney, cannot conduct the cause of his client" (it has been observed) "if he is not fully instructed in the circumstances attending it: but the client" (it is added) "could not give the instructions *with safety*, if the facts confided to his advocate were to be disclosed."* Not with safety? So much the better. To what object is the whole system of penal law directed, if it be not that no man shall have it in his power, to flatter himself with the hope of safety, in the event of his engaging in the commission of an act which the law, on account of its supposed mischievousness, has thought fit to prohibit? The argument employed as a reason against the compelling such disclosure, is the very argument that pleads in favour of it.

This being the professed object of the English system of law, as well as of every other system of law,—viz. the prevention of offences,—is it reconcilable to the idea of wisdom or consistency, that it should lay down a rule, the effect of which, without contributing to the protection of the innocent, or preventing vexation in any other shape, is purely and simply to counteract its own designs?

In vain would it be to impute the favouring of treachery to a regulation by which such disclosures were to be made obligatory. In saying, "a criminative fact, stated by a delinquent to his law adviser, shall, if called for, be disclosed by him in evidence," it gives sufficient warning to offenders not to seek for safety in such means.

Thus much as to the case where the effect of the disclosure may be to subject the client to suffer as for an offence. Where the effect of it does not go beyond the subjecting him to some non-penal obligation to which he otherwise might not be subjected, or to debar him from some right of which he otherwise might have come into possession, or remained possessed,—the objection is no more reconcilable with the main object of the law than in the other case. In every such case, though by a process grievously and unnecessarily dilatory and expensive,† what the law does, or to be consistent ought to do, is to compel each party, out of his own mouth (or, to speak literally, by his own hand,) to make disclosure of such facts as, lying within his own knowledge, are of a nature to contribute towards substantiating the claim of the adversary. Can there be any reason why that information, which he is compelled to give by his own hand, should not be obtained with equal facility from another hand, from which, if there be any difference, it may be extracted with less reluctance? Disclosure of all legally-operative facts, facts investitive or divestitive of right—of all facts on which right depends,—such, without any exception, ought to be—such, with a few inconsistent exceptions, actually is, the object of the law. On the part of the individuals of all descriptions by whom information to such effect happens in each instance to be possessed, the two species of behaviour by which the

* Peake on Evidence (edit. 1801,) p. 126.

† A bill in equity.

fulfilment of this design may be counteracted in such instance, are falsehood and concealment. If falsehood is not favoured by the law, why should concealment? a mode of conduct which, without the guilt (at least in as far as guilt is measured by punishment,) is attended, so far as it takes place, with the same pernicious and undesirable effect

Concealment of those facts, the knowledge of which is necessary to the fulfilment of the predictions delivered by the substantive branch of the law, is a mode of conduct punished in some instances as an offence, and even as a crime. The least that can be required by consistency is, that the species of fraud thus punished in some cases, should not in any case be protected and encouraged

To give encouragement to the spirit of chicane, is an imputation which, on here and there an occasion, men are bold enough to cast upon the general complexion of the law, though not in a hundredth part of the instances in which a just warrant might be found for it. An objection to a proposition in which any such term as chicane is the characteristic word, is, that it is indistinct and vague. The rules of the class of that against which I have been here contending, may serve at once to fix the import, and to exemplify the ground of it.

Expect the lawyer to be serious in his endeavours to extirpate the breed of dishonest litigants! Expect the fox-hunter first to be serious in his wishes to extirpate the breed of foxes.

Idle as a reproach,—as a memento this ought never to be out of mind. It is thus, and thus only, that it can be visible to the legislator, where to look for opposition, and where, if anywhere, for assistance

[*Farther Remarks by the Editor.*—In the notice of the *Traité des Preuves Judiciaires*, in the Edinburgh Review,* the rule which excludes the testimony of the professional assistant, is with much earnestness defended The grounds of the defence, in so far as they are intelligible to me, reduce themselves to those which follow —

1. The first argument consists of two steps, whereof the former is expressed, the latter understood; and either of them, if admitted, destroys the other. The proposition which is asserted is, that the aid which is afforded to an accused person by his advocate, is of exceedingly great importance to justice. The proposition which is insinuated is, that of this aid he would be deprived, if his advocate were rendered subject to examination.—If the only purpose, for which an advocate can be of use, be to assist a criminal in the concealment of his guilt, the last proposition is true: but what becomes of the former? If, on the other hand (as is sufficiently evident) an advocate be needful on other accounts than this,—if he be of use to the innocent, as well as to the guilty—to the man who has not anything to conceal, as well as to the man who has,—what is to hinder an innocent, or even a guilty defendant, from availing himself of his advocate's assistance for all purposes, except that of frustrating the law?

2. The second argument consists but of one proposition it is, that Lord Russell's attorney would have been a welcome visitor, with his notes in his pocket, to the office of the solicitor of the Treasury To the exalted personages, whose desire it was to destroy Lord Russell, any person would, it is probable, have been a welcome visitor, who came with information in his pocket, tending to criminate the prisoner. From this, what does the reviewer infer? That no information tending to criminate the prisoner should be received?—that the truth should not, on a judicial occasion, be ascertained? Not exactly only that one means, a most efficient means, of ascertaining it, should be rejected. Are we to suppose, then, that on every judicial occasion the thing which is desirable is, that the laws should not be executed? Then, indeed, the reviewer's conclusion would be liable to no other objection than that of not going nearly far enough, since all other kinds of evidence might, and indeed ought, on such a supposition, to be excluded likewise.

So long as the law treats any act as a crime which is not a crime, so long it will, without doubt, be desirable that some acts which are legally crimes should escape detection and by conducing to that end, this or any other exclusionary rule may palliate, in a slight degree, the mischiefs of a bad law. To make the conclusion hold universally, what would it be necessary to suppose? Only that the whole body of the law is a nuisance, and its frustration, not its execution, the end to be desired

Laws are made to be executed, not to be set aside For the sake of weakening this or that bad law, would you weaken all the laws? How monstrous must that law be, which is not better than such a remedy! Instead of making bad laws, and then, by exclusionary rules, undoing with one hand a part of the mischief which you have been doing with the other, would it not be wiser to make no laws but such as are fit to be executed, and then to take care that they be executed on all occasions?

3. The third argument is of that ingenious and sometimes very puzzling sort, called a dilemma. If the rule were abolished, two courses only, according to the reviewer, the lawyer would have: he must enter into communication with the opposite party from the

* No. 79, March 1824.

beginning, to which course there would be objections; or he must wait till he had satisfied himself that his client was in the wrong, and must enter into communication with the opposite party *then*; to which course there would be other objections. What the force of these objections may be, it is not necessary, nor would it be pertinent, to inquire: since neither justice nor Mr. Bentham demand that he should enter into communication with the opposite party at all. What is required is only, that if, upon the day of trial, the opposite party should choose to call for his evidence, it may not be in his power, any more than in that of any other witness, to withhold it.

One would not have been surprised at these arguments, or even worse, from an indiscriminate eulogizer of "things as they are;" this, however, is by no means the character of the writer of this article: it is the more surprising, therefore, that he should have been able to satisfy himself with reasons such as the three which we have examined. Not that these are all the reasons he has to give: the following paragraph seems to be considered by him as containing additional reasons to the same effect: —

"Even in the very few instances where the accused has intrusted his defender with a full confession of his crime, we hold it to be clear that he may still be lawfully defended. The guilt of which he may be conscious, and which he may have so disclosed, he has still a right to see distinctly proved upon him by legal evidence. To suborn wretches to the commission of perjury, or procure the absence of witnesses by bribes, is to commit a separate and execrable crime; to tamper with the purity of the judges is still more odious: but there is no reason why any party should not, by fair and animated arguments, demonstrate the insufficiency of that testimony, on which alone a righteous judgment can be pronounced to his destruction. Human beings are never to be run down like beasts of prey, without respect to the laws of the chase. If society must make a sacrifice of any one of its members, let it proceed according to general rules, upon known principles, and with clear proof of necessity: 'let us carve him as a feast fit for the gods, not hew him as a carcass for the hounds.' Reversing the paradox above cited from Paley, we should not despair of finding strong arguments in support of another, and maintain that it is desirable that guilty men should sometimes escape, by the operation of those general rules which form the only security for innocence."

In reading the above declamation, one is at a loss to discover what it is which the writer is aiming at. Does he really think that, all other things being the same, a system of procedure is the better, for affording to criminals a chance of escape? If this be his serious opinion, there is no more to be said; since it must be freely admitted that, reasoning upon this principle, there is no fault to be found with the rule. If it be your object not to find the prisoner guilty, there cannot be a better way than refusing to hear the person who is most likely to know of his guilt, if it exist. The rule is perfectly well adapted to its end: but is that end the true end of procedure? This question surely requires no answer.

But if the safety of the innocent, and not that of the guilty, be the object of the reviewer's solicitude, — had he shown how an innocent man could be endangered by his lawyer's telling all he has to tell, he would have delivered something more to the purpose than any illustration which the subject of carcasses and hounds could yield. If he can be content for one moment to view the question with other than fox-hunting eyes, even he must perceive that, to the man who, having no guilt to disclose, has disclosed none to his lawyer, nothing could be of greater advantage than that this should appear; as it naturally would if the lawyer were subjected to examination.

"There is no reason why any party should not, by fair and animated arguments, demonstrate the insufficiency of that testimony, on which alone a righteous judgment can be pronounced to his destruction." This, if I rightly understand it, means, that incomplete evidence ought not, for want of comments, to be taken for complete. we were in no great danger of supposing that it ought. But the real question is, — should you, because your evidence is incomplete, shut out other evidence which would complete it. After the lawyer has been examined, is the evidence incomplete notwithstanding? then is the time for your "fair and animated arguments." Is it complete? then what more could you desire?

The denunciation which follows against *hunting down* human beings without respect for the laws of the chase, is one of those proofs which meet us every day, how little, as yet, even instructed Englishmen are accustomed to look upon judicature as a means to an end, and that end the execution of the law. They speak and act, every now and then, as if they regarded a criminal trial as a sort of game, partly of chance, partly of skill, in which the proper end to be aimed at is, not that the truth may be discovered, but that both parties may have fair play: in a word, that whether a guilty person shall be acquitted or punished, may be, as nearly as possible, an even chance.

I had almost omitted the most formidable argument of all, which was brought forward by M. Dumont, not as decisive, but as deserving of consideration, and which the re-

viewer, who adopts it, terms "a conclusive *reductio ad absurdum*." This consists in a skilful application of the words *spy* and *informer* (espion, délateur,) two words forming part of a pretty extensive assortment of vaguely vituperative expressions, which possess the privilege of serving as conclusive objections against any person or thing which it is resolved to condemn, and against which, it is supposed, no other objections can be found.

Spies and informers are bad people, a lawyer who discloses his client's guilt is a spy and an informer, he is therefore a bad man, and such disclosure is a bad practice, and the rule by which it is prohibited is a good rule Such, when analyzed into its steps, is the argument which we are now called upon to consider

But to form a ground for condemning any practice, it is not enough to apply to the person who practises it an opprobrious name it is necessary, moreover, to point out some pernicious tendency in the practice, to show that it produces more evil than good It cannot be pretended that the act of him, who, when a crime comes to his knowledge (be it from the malefactor's own lips, or from any other source,) being called upon judicially to declare the truth, declares it accordingly, is a pernicious act. On the contrary, it is evident that it is a highly useful act the evil occasioned by it being, at the very worst, no more than the punishment of the guilty person—an evil which, in the opinion of the legislature, is outweighed by the consequent security to the public Call this man, therefore, an informer or not, as you please, but if you call him an informer, remember to add, that the act which constitutes him one, is a meritorious act

M. Dumont expresses an apprehension that no honourable man would take upon him the functions of an advocate, if compelled to put on what he is pleased to call the character of an informer. Further reflection would, I think, have convinced him that this apprehension is chimerical There is scarcely anything in common between the two characters of an informer and of a witness The antipathy which exists against the former extends not to the latter. A witness, as such, does not take money for giving evidence, as an informer frequently does for giving information The act of an informer is spontaneous: he is a man who goes about of his own accord doing mischief to others: so at least it appears to the eyes of unreflecting prejudice. The evidence of the witness may be more fatal to the accused than the indications given by the informer; but it has the appearance of not being equally spontaneous: he tells what he knows, because the law compels him to say something, and because, being obliged to speak, he will speak nothing but the truth: but for anything that appears, if he had not been forced, he would have held his tongue and staid away. An honourable man, acting in the capacity of an advocate, would, by giving true evidence, incur the approbation of all lovers of justice, and would not incur the disapprobation of any one what, therefore, is there to deter him? unless it be a hatred of justice

The reviewer adds, that M. Dumont's argument "might be assisted with a multiplicity of reasonings" these, as he has not stated them, Mr Bentham, probably, may be pardoned for being ignorant of The reviewer is modest enough to content himself with the "single and very obvious remark, that the author evidently presumes the guilt from the accusation" a remark which could have had its source in nothing but the thickest confusion of ideas Had Mr Bentham recommended condemnation without evidence, or any other practice which would be indiscriminately injurious to all accused persons, innocent or guilty,—it might then have been said of him, with some colour of justice, that he presumed the guilt from the accusation. But when, of the practice which he recommends, it is a characteristic property to be a security to the innocent, a source of danger to the guilty alone,—under what possible pretence can he be charged with presuming the existence of guilt?—though he may be charged, sure enough, with desiring that where there is guilt, it may be followed by punishment, a wish probably blameable in the eyes of the reviewer, who thinks it "desirable that guilty men should sometimes escape."

Thus weak are all the arguments which could be produced against this practice, by men who would have been capable of finding better arguments, had any better been to be found It may appear, and perhaps ought to appear, surprising, that men generally unprejudiced, and accustomed to think, should be misled by sophistry of so flimsy a texture as this has appeared to be Unhappily, however, there is not any argument so palpably untenable and absurd, which is not daily received, even by instructed men, as conclusive, if it makes in favour of a doctrine which they are predetermined to uphold In the logic of the schools, the premises prove the conclusion. In the logic of the affections, some cause, hidden or apparent, having produced a prepossession, this prepossession proves the conclusion, and the conclusion proves the premises. You may then scatter the premises to the winds of heaven, and the conclusion will not stand the less firm.—the affections being still enlisted in its favour, and the show, not the substance, of a reason being that which is sought for,—if the former premises are no longer defensible, others of similar quality are easily found. The only mode of

attack which has any chance of being successful, is to look out for the cause of the prepossession, and do what may be possible to be done towards its removal: when once the feeling, the real support of the opinion, is gone, the weakness of the ostensible supports, the so-called reasons, becomes manifest, and the opinion falls to the ground.

What is plainly at the bottom of the prepossession in the present case, is a vague apprehension of danger to innocence. There is nothing which, if listened to, is so sure to mislead as vague fears. Point out any specific cause of alarm, anything upon which it is possible to lay your hand, and say, from this source, evil of this or that particular kind is liable to flow; and there may be some chance of our being able to judge whether the apprehension is or is not a reasonable one. Confine yourself to vague anticipations of undefined evils, and your fears merit not the slightest regard: if you cannot tell what it is you are afraid of, how can you expect any one to participate in your alarm? One thing is certain: that, if there be any reason for fear, that reason must be capable of being pointed out: and that a danger which does not admit of being distinctly stated, is no danger at all. Let any one, therefore, ask himself, — supposing the law good, and the accused innocent, — what possible harm can be done him by making his professional assistant tell all that he knows?

He may have told to his lawyer, and his lawyer, if examined, may disclose, circumstances which, though they afford no inference against him, it would have been more agreeable to him to conceal. True; but to guard him against any such unnecessary vexation, he will have the considerate attention of the judge: and this inconvenience, after all, is no more than what he may be subjected to by the deposition of any other witness, and particularly by that of his son, or his servant, or any other person who lives in his house, much more probably than by that of his lawyer.

Whence all this dread of the truth? Whence comes it that any one loves darkness better than light, except it be that his deeds are evil? Whence but from a confirmed habit of viewing the law as the enemy of innocence — as scattering its punishments with so ill-directed and so unsparing a hand, that the most virtuous of mankind, were all his actions known, could no more hope to escape from them, than the most abandoned of malefactors? Whether the law be really in this state, I will not take upon myself to say: sure I am, that if it be, it is high time it should be amended. But if it be not, where is the cause of alarm? In men's consciousness of their own improbity. Children and servants hate tell-tales; thieves hate informers, and peaching accomplices; and, in general, he who feels a desire to do wrong, hates all things, and rules of evidence among the rest, which may, and he fears will, lead to his detection.

Thus much in vindication of the proposed rule. As for its advantages, they are to be sought for not so much in its direct, as in its indirect, operation. The party himself having been, as he ought to be, previously subjected to interrogation, — his lawyer's evidence, which, though good of its kind, is no better than hearsay evidence, would not often add any new facts to those which had already been extracted from the lips of the client. The benefit which would arise from the abolition of the exclusionary rule, would consist rather in the higher tone of morality which would be introduced into the profession itself. A rule of law which, in the case of the lawyer, gives an express licence to that wilful concealment of the criminal's guilt, which would have constituted any other person an accessary in the crime, plainly declares that the practice of knowingly engaging one's self as the hired advocate of an unjust cause, is, in the eye of the law, or (to speak intelligibly) in that of the law-makers, an innocent, if not a virtuous practice. But for this implied declaration, the man who in this way hires himself out to do injustice or frustrate justice with his tongue, would be viewed in exactly the same light as he who frustrates justice or does injustice with any other instrument. We should not then hear an advocate boasting of the artifices by which he had trepanned a deluded jury into a verdict in direct opposition to the strongest evidence; or of the effrontery with which he had, by repeated insults, thrown the faculties of a *bonâ fide* witness into a state of confusion, which had caused him to be taken for a perjurer, and as such disbelieved. Nor would an Old Bailey counsel any longer plume himself upon the number of pickpockets whom, in the course of a long career, he had succeeded in rescuing from the arm of the law. The professional lawyer would be a minister of justice, not an abettor of crime — a guardian of truth, not a suborner of mendacity: and not at *his* hands only, in another sphere, whether as a private man or as a legislator, somewhat more regard for truth and justice might be expected than now, when resistance to both is his daily business, and, if successful, his greatest glory; but, through his medium, the same salutary influence would speedily extend itself to the people at large. Can the paramount obligation of these cardinal virtues ever be felt by them as it ought, while they imagine that, on such easy terms as those of putting on a wig and gown, a man obtains, and on the most important of all occasions, an exemption from both? — *Conclusion of Remarks by the Editor.*]

§ 3. *Trustee and cestuy que trust.*

On the subject of *trust-prejudicing* evidence, the decision, if not quite so simple as in the preceding cases, will be grounded on considerations not less conclusive.

The testimony being that of the trustee; whose are the feelings, in consideration of which the testimony in this case can be proposed to be excluded? The feelings of the *cestuy que trust*, the *fidei-committee*, to whose prejudice it redounds? But if the testimony thus proposed to be called for, were his own, no vexation of which the obligation could be productive, could form any sufficient ground for the exclusion of it Will it be said, that the vexation produced in his breast by perceiving the evil in question brought on him by the testimony of another person, his trustee, will be greater than what would be produced by seeing the same evil brought on him by his own testimony? The answer will hardly be in the affirmative. but—be it on the one side or the other—in regard to the question of exclusion, it is not in the nature of things that it should make any material difference.

Is it in tenderness to the feelings of the trustee, that the proposed wound should be inflicted on the vitals of justice? But the vexation attendant on the delivery of the testimony could never rise to such a pitch as to constitute a sufficient ground for the exclusion of it, although it were on the deponent's *own* head that the evil were to fall much less where the head of *another* person is the head to bear it. Will the prospect of the suffering of the *cestuy que trust* be more insupportable to the trustee than if it were his own? Good, as between Nisus and Euryalus, Nisus being trustee. But our trustee is no hero, neither of an epic poem, nor a romance, nor even of real life. He is an average man: an exact likeness may be seen of him in the Propositus of Blackstone and Lord Coke.

Putting together the self-regarding feelings of the suffering *cestuy que trust*, and the sympathetic feelings of the trustee, will they by their joint force constitute a sufficient ground for the exclusion? That nothing may be overlooked, even this case shall undergo examination. Be it ever so strong, it will never be strong enough to support the exclusive rule. That practical point settled, the speculative question, whether the effect of the decomposition will be on the side of diminution or increase, may be left to take its chance

The case of trusteeship, at least in the common as well as technical import of the word, will not rise above the level of that sort of evidence which, were it self-regarding, would fall under the denomination of self-onerative evidence: it will not rise to the level of self-criminating. It has never been proposed that, on the ground of his being trustee for a thief or murderer, a man should be exempt from the obligation of delivering testimony tending to convict such thief or murderer of his crime In this more afflictive case, however, the ground for exclusion is, in proportion to the difference in point of afflictiveness, stronger than in the less afflictive case, where the loss of money or money's worth would constitute the worst evil that could be made to fall on the *cestuy que trust* by the testimony of the trustee.

§ 4. *Husband and Wife.*

The question, of which, the species of evidence, for the designation of which the epithet *family-peace-disturbing* has been appointed, is the subject, is a question in no small degree complicated The necessity of grappling with it, owes its birth to the arrangements made on this subject by English jurisprudence

Whatsoever be the relations (natural or factitious, temporary or perpetual) subsisting between a number of persons living together in the compass of the same family,—relations between husband and wife, parents and children, masters or mistresses and servants, housekeepers and inmates,—any event by which the emotion of ill-will is produced in any one of them towards any other, may *pro tanto*, be said to operate to the disturbance of the family peace: and ill-will being a bad thing, and peace a good thing, the more effectually any disturbance can by any arrangement of law be prevented from being given to it, so much the better Disturbance of the peace of a family is vexation, and of vexation, if not necessary to the averting of a preponderant vexation, the production ought always to be avoided.

That,—testimony being delivered by a person standing in any one of these relations, such as to operate to the prejudice of the person standing in the opposite and corresponding relation,—vexation will be likely enough to be produced in the breasts of both, is manifest enough But in any of these instances, ought such vexation to be considered as forming a sufficient ground for the exclusion of the testimony? Over and over again, the answer has been already made

The case of husband and wife is the only sample which will here be taken, being the only one which is taken in English law for the ground of an exclusionary rule.

To present a distinct conception, the evil of the vexation capable of flowing from this source must, in the first place, be decomposed.

Evil flowing from sympathy, evil flowing from antipathy or ill-will:—to one or other of these two elements, the whole evil of the mixed mass may be referred.

1. As to the evil from sympathy, it has already been put into the balance, under the head of trust-prejudicing evidence. In the case of husband and wife, whether considered on the part of the male or on the part of the female, the affection of sympathy may naturally be considered as operating with greater, much greater, force, than in the case of an average trustee. On the other hand, a point not to be overlooked, is, that the opposite affection (and that acting with a force proportioned to the mutual vicinity of the two parties, and to the inflexibility of the ties of various kinds by which they are connected) is no less capable of finding a place. Yet, after all allowances made, it will not be less true that, as between an average husband and an average wife—as between Baron and Feme in the character of Propositus and Proposita—an affection of the sympathetic kind cannot in reason but be considered as subsisting, and in a degree of force exceeding that which can reasonably be considered as subsisting on either side, as between an average trustee and his average *cestuy que trust*.

Justice thus done to all parties,—the propriety of admission in this case, and the impropriety of the exclusionary rule, considered as placed on the ground of sympathy, will not be the less unquestionable.

With all possible disposition to do justice to the conjugal affection maintained on the one hand in the breast of Propositus by the amiable qualities of Proposita—on the other hand, in the bosom of Proposita by the estimable qualities of Propositus,—it seems difficult to avoid admitting, that the affection of Propositus towards Proposita will not be altogether upon a level with the affection of the same Propositus for his earlier and still more intimate acquaintance, himself: and no less so as between the affection of Proposita towards Propositus on the one hand, and the affection of the same Proposita towards the amiable partner of Propositus on the other. For, let it not be forgotten, that the bosoms to which the thermometer is for this purpose to be applied, are the bosoms of Propositus and Proposita, not of Pœtus and Arria, any more than of Nisus and Euryalus in the other case.

Thus much seemed necessary, yet not more than necessary, to give the corrective requisite for reducing to the standard of plain and ordinary nature the heroic dimensions given to the conjugal flame by the sentimentality of English lawyers.

As, therefore, vexation on a self-regarding account has been shown not to be a sufficient ground for exclusion, neither can the image of the same vexation, presented by sympathy.

Turn next to the evil from antipathy.

The law will not suffer the wife to be a witness for or against her husband: this is a proposition put by a reporter into the mouth of the first Earl of Hardwicke. "The reason is . . . . to preserve the peace of families: and therefore I shall never encourage such a consent." * Here, by good fortune, we have a distinct proposition, with an assignable author, and he of the first degree of professional respectability.

When, on failure of the beaten track of analogy, we find among the opinions of professional lawyers an argument that wears upon the face of it any connexion with the principle of utility, it consists commonly in a reference to some one head of inconvenience or advantage, no account being taken of any other. But it is of the essence of law to be a choice of evils: including under the notion of evil, the absence or negation of this or that lot of positive good. It will happen, in many cases, that not only there shall be an advantage on one side to set against an inconvenience on the other, but in the one scale there shall be a number of perfectly distinct advantages, weighing against a number of equally distinct inconveniences in the other. A narrow and imperfect lot of reason, is better than a mere caprice, having no relation to good or evil, to pain or pleasure, on either side: but from an imperfect lot of reason, no better than imperfect conclusions can reasonably be expected.

In legislative argumentation it is not uncommon to have a number of reasons, such as they are, all grounded on the principle of utility, adduced on both sides: but in judicial argument, if you get a single article in the shape of an original reason, an indication of convenience or inconvenience, it is a sort of a prize. Cases against cases, *i. e.* decisions against decisions, you will have in plenty; but if you have anything in the shape of a rational reason—of a reason referable to the principle of utility,—you will find it stand alone; and a mere allusion, as vague and incompletely expressed as it is possible to conceive, is the shape in which it comes. Hard—hardship—policy—peace of families—absolute necessity:—some such words as these are the vehicles, by which the faint spark of reason that exhibits itself is conveyed. These are the leading terms, and these are all you are furnished with; and out of these you are to make an applicable, a distinct and intelligible proposition, as you can.

Hawkins, one of the best and most comprehensive heads the profession of the law ever possessed, had already taken up the same argument, and added to it another. "Regularly, the one shall not be admitted to give evidence against the other" (husband and wife,) "nor the examination of the one be

* Peake (edit. 1801,) 123. Barker *v.* Sir Woolston Dixie. Cases temp. Hardwicke, 264.

made use of against the other, by reason of the implacable dissension which might be caused by it, and the great danger of perjury from taking the oaths of persons under so great a bias, and the extreme hardship of the case."*

Implacable dissension is one argument the same in substance as that which occurred to and weighed with Lord Hardwicke

Great danger of perjury is another, not stated as having been noticed by Lord Hardwicke.

Of the words "extreme hardship of the case," I cannot make out any argument distinct from the two preceding ones

These are the reasons for which, not only the wife is not allowed to be called as a witness against her husband, but even her extrajudicial declarations are not admitted in evidence against him, though his own extrajudicial declarations are.

The argument from the danger of perjury arises out of the supposed sympathy, and therefore need scarcely receive any farther notice

Suffice it to say, that if the danger of perjury be an objection against the calling in the sanction of an oath in this case, it is an objection against it in all other cases, and an objection that applies to the sanction with the greater force, the greater the need there is of it. If applied to the testimony considered in respect of the danger of falsehood, apart from the consideration of the sanction, it is an objection to all testimony —if it applies to the case of the wife, considered with respect to her presumable unwillingness to do an act whereby her husband may sustain a prejudice, it applies with still greater force against all the instances in which a man's own testimony is permitted to be called for against himself it applies to one of the characteristic features of the practice of the courts styled courts of equity.

As to dissension, — which, to give force to the argument, is presumed, without the smallest alleged reason, to be implacable, —

The rule, if carried as far as it would go, being altogether destructive of the peace of families — of that peace which it is its professed object to protect, — in comes, in consequence, one class of exceptions, and that a very large one † In case of an offence involving a personal injury committed by the husband against the wife, the testimony of

* Lord Coke (C Litt 6) adds a technical reason, truly worthy of the purpose for which it is adduced: —

"Note, it hath been resolved by the justices (Pasch. 10. Ja. in Com. Banco upon the Stat. of Bankrouts,) that a wife cannot be produced either against or for her husband, *quia sunt duæ animæ in carne unâ*, and it might be a cause of implacable discord and dissension between the husband and the wife, and a meane of great inconvenience." Thus far Lord Coke, the supereminently learned ex-Chief Justice.

Mr. Justice Buller "thought the rule a very proper one, as it tended to prevent dissensions in families." (2. Term Rep 269)

Before that time, in the Treatise on the Law of Nisi Prius by the same learned judge (then but an advocate,) the reason had been subtilized and generalized to such a degree as to have lost all meaning: "Husband and wife cannot be admitted as witnesses ..... against each other, because contrary to the legal policy of marriage." (Bull. Nisi Prius, 286.)

Accordingly, anno 1792, the same learned judge (4. Term Rep. 679) agreeing with his learned chief Lord Kenyon, is represented as laying down the law on the subject in these words: — "It is now considered as a settled principle of law, that husbands and wives cannot, in any case, be admitted as witnesses either for or against each other."

† Turn back to the *dictum* of Lord Kenyon, in a former note. In this you have a specimen, and that a fair one, of the degree of certainty, reasonableness, and consistency, that pervade the whole of the system of jurisprudential law: of the degree of dependency fit to be placed on the opinions, the dicta, the statements, delivered by the most eminent among the official professors of it, of the regard due to those panegyrics which its professors of all ranks and classes never cease to anoint it with, and from which the opinions entertained of it by students, and even lawyers, are imbibed

Bad as this branch of the law is in itself, its badness constitutes not by any means the whole of its mischievousness. An additional mischief is, that where, as here, the proposition possesses a certain degree of extent, there is no trusting, with any tolerable degree of safety, to the accounts delivered of it, as it is (*i. e.* as it is said to be) though delivered from the most trustworthy of the hands employed in the dispensation of it

Lawyer Oh! but, the case of a suit in which one of them alone is party being the case in hand, the proposition is to be understood as being confined in its extent to the ground occupied by that case

Non-Lawyer Be pleased to look at the words: they expressly exclude all limits: of the testimony of either against the other, the admission cannot take place "*in any case*"

Lawyer. Nay, but there may have been a want of correctness in this part of the report: by the judge, the requisite exception was made; by the reporter, it is omitted to be stated.

Non-Lawyer. Possible, indeed, just possible, but not probable. Had the rule stood by itself without the reason, then, indeed, you might, with somewhat better grace, have assumed the liberty of imagining clauses to limit the extent of it. But along with the rule, the reason is actually brought to view; and the reason is such as admits not of any the smallest defalcation to be made from that unlimited extent. What? is the danger of future implacable dissension greater, from their being respectively admitted to testify one against the other in a prosecution brought by one against the other, than in a civil suit brought against one of them by a stranger, or by one of them against a stranger?

the wife against the husband is admissible, and admitted in ordinary practice.*

When a man has inflicted severe bodily suffering on his wife — has been in the habit of thus filling her life with misery, — here is a cause of dissension, which, powerful as it is, experience proves to be by no means implacable. Injuries of the like kind, it will sometimes happen (though, by reason of the usual superiority of force on the male side, not so frequently,) shall be inflicted — habitually inflicted, on the husband by the wife. A man forgives the wife who has put him to bodily torture; but it is not in the nature of a man ever to forgive the wife, who, being called upon in a court of justice for the purposes of justice, shall have dared to speak the truth! Where there is injury, and the highest degree of injury, forgiveness is expected, being in every day's experience; where there is no injury — where the supposed cause of offence is a compliance with the injunctions of duty, forgiveness is regarded as altogether hopeless!

To be consistent with itself, the law should strew danger before every step which it could occur to a man to take in the path of criminality. Instead of that, it is the care of the law itself to remove the principal source of danger out of his way. To be consistent with itself, it should remove out of his way every possible assistance that can contribute to engage him in any course of conduct which it reprobates and endeavours to prevent. Instead of that, it secures, to every man, one safe and unquestionable and ever ready accomplice for every imaginable crime.

If the dissension were, in the nature of the case, so implacable as the argument supposes, it should, consistently speaking, operate as a motive with the law to prescribe, rather than exclude, this source of information. If I attempt this crime, it may happen to my wife, from whom I cannot hope to conceal it, to be called upon to bear witness against me: and then, — even if I should escape from the punishment of the law, — the pain of seeing, in the partner of my bed, the once probable instrument of my destruction, will never leave me.

In the days when the exclusive rule in question took its rise, the reason in favour of it operated with a degree of force considerably beyond that with which it acts in these our days. The power of the husband over the wife was much stronger and more absolute. A time there appears to have been, when the exceptions, by which a wife is permitted to

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* In the case, however, of one of the most cruel of all injuries, a wife is deprived of this remedy.

In the case of a prosecution for bigamy, the evidence of the first wife has been deemed inadmissible, on the ground that she is the only lawful wife. If the fact can be proved without the testimony of the wife, no inconvenience ensues, unless it be a quantity of unnecessary vexation and expense; — vexation to the stranger, who is compelled to take a journey, perhaps, to give his testimony; expense to the prosecutor (or say the prosecutrix) who has to defray the expense of the witness's charges. But what in that case is the inconvenience saved? an inconvenience scarce worth saving. In the fact of the celebration — the celebration of the original and valid marriage, — in this, taken by itself, there is nothing, the disclosure of which can of itself have the effect of criminating the husband; nothing, of which, either on that or any other account, the statement can naturally be supposed to be attended with any particular uneasiness to the wife. By the supposition, the fact will be proved by other testimony, if her's be not called in to prove it: what material difference can it make to her, whether it be by her testimony, or that of anybody else? By declaring herself the lawful wife, she does not in any degree sacrifice his character; on the contrary, she supports it. It is not by the first marriage that the disgrace and ruin is thrown upon the guilty husband; it is by the second.

On the other hand, suppose the celebration incapable of being proved by any other evidence; suppose the case such, that for the proving of the celebration no other evidence can be obtained. Here the operation of giving the evidence might be attended with a sensation more or less painful to the injured wife: but on the other hand, what is the consequence if it be rejected? An injury of the most cruel kind that can be sustained, remains without satisfaction of any kind: the crime, a very heavy one, remains unpunished; the criminal triumphs in his guilt.

In the cases that gave rise to the decision, the inducement for calling in the injured wife, was, probably, the wish to save the vexation and expense that would have attended the procurement of other evidence. Had the objection been foreseen — had this ground of exclusion been known to be pre-established, such other evidence would have been resorted to, and that of the wife not employed. But the evidence being deemed inadmissible, the result was, not that the fact was proved by other unexceptionable evidence, but that the fact could not be proved at all, and, in consequence, that the crime was seen to go unpunished. For in a criminal cause, if the determination be in the first instance in favour of the guilty defendant, no omissions can be supplied, no false steps rectified: the example of guilt triumphing in impunity, is the price that, under the reign of common law, must be paid for every point that comes to be established on this side.

[Technical law is never consistent, even in its badness. On a prosecution for bigamy, the first husband or wife is not admissible to prove the fact of the former marriage. But, after a long period of uncertainty, it has been settled, as late as the year 1817, that in any collateral suit or proceeding between third persons, the rule is quite different: a person may therefore be incidentally charged with bigamy by the testimony of the first wife or husband, and with the effect of punishment, viz. in the shape of loss of character — a punishment not the less real, for being inflicted by other hands than those of the executioners of the law. — *Editor.*]

seek protection in a court of justice against ill-usage by the husband, were not yet established. Morality was at the same time more loose — manners more harsh and savage, resentment, on so unbecoming a ground as that of a submission to the laws of truth and justice, was more likely to be conceived and harboured, more easy to be gratified with impunity, and more apt to be implacable

A law which should exclude the testimony of the wife in the case of a prosecution against the husband for ill-usage done to the wife, would be tantamount to authorizing the husband to inflict on the wife all imaginable cruelties, so long as nobody else was present a condition which, having by law the command in and over his own house, it would in general be in his power to fulfil

A law which excludes the testimony of the wife, in the case of a prosecution against the husband for mischief done to any other individual, or to the state, is, in like manner, in other words, a law authorizing him to do, in the presence and with the assistance of the wife, every kind of mischief, that excepted by which she herself would be a sufferer The law, which in the former case affords its protection to the wife, — with what consistency can it, in the latter case, refuse its protection to every human creature besides?

So often as the mask has been stripped off, can it be necessary to lay bare the real policy that lies at the bottom of this business?

A cause between Doe and Ux admits as many fees as a cause between Doe and Roe. In a case where there is nobody to swear for Ux, if Ux were not admitted, there would be no cause, no fees Rule — admit her evidence

Very different is the case, where the cause is between one of the married pair, viz the husband (by whom the cause, in a dispute with a stranger, is in general conducted,) and a stranger.

If a man could not carry on schemes of injustice, without being in danger, every moment, of being disturbed in them, — and (if that were not enough) betrayed and exposed to punishment, — by his wife; injustice in all its shapes, and with it the suits and the fees of which it is prolific, would, in comparison with what it is at present, be rare Let us, therefore, grant to every man a licence to commit all sorts of wickedness, in the presence and with the assistance of his wife let us secure to every man in the bosom of his family, and in his own bosom, a safe accomplice: let us make every man's house his castle; and, as far as depends upon us, let us convert that castle into a den of thieves.*

Two men, both married, are guilty of errors of exactly the same sort, punishable with exactly the same punishment In one of the two instances (so it happens,) evidence sufficient for conviction is obtainable, without having recourse to the testimony of the wife, in the other instance, not without having recourse to the testimony of the wife While the one suffers, — capitally, if such be the punishment, — to what use, with what consistency, is the other to be permitted to triumph in impunity?

The film of prejudice once removed, a very loose system of morality, or rather (to speak plainly) a system of gross immorality, will be seen to be at the bottom of these exemptive rules The very crime which it punishes in one man — punishes even with death — it affords its protection to in another It converts, or seeks to convert, the house of every man, into a nursery of unpunishable crimes The same age of barbarism and superstition, the same age of relaxed morality, which gave birth to the institution of *asylums*, gave birth (there seems reason to think) to this privilege, which gives to each man a safe accomplice in his bosom The mischievousness of the domestic asylum goes, however, far beyond that of the asylum commonly so called The church, churchyard, or monastery, whatever it was, did not afford to the criminal anything like a complete exemption from all punishment it was itself a punishment it was banishment from his family it included imprisonment, or a degree of confinement so close as to be scarce distinguishable from it it placed him in a state of penury, humiliation, and dependence

A rule like this, protects, encourages, inculcates fraud For falsehood, positive falsehood, is but one modification of fraud concealment, a sort of negative falsehood, is another I mean, concealment of any facts, of which, for the protection of their rights, individuals o-

* Advice to judges: — When you have a reason to give for a rule or supposed rule of jurisprudential law, copy Mr. Justice Buller; let *policy* be your word; keep to generals; keep to the generalissima among generals. Behold the consequence, the fatal consequence, of descending into particulars, of talking of "*implacable dissension between man and wife*," you commit yourselves, you give a handle to non-lawyers They are thus enabled to look into your reasons, and to see whether there be any truth in them. No, never more suffer yourselves to fall into any such snare Keep to *policy*, and such other arguments as, in the region of the clouds, are of equal altitude, or, if that be difficult, of nearly equal altitude, with it. Keep to *policy*, you are omnipotent. With the word *policy* in your mouths, the law is, what you please to make it: anything to-day — the same, or any different thing, to-morrow.

King, Lords, and Commons, what drudges in comparison with you! Toiling for a whole session, with committees upon committees, examinations upon examinations, papers upon papers; while to make the law, by declaring it, costs you but a word: you speak the word, the law is made, and everything is as it should be.

the public have a right to be informed. The concealment which is authorized by the law, it may be said, ceases to be fraud. No; that it does not: I mean, in this case. A concealment which is authorized by the *substantive* branch of the law, cannot be fraudulent: the authorization does away the fraud: what is authorized is legalized: criminality, and legality, are repugnant and incompatible. But the law cannot, without authorizing fraud, authorize by its *adjective* branch, the doing of that which, by its substantive branch, it has constituted a crime. By the punishment annexed to the act by the substantive branch of the law, the law has acknowledged and proclaimed its mischievousness: if the act be not mischievous, the legislator has no warrant for marking it out for punishment. But if the act be mischievous, on what ground, with what consistency, does it in any instance seek to exempt it from punishment, as if it were innocent?—exempt it in consideration of a fact purely irrelevant—a fact by which the mischievousness of it is not so much as pretended to be diminished? An article of adjective law which is at variance with the substantive law, is itself a fraud. The substantive branch of the law declares, undertakes, engages, for the benefit of all parties interested, that all persons offending so and so shall be punished so and so. The judicial authority, which, by a law of the adjective kind, of its own making, takes upon itself to exempt a man from such punishment, on a ground by which his case is not varied in point of guilt, violates that engagement. Fraudulent in itself,—so far as it encourages others to pursue that plan of concealment by which the engagement is violated, it is the cause of fraud in others. By aggregating the act to the class of crimes, and rendering it punishable as such, it declares it to be a mischievous act, and to such a degree so, as to be a crime. By authorizing an individual to conceal it, in a case in which it is not so much as pretended that its mischievousness is in the smallest degree less than in other cases, it at once protects and encourages two different acts, of the mischievousness and criminality of which it shows itself sufficiently sensible on other occasions;—the principal crime, and that concealment of it, which, when the act so concealed is criminal, is itself a crime.

It debases and degrades the matrimonial union; converting into a sink of corruption, what ought to be a source of purity. It defiles the marriage-contract itself, by tacking to it in secret a licence to commit crimes.

I say in secret; for the probability is, that an institution so repugnant to moral sentiments is not generally known, and, on that account, is not productive of all the mischief, of which, if known universally, it would be productive. No care being taken to enable men to possess themselves of that knowledge, on which their security, in every branch of it, is in a state of continual dependence,—the degree of information which they actually have of it, depends upon its natural aptitude for being guessed at. To the knowledge of what, on each head, *is* law, they have no other clue than such conception as they are led to form to themselves of what it *ought to be*.

Oh! but think what must be the suffering of my wife if compelled by her testimony to bring destruction on my head, by disclosing my crimes!—Think? answers the legislator: yes, indeed, I think of it; and, in thinking of it, what I think of besides, is, what *you* ought to think of it. Think of it as part of the punishment which awaits you, in case of your plunging into the paths of guilt. The more forcible the impression it makes upon you, the more effectually it answers its intended purpose. Would you wish to save yourself from it? it depends altogether upon yourself: preserve your innocence.

To the legislators of antiquity, the married state was an object of favour: they regarded it as a security for good behaviour: a wife and children were considered as being (what doubtless they are in their own nature) so many pledges. Such was the policy of the higher antiquity. The policy of feudal barbarism, of the ages which gave birth to this immoral rule, is to convert that sacred condition into a nursery of crime.

The reason now given was not, I suspect, the original one. Drawn from the principle of utility, though from the principle of utility imperfectly applied, it savours of a late and polished age. The reason that presents itself as more likely to have been the original one, is the grimgribber, nonsensical reason,—that of the identity of the two persons thus connected. Baron and Feme are one person in law. On questions relative to the two matrimonial conditions, this quibble is the fountain of all reasoning.

Among lawyers, among divines, among all candidates setting up for power in a rude age, working by fraud opposed to force, scrambling for whatever could be picked up of the veneration and submission of the herd of mankind,—there has been a sort of instinctive predilection for absurdity in its absurdest shape. Paradox, as far as it could be forced down, has always been preferred by them to simple truth. He who is astonished, is half subdued. Each absurdity you get people to swallow, prepares them for a greater. And another advantage is, the same figure of rhetoric which commands the admiration and obedience of the subject class, helps the memory of the domineering class. it is a sort of *memoria technica*.

All these parodoxes, all these dull witticisms, have this in common,—that, on taking them to pieces, you find wrapped up, in a covering of ingenuity, some foolish or knavish,

and in either case pernicious, lie. It is by them that men are trained up in the degrading habit of taking absurdity for reason, nonsense for sense. It is by the swallowing of such potions, that the mind of man is rendered feeble and rickety in the morning of its days To burn them all, without exception, in one common bonfire, would be a triumph to reason, and a blessing to mankind.

[*Further remarks by the Editor* —The exclusion of the testimony of husband and wife, for or against each other, is in the number of the exclusions which, in an article already alluded to, are defended by the Edinburgh Review: "yet not entirely," says the reviewer, "on account of that dread entertained by the English law, of conjugal feuds, though these are frequently of the most deadly character. But the reason just given, in the case of the priest, applies" (this refers to the opinion of Mr. Bentham, that the disclosure, by a catholic priest, of the secrets confided to him by a confessing penitent, should not be required or permitted,) "for the confidence between married persons makes their whole conversation an unreserved confession, and they also could never be contradicted but by the accused. while external circumstances might be fabricated with the utmost facility, to give apparent confirmation to false charges. But our stronger reason is, that the passions must be too much alive, where the husband and wife contend in a court of justice, to give any chance of fair play to the truth. It must be expected, as an unavoidable consequence of the connexion by which they are bound, that their feelings, either of affection or hatred, must be strong enough to bear down the abstract regard for veracity, even in judicial depositions"

Want of space might form some excuse to this writer for not having said more, but it is no apology for the vagueness and inconclusiveness of what he *has* said

The confidence, say you, between married persons makes their whole conversation an unreserved confession? So much the better their testimony will be the more valuable It is a strange reason for rejecting an article of evidence, that it is distinguished from other articles by its fulness and explicitness

The reviewer must have read Mr Bentham very carelessly, to suppose that his reason for excluding the testimony of the priest is, because the discourse of the penitent is an "unreserved confession:" this would be a reason for admitting, not for rejecting, the evidence The true reason for the exclusion in the case of the confessor, is, that punishment attaching itself upon the discharge of a religous duty, would in effect be punishment for religious opinions. Add to which, that the confidence reposed by the criminal in his confessor has not for its object the furtherance, nor the impunity, of offences; but for its effect, as far as it goes, the prevention of them. To seal the lips of the wife, gives a facility to crime. to seal those of the confessor, gives none; but, on the contrary, induces a criminal to confide the secret of his guilt to one whose only aim will in general be to awaken him to a sense of it. Lastly, it is to be remembered that, by compelling the disclosure in the case of the confessor, no information would ultimately be gained: the only effect being, that, on the part of the criminal, no such revelations would be made. Not so in the case of the wife, who may have come to a knowledge of the crime independently of any voluntary confession by her criminal husband

That the testimony of the wife could not be contradicted but by the accused person, her husband, and *vice versâ*,—which, if true, would be a good reason for distrusting, but no reason for rejecting their evidence,—is, in the majority of cases, not true What the husband and wife have told one another in secret, no one but they two can know; and, consequently, what either of them says on the subject of it, nobody but the other has it in his power to contradict But is not this likewise the case between the criminal and his accomplice, or between the criminal and any other person, with respect to any fact which occurred when they two were the only persons present? while, with respect to all other facts, the testimony of husband or wife would, if false, be just as capable of being refuted by counter-evidence as the testimony of any other witness

The aphorism on which the reviewer founds what he calls his "stronger reason," one would not have wondered at meeting with in a German tragedy, but it is certainly what one would never have looked for in a discourse upon the law of evidence Strange as it may sound in sentimental ears, I am firmly persuaded that many, nay most, married persons pass through life without either loving or hating one another to any such uncontroulable excess Suppose them however to do so, and their "feelings," whether of affection or of hatred, to be "strong enough to bear down the abstract regard for veracity," will they, in addition to this "abstract regard,"—a curious sort of a regard,—be strong enough to bear down the fear of punishment and of shame? Will they render the witness proof against the vigilance and acuteness of a sagacious and experienced cross-examiner? Or rather, are not the witnesses who are under the influence of a strong passion, precisely those who, when skilfully dealt with, are least capable of maintaining the appearance of credibility, even when speaking the truth; and, *à fortiori*, least likely to obtain credit for a lie?

But I waste time, and fill up valuable space, in arguing seriously against such solemn trifling —*Conclusion of remarks by the Editor.*]

PART V.

VIEWS OF THE CASES IN WHICH EVIDENCE HAS IMPROPERLY BEEN EXCLUDED ON THE DOUBLE ACCOUNT OF VEXATION AND DANGER OF DECEPTION.

CHAPTER I.

IMPROPRIETY OF EXCLUDING THE TESTIMONY OF A PARTY TO THE CAUSE, FOR OR AGAINST HIMSELF.

Of the case in which the exclusion appears to have rested on a double ground—that which respects *deception*, and that which respects *vexation*—one exemplification is constituted by the case in which the testimony in question is that of a *party* to the cause.

Receive his testimony at his own instance, the testimony will be false, and you will be *deceived* by it: call for it at the instance of his adversary, it will be *hardship* to him to be obliged to give it. Such (it may be presumed) are the reasons, by which the exclusions put upon the evidence of a person bearing this relation to the suit, have been suggested. But, in each instance, the insufficiency of the reason has been already brought to view: nor, though they are applicable to the same person, does the force of either make any addition to that of the other; for wherever the one applies, the other does not. The consequence is, that there is not an imaginable case in which the testimony of a party, be he plaintiff or be he defendant, ought to be excluded.

At his own instance,—the reason which forbids the admission of the testimony is weaker in this case than in the case of an interested extraneous witness. The real magnitude of the interest being the same in both cases,—in the case of a party the interest is more palpable: the objection created by it is likely to act with greater force upon the judicial faculties of the magistrate: his mind is more surely open to it: the danger of deception is therefore less.*

If, in so far as it operates in his own favour, the testimony of the party is liable to be drawn aside from the line of truth by the action of this force, which is so obvious even to the most unobservant eye,—in so far as it operates in his disfavour, it possesses, in a degree superior to all other testimony, a claim to confidence. That, in this case, the error, if any there be in the testimony, is not a wilful one—is not accompanied, at the same time, with a knowledge of the falsity of the information, and of the tendency it has to operate to the deponent's prejudice—is a proposition, the truth of which is far more certain in this instance, than it can be in any other.

Accordingly, as often as the testimony of a party is received—so sure as it enters into the mind of any one who has to judge of it—so sure is it to be analyzed, and, as it were, divided into two parts. To the part which is regarded as operating in the deponent's own favour, the incredulous, the diffident part of the judge's mind, applies itself of course: while the part regarded as operating in his disfavour, commands, on the part of the judge, an almost unlimited share of confidence: in a word, what portion of the mass is understood as belonging to this division, is, by the common sense and consent of mankind, universally regarded as the best evidence.

Such is the evidence, of which, on the ideal supposition of extraordinary vexation, the rashness of a certain class of jurists has not hesitated to rob the treasury of justice.†

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* On the other hand, what must not pass unnoticed is, that, supposing the probability of mischief from this quarter were really preponderant, the mischief would in this case be more frequently realized than in the other. Why? Because to gain an undue advantage by the party's single testimony, requires no more than the operation of that one person: whereas, to gain the same advantage by the false testimony of an extraneous witness, requires the co-operation of two persons—the party, and the extraneous witness his accomplice: each of them conscious of guilt—each of them liable to be betrayed by the unfaithfulness or imprudence of the other.

† The Edinburgh Review, in an article which has been several times referred to, makes a long attack upon "the French method of interrogating persons under a charge," with a view to the extraction of their self-criminative testimony.—It is not necessary to enter particularly into the objections advanced by the reviewer against this practice. They may all be summed up in two propositions, neither of which seems very likely to be disputed:—1. That an innocent man may very possibly be unable to furnish, all at once, those explanations which are necessary to make his innocence appear; and, 2. That, such inability on the part of a prisoner not being conclusive evidence of his guilt, it would be very wrong to treat it as if it were so.

The reviewer does not state whether his objection extends to the examination of the prisoner on the occasion of the *definitive* trial: but we may presume that it does not, since his argu-

A party is not suffered to be examined on his own behalf. Observe the consequence he is delivered without mercy into the hands of a mendacious witness on the other side Your adversary, to make evidence for a suit he means to bring against you, sends an emissary to you to engage you in a conversation, that, when called upon as a witness, he may impute confessions to you such as you never made. When the evidence comes to be given at the trial, the witness tells what story he pleases: as for you, you must not open your mouth to contradict him, although, were you admitted to state what passed, it might be in your power to satisfy the judge, that the account given of the conversation by the witness could not possibly have been true

If, instead of sending his agent, the plaintiff had gone with him, his testimony, it is true, would hav been excluded as well as yours In words, here is a sort of reciprocity, but in effect, no such thing The plaintiff has no need to tell his own story. he has his witness, by the supposition a partial, and even corrupt one, to tell it for him The plaintiff, instead of being a sufferer by the exclusion put upon himself, is a gainer by it understand, where his plan of defence is dishonest, as it is here supposed to be In his spontaneous examination, he would have had the advantage, it is true, of joining his witness in the concerted lie; but in their cross-examination (being kept out of each other's hearing for that purpose,) they might have been brought to contradict one another, and thus the lie might have been discovered.

On this occasion, as on so many others, *mutato nomine* the law departs from its own principles the same evidence which it refuses to hear at one time, in a cause called by one name, it admits at another time, in a cause called by another name but the repentance comes too late for justice In the original cause, the corrupt witness (things being as in the case above supposed) stands up uncontradicted, and carries his point In another cause, if the injured plaintiff has courage and money to venture upon it,— in a derivative cause, growing out of the original one,—in an indictment brought against the perjured witness for the perjury,—the mouth of the corrupt witness (now converted into a defendant) is stopped, while that of the quondam plaintiff, now called a prosecutor, and under that name a witness in his own cause without difficulty, is opened *

Here there are two causes, one after another, in each of which the judge hears but on one side, instead of a single cause, in which he might have heard on both sides Nor even

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ments do not apply to that case. By that time, the prisoner may reasonably be supposed to be prepared with all such explanations as the circumstances will admit of, and if he is not, I fear it will go hard with him, whether the insufficient explanations which he does give, are given through his advocate only, or partly from the lips of his advocate, and partly from his own.

But, even against the preliminary interrogation of the prisoner as soon as possible after his apprehension, the objections, it is evident, are altogether inconclusive. That non-responsion and evasive responsion are strong articles of circumstantial evidence against a prisoner, is what will hardly be denied:— that, by an inconsiderate judge, more than the due weight may be attached to them, is a casualty to which they are liable, in common with all other sorts of circumstantial evidence, but not more liable than other sorts. Were the possibility of deception a sufficient ground for putting an exclusion upon evidence, can it be necessary to say, that no evidence would be admitted at all? But the exclusionists never seem to consider, that if deception may arise from evidence, it is still more likely to arise from the want of evidence

After all, the reviewer, when he comes to his practical conclusion, explains away the whole effect of his previous arguments, and ends by prescribing "a middle course, which leaves the party to judge and act for himself If he is blessed with self-command, and is in possession of the means of at once refuting his pursuers, why should his vindication be delayed? but as he may be incompetent to do so, or unprovided with the necessary proofs, let him be calmly told by the magistrate, that no unfair inference will be drawn from his reserving his defence for a more convenient season"

That *something* of this sort should be told him, is obviously proper; to which I will add, that no promise could be more safely given than a promise not to draw any *unfair* inferences; though it may be doubted how far such an assurance would quiet the alarms of an innocent prisoner, until he should be informed *what* inferences the magistrate would consider unfair. The proper thing to tell him would be, that if, from the unexpectedness of the accusation, he felt his faculties to be in too bewildered a state to qualify him for making a clear statement of the truth (and of this the magistrate would be in some measure able to judge,) or if any sufficient reason rendered him unable or averse to give the necessary explanations without delay, he would be at liberty to say as little or as much as he pleased; but that if, when the trial should come on, and he should come to be finally examined, the explanations afforded by him should appear to be such as might with equal facility and propriety have been given on the spot,—his having refrained from giving them at that time, would be considered as strong evidence (though even then, not conclusive evidence) of his guilt. —*Editor*

* In the supposition of a prosecution grounded on such evidence, there is nothing at all unnatural. On your single testimony, the jury (suppose) would not convict: but, though nobody but yourself and the perjurer was present, it may happen to your testimony to receive support from circumstantial evidence; or from extrajudicial confessorial evidence of the perjurer's, coming from another witness in the shape of hearsay evidence.

by this second cause, — supposing the truth to come out, and the judge to be satisfied about it, — is it in his power to do justice: for in this second cause nothing more can be done than the convicting the perjured witness of the perjury: to do justice to the party injured by the perjury, there must be a third cause, of the same denomination as the first. And this is what justice gets, by the care taken to defend the wisdom of the judge from deception, and the feelings of the parties from vexation, by a rampart of excluding rules. The man of law is satisfied, because suits are multiplied: but where is the satisfaction to the injured suitor and to justice?

Another circumstance concurs in rendering the remedy still more inadequate. In the prosecution for the perjury, conviction ought not to take place, and naturally will not take place, without the degree of persuasion commensurate to the punishment attached to so high a crime: whereas, in the original non-penal suit, any the slightest degree of preponderant probability would have been sufficient to turn the scale.

On this head, compared with English law, Roman law (with all its faults) distinguishes itself to great advantage. In simplicity, though absolutely imperfect, it is relatively transcendant.

In his own favour, — that is, at his own instance, — it suffers not the testimony of any party, of any person at least whom it recognises in that character, to be received: and thus far it does wrong.

But in his own disfavour, that is, at the instance of his adversary (or of the judge, in the case of inquisitorial procedure,) the testimony of the party is in every case received, and allowed to be called for: and thus far it does right.

As to admissibility, there is no such irrelevant and indefinable distinction as that between civil and criminal. The only difference is, that in a case recognised as a criminal case, the testimony of the defendant is called for of course, and in the first instance; — whereas, in a case recognised as a civil (that is, a non-criminal) case, — though the testimony of each party may be called for by the other, — unless called for by the opposite party, it is not called for, or received, by the judge.

It is to English law that we must look for modification upon modification; and that confusion and inconsistency, with the delectable and ever-cherished intricacy, which, where there is but one straight course, is the necessary consequence.

Courts upon courts; each, in this part of the field, proceeding and judging by a different set of rules: as if the suitors were human creatures in some one of them, and beings of a different composition in the other. Harmonious disagreement! all tending to one common end.

Which shall we take for the general rule? For elucidation's sake, let it be the rule of exclusion: the rather, as being consigned to one of those Latin maxims, which, though in universal currency, express with equal infidelity, both what is the practice, and what ought to be: — *Nemo debet esse testis in propriâ causâ.*

Taking this for the general rule, we shall find it cut into by exceptions upon exceptions; and that in each of the two parts into which we have seen it dividing itself.

This, for the rule with regard to the *admission* of the party's testimony, in his *own* behalf. Next, with regard to the *compulsory extraction* of it, in behalf and at the instance of the *other* party, comes another Latin maxim, the absurdity of which has already been fully exposed: — *Nemo tenetur seipsum accusare.*

CHAPTER II.

EXAMINATION OF THE COURSE PURSUED IN REGARD TO THE PLAINTIFF'S TESTIMONY BY ENGLISH LAW.

§ 1. *Plaintiff's testimony, in what cases receivable in his own behalf. Inconsistencies of English law in this respect.*

Among the inviolable rules of English jurisprudence, one of the most inviolable is this, that no man (understand, at his own instance) is to be a witness in his own cause. Like other inviolables, it is continually violated: let us observe the violations, and the contrivances by which they are reconciled to the rule.

In the first place, in all causes that are called criminal (and more especially capital ones,) the plaintiff is admitted. In cases of this class, supposing deception to take place, the mischief of it is at its maximum. The plaintiff is called *prosecutor.**

By this change of name, he is divested of all bias — no less effectually than if it was by a little seal, a broad seal, or a sceptre.†

Oh! but at any rate the prosecutor has no pecuniary interest; and pecuniary interest is the only sort of interest which, in the opinion of an English lawyer, can produce any bias in the mind.

Indeed, but he has a pecuniary interest; as substantial a one in these criminal cases, as he can have in any civil (*i. e.* non-criminal) case.

In theft, and other cases of criminal de-

* That you may be sure he is not a plaintiff, that title is made over to the king; who has been rendered the fitter for the station, by his being already in possession of that of judge.

† *Vide* Part III. *Deception;* Chap. VII. *Restoratives to Competency. Supra,* p. 433.

predation (it would be too much to say precisely which — a book might be written upon it,) the prosecutor, upon whose testimony the thief is convicted, gets back the stolen goods: and that (by an almost unexampled exertion of summary justice) without the expense of an additional suit.

In forgery, he does or does not, by the same means, make good his damage * But here, if he does, there must be another suit for it

In assaults, in case of success, money may visit him in either of two shapes Instead of being fined (the money going to the green wax, — that is, to the king's private purse,) the defendant may be sent "to talk with the prosecutor:" or, being fined, a part of the fine (it must not exceed a third part †) may be put openly into the prosecutor's pocket ‡

Upon affidavit evidence, introduced by a motion "for an attachment," or, by a polite circumlocution, "that the defendant may answer the matters of the affidavit," causes of a pecuniary nature are tried every day in all the courts. No sooner is the cause intituled "The King against such a one" (but care must be taken that the title be not put upon it too soon,) than the cause becomes a criminal one: and the money, by which the plaintiff would otherwise have been turned into a liar, and the judges deceived, loses all its influence

One thing is clear enough, — to any one at least whose eyes are not closed by science, — viz. that £50 is not made less than £50, by being given under the name of costs Therefore, — of whatever nature may be the satisfaction, pecuniary, vindictive, or honorary, ‖ the prospect of which is the motive that gave birth to the suit, — if reimbursement (partial as it is at best) under the name of costs, be among the consequences of success in the suit, the interest of it is of a kind as strictly pecuniary, as it is in the power of money to create.

In actions not comprehended under the denomination of penal ones, the exclusion put upon the evidence of the party (provided always there is but one) is no less, in effect, as well as design, inexorable, than in design it is in penal actions

In the case we have just been viewing, the extensive case of injuries to person, — the same individual who, suing by a civil action, and called *plaintiff*, would not be heard, suing by an indictment or information, and calling himself *prosecutor*, is admitted without difficulty. But so long as the words employed are *action* and *plaintiff*, the difficulty is insurmountable, the judge inexorable

To the admissibility of the prosecutor in the capacity of a witness, there is, however, one remarkable exception. There is a class of offences in regard to which, how noxious soever to the public (that is to say, to any or every individual,) no one individual can be found, who (unless by accident) has any interest capable of engaging him to take upon himself the expense and vexation attached to the function of prosecutor In all these cases, either a factitious interest must be created, or the offence go unpunished, and society fall to pieces Accordingly, in cases of this description, as often as, by the prohibition and punishment attached to it by the legislature, an act was created into an offence, rewards were offered to the individual by whose exertions the conditions necessary to the infliction of the punishment should be fulfilled. In the whole, or in part, the punishment was put into a pecuniary shape, and termed a *penalty* the penalty, in case of success (or a part of it,) constituted the remuneration of this temporary servant of the public *Costs*, — that is, a reimbursement (never more than partial) of expenses of suit, under that name, were added or not added, according as the lawyer, by whom the legislator was led, happened, for this purpose, to be faithful or treacherous, awake or asleep

What, on this occasion as on all others, was the care of the man of law, was, that rules of law should be observed. what, on this occasion as on others, was no part of his care, was, that offences should be prevented. It was decided, therefore, that the testimony of a witness of this sort — a witness who, in case of conviction, expected to receive the penalty, or any part of it — was bad, that is to say, inadmissible. Had the person to whom the reward was offered, been allowed to earn it by giving his testimony, he would have committed perjury: judge and jury would constantly have been deceived by the perjury. and so, instead of the guilty, punishment would have fallen upon the innocent. How so? For this plain reason: because the suit

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* Since the 9 Geo. IV c 32, a man may prove a document to have been forged, notwithstanding any pecuniary interest he may have in so doing If his signature, or any part of the body of a check on his banker, has been forged, upon which money has been paid, the banker sustains the loss; but if the witness has signed a *blank* check, which the prisoner has filled up without his authority, then he himself must sustain the loss, and not the banker.—*Ed.*

† The practice in such cases is to fine the defendant so much, with leave to speak to the prosecutor: which means, that if the defendant will pay one *half* of the sum mentioned, to the prosecutor, no fine is imposed; but if the defendant is too angry to consent to this, the whole of the fine is imposed upon him.—*Ed.*

‡ Had the suit been of that sort which is called an action (a civil action,) his testimony would not have been receivable. For in a suit of that sort, the plaintiff is called plaintiff, without ceremony.

‖ See Dumont, Traités de Législation, and *supra*, Vol. I. p. 371, *et seq.*

was called civil; and, in a suit denominated civil, the plaintiff is called plaintiff. Whatsoever else the king may get by the suit, what he does not get by it is, the title of plaintiff: which, consequently, finding no other place to rest on, rests upon the shoulders of him by whom the function is performed.

All instances of the exclusion of witnesses on prosecutions for offences created by statute, are acts of usurpation committed by the judicial authority against the legislative. But, in the case of the exclusion of informers, the usurpation is more particularly flagrant — I had almost said *impudent*. The legislature beckons a man into court; the judge shuts the door in his face.

All this while, unless those who know of an offence tell of it, it cannot be punished; and unless those who know of it are paid for telling of it, they will not tell of it: this the legislature is convinced of, and therefore offers money for the telling of it.

The legislature, satisfied that, without a factitious inducement, a man who has not the interest of revenge to prompt him, will not subject himself to the trouble, expense, and odium of bringing to punishment an offender, whose offence, how prejudicial soever to the public, produces no mischief that comes home in the shape of suffering to any particular individual, — orders that a reward to a certain amount shall be given by the judges to him by whom the information requisite for that purpose shall have been given. When the man comes for his reward, the judges refuse to give it him. Why? Is it that it was not the will of the legislature he should have it? No: but because the will of the legislature is contrary to their rules.

Such are the effects, political and moral, of these excluding rules: breach of faith, as towards individuals — breach of obedience, as towards the legislature.

It is among the maxims of men of law, that no man ought to be suffered to be wiser than themselves: but unless many men had been wiser, as well as more honest, than themselves, society would long ago have gone to wreck. The maintenance of society has all along depended upon the evasion of this rule of law. Society exists: therefore the rule has been evaded. The intention of the judges was to defeat the intentions of the legislature: individuals, by defeating the intention of the judges, have rendered to the public that service which it was their object to prevent, and to the legislature that obedience on which the preservation of society depends.

If the man who saw the offence committed has nothing to get by telling of it, he is an unexceptionable witness: but having nothing to get by telling of it, he has no inducement to engage him to tell it: and as telling of it in the character of a testifying witness at a distance from home, and under a certainty of being baited by lawyers, is attended with both vexation and expense, he has just so much inducement to prevent him from telling it. One of two things: either the man who on these occasions appears in the character of an uninterested witness, and, upon being interrogated, declares himself upon oath to be uninterested, is really an interested one; or, he acts without a motive — the effect is produced without a cause.

As often as the effect can be produced without a cause, they are willing (these men of science) that it shall be produced; they are willing (these upright ministers of justice and patterns of constitutional obedience) that the will of their superior, the legislator, shall be done. As often as the effect cannot be produced without a cause, their determination is, that it shall not be produced, and that the will of the legislator shall remain undone — that the law, which they are sworn to execute, shall remain unexecuted.

But they have a reason for what they do, and it is this: — to gain twenty pounds, a man will speak the truth; by coming and speaking the truth, he will lend his exertions to give execution to the laws: — therefore, for the same price, he will be ready to commit perjury. Yonder man cut the throat of a pig, the other day, for sixpence; therefore he would cut the throat of his brother for the same price. Such is the logic of these lawyers.

That by this logic and this wisdom, perjury was ever prevented in any one instance, seems not in the smallest degree probable: that by the same exertions it has in many instances been produced, seems in the highest degree probable.

By what contrivance the existence of the interest can be denied in words, in such manner as to save the witness from the danger of legal conviction, — what expedient is in these cases most usually relied on, and upon occasion employed, — I do not undertake (for it is not necessary) to know. As promising a one as any, appears to be this: in the present cause, in which I am plaintiff, you give me your testimony *gratis;* in the next cause you will be plaintiff, and then it will fall to my share to return the accommodation.

Another arrangement may be this: — The only man who knows of the transgression is forbid to tell of it. True: but the prohibition does not extend to those who know nothing about the matter. Well then: when a man who means to earn the reward, comes to me (A. B. an attorney) to know how he is to get it, this is the way in which we will settle it between us. Though he must not tell the judge in the first instance — though he must not put in for the reward (since if he did,

the judges would not let him give the evidence which he must give to earn it,) — this will be no hindrance to me, who have no evidence to give. Let him, then, tell me the story: and I, or (what will do as well) John Doe, will put the story into grumgribber, to make it intelligible to the judge When the trial comes on, the witness tells the story, when execution comes, I pocket the reward The witness cannot receive a penny of it but I am a man of honour, and too generous to suffer a good witness to be a sufferer by the time he has expended in the public service

Is interest in reality cleared away by this manœuvre? Are effects produced without causes, as the sages of the bench intended they should be produced? Is the self-purgative oath, which must be swallowed upon occasion by the witness, nothing worse than an equivocation, pure from the taint of perjury? This will depend upon the skill and attention of the preceptor, and the capabilities of the pupil

In the first instance, the laws turned into a dead letter by the precipitancy of a judicial rule! In the next place, something (to say the least) nearly approaching to perjury, the constant result of their connivance at the evasions put upon their own rules! Which is the worst — the disorder, or the remedy?

As the rule which admits the evidence of the plaintiff when called a prosecutor, is not without exceptions, so neither is the rule which excludes the evidence of the plaintiff when called a plaintiff One exception — a very colossus of inconsistency — stares us in the face, and figures in all the books A statute had been made, entitling a traveller to receive compensation at the expense of the hundred, in case of his being robbed between sun and sun A decision was pronounced, by which, in this one instance, the inviolable rule was violated, and the party (the plaintiff in an action on this ground) was admitted to support his demand upon the district by his own evidence. The word given by way of reason was *necessity* — unless this evidence be admitted, the law will fail of its effect

It is difficult to see on what ground to rest the passing of this statute Was it to excite the hundredors to vigilance? Was it to dissipate the loss, by breaking it down into impalpable portions, upon the principle of insurances? The first conception is altogether visionary, and the second is in repugnancy to it. Be this as it may, obedience to the legislator is always laudable, and especially on the part of a judge. But, for beginning the practice of admitting the plaintiff's evidence, it seems difficult to imagine a case in which the demand for the exertion could have been less, or the danger more formidable. Even without any view to protection, more journeys are taken in company than in solitude In this case it would have been easier than in a thousand others that might be mentioned, for a man to provide himself with preappointed evidence. To carry a witness with him, might be attended with expense; to show to a friend the contents of his purse at starting, would involve no expense.

One circumstance fills up the measure of absurdity Conceive the whole number of rateable inhabitants in the hundred escorting the traveller the whole time he employed in traversing it. The traveller swears he was robbed the hundredors swear he was not, for they were with him all the time The one really interested witness would command the verdict the five hundred nominally interested, but really not interested witnesses, would not be suffered to open their mouths.*

Absurd as the admission is in a relative, I mean not to hold it up as such in an absolute point of view Under favour of such encouragement, here and there a case has probably happened in which a fraudulent demand has been made on this ground, not impossibly a successful one But, from the station which such a law, supported by such a decision, still maintains in the statute book, a pregnant proof is surely afforded (were all others wanting) how little the interests of truth and justice would have to apprehend from the unreserved admission of the party's testimony in his own favour in any imaginable case

Equity presents a different scene for the same mode of searching after the truth is good or bad, according as, in speaking of it, you pronounce the words *common law* or *equity*

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* In speaking of *hundredors*, dreading inaccuracy I took care to limit the import of the term by the adjunct *rateable* The caution was superfluous.

Anno 1713. In the King's Bench Parker, chief-justice. "No one *living in* a hundred shall be allowed to give evidence for any matter in favour of that hundred, though so poor as upon that account to be excused from the payment of taxes: because, though poor at present; he may become rich."—(The Queen against the Inhabitants of Hornsey, 10 Mod 150) This judge, whose sensibility to the idea of pecuniary interest was thus exquisite, was afterwards chancellor, with the title of Earl of Macclesfield.

On this footing continued the law till the year 1735 (8 Geo II. c 16, sect. 15. See also 22 Geo II. c 24; and 22 Geo II. c. 46;) when a statute was made to alter it Recognising for law the admission given to the testimony of the plaintiff supposed to have been robbed (though doctrines much better supported were then, and are still overruled every day,) it gives admission to the testimony of hundredors, but confines it to this single case On all other occasions, hundredors, that is, all the good people of England, without exception, continue as certainly liars and deceivers as before.

Ask an equity lawyer, ask any lawyer; he will tell you without difficulty, and without exception, that in equity the testimony of the plaintiff never is admitted: no, not in any case whatever. Thus much certainly is true, that it never is admitted to any good purpose: but thus much is no less true, that it is admitted to every bad purpose.

Here, on this occasion, the arrangement we set out with is unavoidably departed from. Striving, in behalf of existing establishments, to find, as far as possible, for everything an honest reason — a reason referable to the ends of justice, — I set out with taking the fear of producing deception, and the fear of producing vexation, as the causes of the existing arrangements. But here, both principles of arrangement fail us altogether. The phenomena, as we see and feel them, will be effects without a cause, if anything but the pursuit of the spurious ends of judicature, the ends really pursued in the formation of the technical system, the professional interests, had been in view and aimed at.

In the first place, to consider the testimony of the plaintiff as proffered by himself.

For the purpose of the ultimate decision — for the purpose of giving termination to the suit, it is not admitted. Why? Lest, peradventure, the suit should be brought to an untimely end. But, for the purpose of giving commencement to the suit, the testimony of this same party is admitted. And here, lest groundless demands should be excluded, and *mala fide* suits prevented, by the fear of punishment as for perjury, that punishment is taken off; and the mendacity-licence, which we have seen constituting the basis of the technical system of procedure in the common-law branch of it, is extended to this pretended purer branch, the equity branch.

In the instruments by which suits are commenced in the way of common law, the mendacity could be, and accordingly was, cloaked to a certain degree by the generality of the terms. To the equity branch, this cloak could not be extended: for neither the grounds of demand, nor the services demanded at the hands of the judge, having been put into any sort of method (not even that wretched method into which the matter of common law has been shaken by the fortuitous concourse of atoms,) a particular story required in every instance to be told.

A court of equity being a shop, at which, for the accommodation of those for whose purposes the delays sold by the common-law courts are not yet sufficient, ulterior delays are sold to every man who is content to pay the price; suits are every day instituted in the equity courts, by men who themselves are as perfectly conscious of being in the wrong as it is possible for man to be. A man who owes a sum of money which it is not agreeable to him to pay, fights the battle as long as he can on the ground of common law, and when he has no more ground to stand upon, he applies to a court of equity to stop the proceedings in the common-law court, and the equity court stops them of course. Among the uses, therefore, of a court of equity, one is, to prevent justice from being done by a court of common law.

There are many men who, though they have no objection to reap the profit of falsehood, would not be content to bear the shame of it, notwithstanding the suspension put upon all punishment — legal punishment, by the mendacity-licence above mentioned. The fear of shame would be apt to stare a man in the face, if, after reading a story composed more or less of facts which he knew to be false, it were necessary for him to adopt them, and make himself known for a liar by his signature. Accordingly, care has been taken that no such unpleasant obligation shall be imposed. The story is settled between two of his professional assistants, his attorney (in equity language, his solicitor,) and his counsel: as for the complainant himself (for so in equity the plaintiff is called,) the orator (for so in the same language he is made to call himself,) what is probable is, that he does not — what is certain is, that he need not — ever set eyes on the story thus told under his name.

Such as the seed is, such will the harvest be. Even when the plaintiff is in the right, his *bill* (such is the name given to his story) is a great part of it, to the knowledge of every body, a tissue of falsehoods. The great judge, who knows better than to administer equity unless a composition of this complexion has in regular form been delivered in at the proper office, knows it so to be. It is accordingly a settled maxim with him, that no credit is to be given to anything that is put into a bill. Falsehood, in equity as well as common law — falsehood (every equity draughtsman is ready to tell you) is necessary to justice. Accordingly, if through delicacy (which never happens,) or from some other cause (which frequently happens,) the attorney and the counsel between them fail of inserting the requisite quantum of falsehoods, no equity is to be had till the deficiency has been supplied. To assert, in positive terms, a fact concerning which a man is in a state of ignorance, is to assert a falsehood; and if there be such a thing as a lie, it is a lie. A lie of this sort a court of equity exacts from every plaintiff, as a condition precedent to his learning from the pen of the defendant what it happens to be necessary for him to know.

Thus then stands the practice, with regard to the admission of the plaintiff's testimony, considered as delivered at his own instance. For the purpose of justice, it is not admitted: to the effect of vexation and expense, and for the purpose of the profit extracted out of the

expense, it is admitted—admitted and exacted. Nor need he entertain the smallest hope for justice, unless, to swell the account of profitable expense, this testimony (such as it is) is stuffed with falsehoods

The real purpose of equity procedure will be seen standing in a still more conspicuous point of view, when we come to consider how far, under the rules of the same courts, admission is given to the testimony of the plaintiff, when called for at the instance, and consequently with a view to the advantage, of the defendant

§ 2. *Plaintiff's testimony, in what cases compellable at the instance of the defendant Inconsistencies of English law in this respect.*

The plaintiff, is he compellable to testify against himself?—to testify at the instance of the defendant?

Under this remaining head, as under the former, let us observe, in the first place, how the matter stands at common law

In cases called criminal cases, at the trial, the plaintiff (we have seen) is, under the name of *prosecutor*, always a witness at his own instance, and consequently for himself, frequently the sole witness. When in this way he has been testifying for himself, the defendant, in virtue of the right of cross-examination, possesses the faculty of causing him to testify against himself That the plaintiff should be called upon to testify by the defendant in the first instance, is what can never happen, at least never does happen Expecting the plaintiff, the prosecutor, to come forward, and testify of course *pro interresse suo*,* it can scarcely occur to the defendant (that is, to the professional assistants of the defendant,) to call for his attendance in the defendant's name

In those criminal cases in which, as above, there is but one inquiry, and that inquiry carried on (if the contradiction may be allowed) by uninterrogated evidence, neither party saying any more than he thinks fit,—the plaintiff, in particular, is not compellable to say anything at the defendant's instance Here again, however, to place the case in a correct point of view, the distinction between compulsion *ab extrà* and compulsion *ab intrà* must be called in. The prosecutor is not, any more than the defendant, compellable at the instance of the adversary, by the fear of any collateral punishment, like an extraneous witness; the prosecutor, as well as the defendant, is impelled by the interest he has at stake in the cause, to say everything that he can say with safety in support of the interest he has in the cause. So far then as the defendant, in his affidavit, says anything that can operate to his own exculpation, this defence is a sort of call (though an indirect call) upon the prosecutor, to bring forward any further facts (if he has any which he can advance with safety) that promise to operate in refutation of such defence

The facts thus brought forward in reply,—at whose instance are they brought forward? At the defendant's, if at anybody's. But in whose favour do they operate? As certainly, in the prosecutor's, and his only. Are there any, that, if brought forward, would operate to the advantage of the defendant—to the disadvantage of himself? So surely as he knows of any such, so surely does he keep them all to himself So far from being called upon for them by particular interrogation, he is not so much as called upon for them by the general terms of his oath. Before a jury, the deponent being an extraneous witness, the oath says,—"The evidence you are about to give shall be the whole truth," as well as "nothing but the truth" "The contents of this your affidavit are true," says the person by whom the oath is administered to a deponent on the occasion when he is said to make affidavit Correctness is stipulated for, how ill soever secured completeness, absence of partial imperfection, is not so much as stipulated for

Such is the form, the only form, in which the judges (I speak of that class of which learning is the exclusive attribute) will suffer testimony to be delivered to them, when the decision grounded on it is to be framed by themselves

In the case of those accessory, and most commonly redundant, inquiries, which, in indictments and informations, precede or follow that principal one which is called the *trial*,—the testimony, being likewise in the form of affidavit evidence, falls, in like manner, under the last preceding observations So likewise in the case of those comparatively summary causes, in which (though ranked under the head of civil causes) the suit,—instead of commencing by a declaration delivered in at an office, and never looked at by the judge,—commences by a *motion*, *i e* by a speech made to the judge, in open court, by an advocate

In the case of the examinations by which, in felonious and peace-breaking offences, the trial is preceded (inquiries performed by a justice of the peace,) the obligation of the prosecutor to testify at the instance of the defendant, and thence to the disadvantage of his own cause, stands on the same footing as at the trial, as above.

In a nearly similar, though not exactly the same, predicament, stands the *ex-parte* inquiry, which, in all suits prosecuted by indictment, is carried on in secret before the grand jury, antecedently to the trial. No

* A phrase employed on a particular occasion in equity law.

defendant being there, nor any person on his behalf, the plaintiff cannot be compelled to testify at the defendant's instance. But at the instance of any one of those his judges, the prosecutor—while occupied in delivering his testimony at his own instance, and consequently to the advantage of his side of the cause,—may, and frequently does, by questions put to him by any of those judges, find himself under the obligation of disclosing what may operate to the disadvantage of it. Such counter-interrogation has the effect of cross-examination, in so far as the zeal and probity of the judge alone may be considered as an adequate succedaneum to that same zeal and probity added to the interested zeal of the party (the defendant) whose safety is at stake.

Let us next suppose the case civil; and the procedure still at common law, viz. by action.

Principal or sole inquiry,* the trial.

On this occasion, unless the plaintiff, by any of the expedients above spoken of, has contrived to deliver his own testimony in his own favour, the defendant cannot, by the single powers of common law, draw upon that same source for any testimony which he on his part may stand in need of.

But if the plaintiff has contrived, in any such way, to give himself the benefit of his own testimony, the defendant, in virtue of the right of cross-examination, may also put in for his share.

In general, therefore, at common law, the defendant has no means of obtaining the benefit of the plaintiff's testimony: in no case without the consent of his adversary; nor then, but at the adversary's own instance, and by the adversary's own contrivance: that is, in no case but where, in all probability (and at any rate in the opinion of his adversary, the plaintiff,) it will be of no use to him.

I said, by the single powers of common law. The limitative clause was necessary. For in certain cases (though nobody knows exactly what cases,) by the assistance of a court of equity, the testimony of either of two persons about to appear in the characters of plaintiff and defendant at common law, may be extracted at the instance and for the benefit of the other. To the extent, therefore, of the aggregate, whatever it be, of these cases (concerning which, *quære*, *quære*, *et in æternum quære*,) the objection to the admission, the forced admission, of the plaintiff's testimony, has for its psychological cause—not the fear of deception, not the fear of producing vexation (viz. excessive and preponderant vexation,) but, if vexation must be mentioned, the fear of not producing enough of it.

But, as the draft drawn upon the breast of the adversary for evidence is more apt, much more apt, to be drawn by that of one of the two parties who institutes the suit, than by the other, who is dragged into it,—the consideration of this mode of making holes in the door shut against the light of evidence will be considered to more advantage, when the defendant's side of the cause comes under review.

Thus much for common law: we come now to equity law.

The testimony of the plaintiff, is it allowed, in these courts, to be delivered at the instance, and thence for the benefit, of the defendant? Not it indeed. But why not? Because, if it was, the man of law, in all his forms, would lose the benefit of a second cause. The delay, vexation, and expense of a suit at common law, is not enough for him: the delay, vexation, and expense of an equity suit, coming upon the back of a common-law suit, is not enough for him:—there must be a second equity suit,—or (so it will be in many instances) the facts in the case will be but half brought out—will have been brought out only on one side.

There must be what is called a *cross* cause, commenced by a cross bill, in which the plaintiff and defendant change sides: and the same individual, on whose testimony not a single fact was deemed fit to be believed, is now believed; and believed to such a degree, that the testimony of a disinterested witness, by whom his testimony should be contradicted, would tell as nothing: the judge would not so much as stay to inquire which of the two testimonies, the interested or the disinterested, seemed most deserving of credit, but would ground his decree upon the interested testimony, just as if the disinterested had never been received.

In this particular, so far as extortion and denial of justice are improvements, the English edition of the Roman system of procedure is no small improvement on the continental edition: to judge of it at least by the practice in French law. In French law, in the course of one and the same suit, though neither party is supposed to deliver his testimony at his own instance, each party obtains the testimony of the other.

The old French law, with all its plagues, the French modification of the technical system, inclosed no such curse as that of two sets of courts, each operating with powers kept imperfect, that assistance and obstruction may be obtained from the interposition of the other. The inquiry which in the English system occupies three suits—one common-law and two equity suits—was in the French system dispatched in one.

* Sole inquiry, if the pleadings are not reckoned: principal inquiry, if they are.

Even under the English edition of the Roman system — in that division which, in virtue of a connexion already become obsolete, goes still by the whimsical name of *ecclesiastical* law, — more honesty or more shame has been preserved, than thus to make two grievances out of one. In the courts called ecclesiastical, as in French law in all the courts, in the course of one and the same cause (I speak of causes non-penal) each party obtains the testimony of the other

CHAPTER III.

EXAMINATION OF THE COURSE PURSUED IN REGARD TO THE DEFENDANT'S TESTIMONY BY ENGLISH LAW.

§ 1. *Defendant's testimony, in what cases receivable in his own behalf. Inconsistencies of English law in this respect*

We come next to speak of the case where (the suit, as before, not affecting more than one party on each side) the party whose testimony is in question is the defendant

Is the testimony of the defendant admitted at his own instance?

Here, as before, the answer will be different according to the species of the suit *i. e.* whether it be criminal or civil, and if civil, whether the theatre be a court of common law, a court of equity, or an ecclesiastical court: and (whatever be the suit) according to the stage of the cause, *i. e.* which inquiry it is, of the several inquiries which the species of suit admits of, where it admits of more than one.

I. Case, criminal procedure at common law.

1. In this case, as in that of the plaintiff, in the first place let the cause be a criminal one; mode of procedure by indictment, inquiry, the principal one — the trial

At the trial, is a defendant allowed to deliver his own testimony at his own instance, and consequently in his own favour, to his own advantage? No, and yes. no in words, yes, in effect.

In words, no for in that station, let a man say what he will, it is not *evidence*. No oath can be administered to him, lest, if that security for veracity were applied, it might have the effect of confirming his statements, his *non-evidentiary* statements, within the pale of truth; which "would be inconvenient" Not so much as a question can be put to him by anybody. Not by his own advocate, if he be rich enough to have one; not by the advocate on the side of the prosecution; not even by the judge. By being circumstantiated, distinct, complete, and methodical, his statement, if true, might be seen to be so; if false, or incomplete, might be made to appear so: which again, according to established legal notions of inconvenience, would be inconvenient

In effect yes, for so long as it is not called evidence, — nor subjected to any of those processes by which evidence is purged (or endeavoured to be purged) of its deceptitious qualities, — he may say whatever he chooses to say, under the name of his *defence*.

As to the judges *ad hoc* — the jury, with the uniform degree of suspicion naturally called forth by the view of the situation in which they see him placed, added to the variable degree of suspicion called forth by the evidence that has been delivered on the other side, they form their judgment of the trustworthiness of this non-evidentiary statement taking into account, at the same time, its consistency or inconsistency with itself, and with such relevant facts as are of themselves sufficiently notorious without evidence What they do think about, in judging of this statement, is, its trustworthiness or persuasive force, intrinsic and extrinsic, as above what they do not think about, in judging of it, is, the kiss that has not been given to the book, for as to any security that may be supposed to be given by any such kiss, for the truth of the assertion, or the performance of the engagement supposed to be sanctioned by it [the absence of,] it cannot be a secret to any one of them who, to get out of the box so much the sooner, has joined in a verdict of *not guilty*, in favour of a defendant of whose guilt he was at that time persuaded in his own mind.

No counter-interrogation Will the absence of this security for correctness and completeness present itself to a juryman as a reason for paying no regard to what he hears? Yes, when their learned directors cease to receive affidavit evidence — uninterrogated evidence, to the exclusion of interrogated evidence

In offences of the rank of felony, the case is comparatively so rare, in which a man in that unhappy situation has anything plausible to say for himself (especially in the character of testimony,) that, comparatively speaking, the operation of this non-evidentiary sort of testimony seldom presents itself to view.

2 Case criminal, as before

Is the mode of procedure by information? The chance which a defendant has of profiting in this way by his own testimony, will not be essentially different But, his situation not being in this case so apt to attract the compassion of the public as in the other, — the quantity of suffering to which he stands exposed, not being so great as in those cases which occupy the largest space in the list of indictments, the defectiveness of his claim to have his non-evidentiary statement received on the footing of evidence, will not be so apt to pass without remark.

Moreover, among indictments, a consider-

able number will always be *pauper* causes. Nine-tenths, at least, of the cases which come on in the way of indictment, are cases of depredation; and these have, almost all of them, either by statute, or by jurisprudential law, been promoted to the rank of felonies. By pauper causes, I mean here such wherein the defendant is not rich enough to engage an advocate. Having no one to speak for him, on the part of a jury there will naturally be the more readiness to hear a poor culprit speak for himself.

Besides, in felonies, the tongue of the defendant's advocate (when there is one) is but half let loose. Questions,—interrogations and counter-interrogations, for the extraction of testimony,—he is allowed to put. Statements, or observations on the evidence, it is not allowed to him to make.*

Indictments, especially in cases of felony (by far the most numerous class of indictable cases,) are, therefore, many of them, pauper causes. But informations are none of them pauper causes. a principal recommendation of this mode of prosecution, as compared with indictment, being the property it possesses of loading the parties with an extra mass of expense—the enormity of which has no connexion with the merits—which, being never held up to view in the sentence, is of no use in the way of example, and has no other effect than that of impoverishing the suitor, and enriching the man of law.

3. Case criminal, as before: mode of procedure, by attachment: principal or sole inquiry (if inquiry it may be called, where there are no questions,) by receipt of affidavit evidence. Here all discrimination, all subterfuge, is at an end. So long as he is not checked by any such inconvenient curb as that of counter-interrogation, and on condition of his taking the pen of an attorney to speak through, instead of his own lips (or rather on condition of his setting his hand to sign what the attorney has said of him and instead of him—for in affidavit evidence the deponent never speaks for himself,) let his designation be what it may, extraneous witness or party, plaintiff or defendant, his testimony is received with equal deference. Interested or not interested, perjured or unperjured,—thus introduced, all doors and all ears are open to the testifier.

When an exclusion is put upon testimony, the objection is, nominally and ostensibly to the station of the proposed deponent—really and at bottom to the shape in which the testimony is presented. Give but this shape to the testimony—a shape to the purposes of justice the most unsuitable, to their own purposes the most profitable,—learned gentlemen on this occasion pay no more regard to their own rules—their own most sacred and fundamental rules—than on this and all occasions they pay (unless it be for the purpose of contravention) to the ends of justice.

4. These same observations apply of course, and with equal force, to all that multitudinous and most extensive list of cases, in which, to the exclusion of all better evidence, testimony is received in this unquestioned and thence most questionable shape.† 1. *In re criminali*,—on indictments, on occasion of the supplemental inquiry; on informations, on the preliminary as well as on the supplemental inquiry. 2. *In civili*,—at common law and equity law, in all motion causes, on the sole inquiry. 3. In the sort of motion causes called *petitions*—causes relative to the estates of bankrupts,‡ and heard by the highest equity judge, in a mode that by its summariness forms the most striking contrast to the regular equity mode,—on the inquiry which, in that unusually important class of cases also, is the only one. 4. On the occasion of all those incidental applications, which (be the cause where it may, and what it may) are received in the course of the cause; and for which the occasion has been manufactured in such abundance, and with such successful industry.

5. Procedure, by indictment, as before: inquiry, the preliminary one, the examination, as it is called, before the sort of judge called a justice of the peace, acting singly.

On this occasion,—there being, or not being as yet, a person, established (under the name of prosecutor) in the station and function of plaintiff,—the testimony of the defendant, in relation to himself, is called for by the judge. Called for from that commanding station,—the occasion and the station of the respondent being more or less perilous,—for the most part, if he be guilty (as in most instances he is,) it comes from him with reluctance: but, while what he thus wishes to withhold is extracted from him against his wishes,—whatever his wishes prompt him to deliver at the same time, pours itself out of course at the same gate. What he thus advances on his own behalf, is it, or is it not, evidence? Once more, yes and no. Yes, to the purpose of the question, whether he shall be subjected or no to ulterior prosecution,

* The advocate is now permitted to address the jury, by 6 & 7 Will. IV. c. 114.

† "Thou com'st in such a questionable shape,
That I'll *not* speak to thee:"
—a parody such as Hamlet could little have expected from the bench of justice.

‡ The chancellor is relieved from most of bankruptcy business, by the statutes for establishing and regulating the proceedings of the Court of Bankruptcy. See 1 & 2 Will. IV. c. 56, amended by 2 & 3 Will. IV. c. 114; see also 3 & 4 Will. IV. c. 47, and 5 & 6 Will. IV. c. 29.—*Ed.*

and for that purpose consigned to imprisonment for safe custody. No, to the purpose of the question 'guilty or not guilty;' the question to be decided at the trial Yes, in the first case, in effect. no, in both cases, in words.

6. Procedure, by indictment, as before inquiry, the preliminary one, before the grand jury.

On the occasion of this partial and secret inquiry, the presence of the defendant being neither compelled nor admitted, his testimony, as well at his own instance as at the instance of his adversary or the judge, is out of the question.

II. Civil cases, at common law

Case, a civil one, procedure, in the way of action: inquiry, the principal one, the trial (the only one, except the sham inquiry composed of the *pleadings* — the inquiry carried on by lawyers on both sides, for the benefit of themselves and their superiors and protectors, by reciprocal effusions of falsehood, of vague assertion, and nonsense, poured out under the mendacity-licence, without the signature, and, as to details, without so much as the privity of the suitors who are made to pay for it.)

On the occasion of the trial, occasion has been taken to delineate the plaintiff, appearing in disguise, in causes of this class, in the character of an extraneous witness admitted, in that character, in spite of technical rules and principles, to employ his own testimony in the support of his own claims

In this advantage the defendant has no means of sharing At the trial, he is not shut out, because nobody is shut out But at the trial, speak he must not not in his own character, nor is there a crevice through which he can creep in, to speak in any assumed one.

Speak indeed he may, if mere speaking will content him; without speaking to any purpose. For, in cases of this class, defendant and plaintiff standing on even ground, and without any nook for compassion (real or hypocritical) to plant itself upon, and cry, Hear him! hear him! whatever he may (if he have courage) insist upon saying, will be watched by men with sieves in their hands; and whatever testimony he may take upon him to throw in along with his matter of argument and observations, will be carefully separated, and forbidden to be lodged in the budget of evidence.*

One case there is, which for its oddity, as well as its inconsistency and absurdity, is worth observing.

This is the case of a mandamus.† Like an attachment, a mandamus is a writ of a special nature Like an attachment, this writ is not to be had without asking for in open court and it is by affidavit evidence, that, on this as on all other occasions, the application is supported and opposed In the case of the attachment, the writ is directed to the sheriff, and commands him to seize the body of the defendant, and do with it, he knows how in the case of the mandamus, it is addressed to the party, the defendant

But the curious circumstance, and that which brings it under the present head, is this — When once the writ is issued, not only the testimony of the defendant is admitted, but no other evidence is admitted: when admitted, it is admitted not only without the check of counter-interrogation, but without so much as the sanction of an oath. and in this shape, still less trustworthy than even that of affidavit evidence, it is not only admitted, but made conclusive.‡

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* There is one case, according to Phillipps, in which the evidence of the defendant is allowed to be given in his own behalf, on the occasion of an action in the common-law courts. The case I allude to, is that of an action for a malicious prosecution, "where it seems," says Phillipps, "to have been understood, that the evidence which the defendant himself gave on the trial of the indictment, may, under certain circumstances, be received in his favour on the trial of the action" Phillipps, i. 66.

Observe, that in this, as in so many other cases, evidence which might without any trouble be obtained in a good shape, is carefully put into a bad one What the defendant said on the first occasion, may be received in his favour on the second; though by what evidence, except hearsay evidence, he can be proved to have said it (unless the judge's notes happen to have been preserved) is not clear: while the defendant himself, who is there in court, ready to be examined, and without the slightest inconvenience in the shape of delay, vexation, or expense, stands peremptorily debarred from opening his mouth. Whether he is allowed in this case to give evidence for himself, or no, — certain, however, it is, that in this one case his wife is allowed to give evidence for him, which, in the opinion of Phillipps, seems to be the same thing. The reason given by Lord Holt for admitting in evidence the oath of the defendant's wife, to prove the felony committed, is as follows: "For otherwise, one that should be robbed would be under an intolerable mischief: if he prosecuted for such robbery, and the party should be acquitted, the prosecutor would be liable to an action for a malicious prosecution, without the possibility of making a good defence, though the cause of prosecution were ever so pregnant." — The reason is a good one: but admit its goodness, and what becomes of the exclusionary rule? —*Editor.*

† Is this a regular cause? an action? or is it not rather a sort of motion cause? By lawyers it is confounded with actions. But in the track of procedure, its march is that of a motion cause.

‡ In one case, one *sort* of case, — viz. that where the object of the mandamus is to procure the filling up of a vacant office in a "borough or corporation," or the due filling of it up where unduly filled, — provision has been made by a

III. Civil cases in equity law.

In equity procedure, the case of a defendant proffering his own testimony without its having been called for on the part of the plaintiff, can never happen: a suit in equity never commencing in any other way than by an instrument called a bill, in which the plaintiff calls for the defendant's testimony.

After so much as has been said, it surely cannot require in this place any fresh argument to prove, that no real service can be done to the interests of truth and justice, by taking, or attempting to take, each man's testimony by halves; cutting out of it whatever part of the facts happen to operate to his advantage — retaining such only as are supposed, on the other side, to operate to his disadvantage. But, for the purpose of illustration, the consequences of the attempt as conducted, may not be undeserving of notice. Though neither party is permitted, at his own instance, to bring to light, among the facts that have come to his knowledge, such as appear to him to operate in his own favour, — each party has, in a greater or less degree, the opportunity of bringing to view those same facts, in the event, and through the means, of the interrogation which may be administered to him by the other. But on what depends the defendant's chance of bringing to light the whole or any part of such of the facts that come to his knowledge, as appear to him to operate in his own favour? Not upon the merits of his cause — not upon the truth or importance of these same facts; — but, in the first place, and in some degree, upon the dexterity of his professional assistant in coupling the facts of the one description with those of the other; in the next place, absolutely and conclusively upon the pleasure, upon the accidental circumstances and exigencies of the situation of his adversary the plaintiff, coupled with the sagacity and judgment displayed by the professional assistants on that side, in their endeavours to turn to the advantage of their client the views of the law. Of the facts brought to view by the defendant, let those which operate in his favour be ever so true and ever so important, not one of them will the judge ever hear of, if such of the facts as operate to his prejudice are testified by such other evidence as, in the judgment of the advisers of the plaintiff, are sufficiently conclusive: so that, as to all facts derivable from that source, the chance which they have of operating with such weight as is their due upon the mind of the judge, depends not either upon their truth or their importance, but upon the will and pleasure of a party, who, the juster the claim is to admission, is so much the more strongly engaged by interest to refuse it.

§ 2. *Defendant's testimony, in what cases compellable at the instance of the plaintiff. Inconsistencies of English law in this respect.*

The testimony of the defendant, is it compelled at the instance of the plaintiff? *

1. Case, criminal: procedure, at common law.

1 & 2. Case, criminal: procedure, by indictment or information: inquiry, the principal one, the trial.

On this occasion, no compulsion, direct or indirect: not so much as a question permitted to be asked. The defendant, as already stated, says what he pleases in his own behalf; tells consequently (as often as, being guilty, he says anything in the way of testimony,) a

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statute of Queen Anne (9 Anne, c. 20,) for putting this sort of procedure upon a footing analogous to that of an ordinary action. But in all the other sorts of cases, the remedy remains still in the state in which that statute found it.

In one case — one individual case — the return received somehow or other (it does not appear how) the sanction of an oath; but this case was out of the common course: a special order was made for the purpose. (3 Car. I., B. R. Anno 1630. Palmer, 455.) Lawyers, like other men, are subject to fits of forgetfulness; in those fits, that love of justice which, having been planted by nature in every human bosom, can never be completely eradicated in any, not even in that of a technical lawyer, breaks out into irregularities. But, — howsoever it may be with this or that individual, on this or that particular occasion, — professions, taken in the aggregate, are ever steady to the professional interest: so that, after the general rule, which owed its birth to the general interest of the profession, has been broken through by the momentary and casual prevalence of individual virtue, or interest or caprice, the predominant force soon brings back the course of practice into its natural channel. Here, on a particular occasion, we see the mendacity-license (one of the most efficient instruments of the technical system) unwarily revoked? on another occasion, we shall see the regular practice, — by which judges forbid the presenting testimony to them, when for their own use, in any other than one or other of two bad shapes, *affidavit* evidence (*i. e.* uninterrogated evidence,) or *equity deposition* evidence (*i. e.* secretly and inadequately interrogated evidence,) — hastily broken through, and the deponent convened before them and examined by them *vivâ voce*, just as if, on that particular occasion, a fancy took them for coming at the truth. But these rare instances, numerous enough to prove the power of doing right, serve, by their rarity, to show the want of inclination to employ it.

In the case in question, fortunately for justice, unfortunately for lawyers, the oath was effectual. Not staunch enough to expose himself to the pains of perjury, the *malâ fide* defendant, the mayor to whom the mandamus was directed, restored the plaintiff to the office from which he had been removed: the benefit of the action on the case for false return, was thus lost to the men of law.

* Those criminal cases included, in which the judge unites to his own office that of plaintiff, *i. e.* prosecutor.

false and imperfect story: not a question is to be put that can tend to the correction or completion of it.

Our business here is with the fact: the actual state of the law. With reference to the ends of justice, what the consequence is, has been already brought to view to the guilty, nothing but impunity and triumph; to the innocent, nothing but danger and inconvenience.

It is not that no testimony is to be received from this same source, on the contrary, any testimony is received, that either has come from it, or (though untruly) has been said to come from it. Any testimony, so the purport or pretended purport of it be but delivered through the medium of another pair of lips—delivered in the shape of hearsay evidence,—is received. unsworn, uninterrogated if inaccurate, uncorrected, if imperfect, uncompleted.

Here, then, comes the often-presented question, followed by the as often-returned answer. The testimony of the defendant, at a criminal trial, is it compellable? No, and yes no, in the most trustworthy shape, yes, in an egregiously untrustworthy one. Blessed tenderness! Encouragement to the guilty, injury to the innocent, resolving itself into a predilection for bad evidence!

3. Inquiries of all sorts (sole, principal, supplemental, preliminary, *in criminali*, *in civili*, on the principal point, on incidental points) performed by the receipt of affidavit evidence

In regard to admissibility, at the will of the defendant, and consequently in his favour, how the matter stands has been seen already But,—when coupled with the consequences that have been made to follow upon silence,—admission, permission, is compulsion. Every assertion contained in the affidavit of the plaintiff, or of any extraneous witness testifying in this way in his behalf,—every such assertion, so it be not irrelevant, is in effect a question, though a leading, a suggestive one Deny the fact, or you will be considered as affirming it, as confessing it

But the mass of assertions contained in the plaintiff's affidavit, though a sort of succedaneum to a string of interrogatories, is a constantly imperfect and inadequate one: the interrogatories, if such they may be termed, delivered *uno flatu*, not arising out of the answers: the silent virtual confession returned to some of the questions, smothered by the responses (satisfactory or evasive, distinct or indistinct) given to others.

To display in detail the imperfections inherent in the nature of affidavit evidence, belongs not to this place: it has been done in a former Book.*

Thus much may suffice to warrant the introduction of the already presented question, followed by the ambiguous answer which there is such frequent occasion to subjoin to it.

On the inquiries (criminal and civil) in which the evidence is cast into the shape of affidavit evidence, is the testimony of the defendant compellable? Yes, and no: not compelled in any good shape, compelled in this egregiously bad one. Tenderness or no tenderness, at any rate a predilection for, a preference (and that an exclusive one) to, bad evidence

4 Procedure, by indictment inquiry, the preliminary one, the examination before a justice of the peace, as above.

On this occasion, too, the defendant, in respect of the delivery of his testimony. lies under a sort of compulsion and that more efficient than we have seen it in the case of ready-written testimony To produce the compulsion, no extraneous force is indeed employed, but the other sort of compulsion just described, compulsion *ab intrà*, in this as in those other cases On this occasion it will seldom happen that the testimony of the defendant is called for, that he is put to the bar to be examined, till some other evidence, some extraneous testimony bearing against him, has been previously delivered The question here is, whether he shall be prosecuted and committed, or liberated? From silence, as well as from evasive responsion, or false responsion, proved to be so by contradiction *ab extrà*, or self-contradiction, the magistrate will draw his inference To whatever evidence (direct or circumstantial) may have been brought out from other lips, the circumstantial evidence consisting of this silence, will constitute an addition of no unpersuasive kind

In a word, the mode of collecting the testimony differs in this case from the best mode, by nothing but the want of the presence of the adverse party, with the faculty of pushing the inquiry to the utmost, as on the trial in civil cases and to say the *best* mode, is as much as to say the most compulsive.

Perhaps the subordinate and unlearned judge *ad hoc*, imitating the tenderness of his learned superiors, will aid and abet the defendant with a piece of advice, which, on any other supposition than that of his being guilty, will be of no use to him. "Here is the question; but unless you have some falsehood ready, which you think may help to screen you, do not answer it."

Happily, the obligation attached to the situation cannot be altogether destroyed by this pious endeavour to destroy it. If the advice is taken, and silence preserved, the judge, with all his high-born learning, can scarcely keep himself from drawing that inference which common sense, unpoisoned by learn-

* Book III. *Extraction*; Chap. XIII. *Uninterrogated Testimony*. (Vol. VI. p. 458.)

ing, cannot avoid drawing from such data. Though the answer should be a confession, he cannot convict; and though, instead of an answer, the silence he bespeaks be presented to him, he can scarcely avoid committing, and taking order for prosecution; and if, instead of silence, confession had come, he could have done no more.

II. Civil cases at common law.

1. Procedure by action: preliminary sham inquiry, the pleadings. Here, as in the case of procedure by affidavit evidence, the compulsion, though indirect, is still compulsion, and the admission, as it were, merged in it. The principle of compulsion is not deduced *ab extrà*, but innate as it were, arising out of the cause, and proportioned in force to the value at stake upon the cause. A mass of jargon, in the accustomed form, has been poured forth by your adversary's lawyers: employ your's to reply to it by a correspondent mass, or you lose your cause.

Had the object of the framers of this system been the attainment of the truth, — as in felonies it was the object of the legislature, in ordaining the preliminary examinations, — they would here have taken the same course: but (as anybody may see that chooses it) their real and sole object was, to produce, for the sake of the profit extractible out of the expense, that system of delay, vexation and expense, which has been produced accordingly.

Compulsion (indirect as it is) there is no want of. Compulsion; but to do what? Not to deliver anything that can serve for evidence — not to speak a syllable of truth, or of anything that can serve to bring out the truth, — but to pay lawyers for writing lies and nonsense.

2. Principal inquiry, sole real inquiry, the trial. Here no compulsion, any more than in a trial on an indictment or information. No compulsion; and (saving whatever difference there may be in respect of the value and importance of the matter at stake,) the consequences — the mischievous consequences, the ambiguities, the inconsistencies — the same here as there.

III. Civil cases: equity law.

In all those civil cases to which the jurisdiction of a court of equity extends, by one means or other the testimony of a defendant is compelled without reserve or disguise.

The question having been propounded, — silence, silence as to the whole together, is taken for confession; an inference that would not be unreasonable, if the defendant were on the spot to answer for himself, — or if, instead of one man out of twenty, every man were rich enough to be able to speak in the only way in which a hearing is to be obtained.

But, where *appearance* is in question, command does not include permission, either in law or equity. In both places, men know their own business better than to suffer a cause to be begun in a mode which, in nine cases out of ten, brings it (as where *conscience* presides it is actually brought, brought in the self-same hour) to an untimely and unprofitable end.

Propose, then, the constant question: — no other than the constant answer can be returned to it.

In equity law, the testimony of the defendant, is it compellable? Yes, and no. No, in the best, most natural, most efficacious, most prompt, least vexatious, least expensive mode. Yes, in an inferior, makeshift, accidentally (though but occasionally) necessary mode — drawn aside from the ends of justice by factitious delay, vexation, and expense.

Such, then, are the shifts to which a man is reduced, when straining to find a legitimate reason, or so much as the shadow of one, for any part of the mountain of abuse of which the technical system of procedure is composed. Vexation, fear of producing unnecessary vexation, is that the reason why the testimony of a party is not compelled, in the same mode in which it would be compelled were he an extraneous witness? To save the vexation of an hour, months or years filled with more corroding vexation, aggravated by a load of expense which to nineteen persons out of twenty is altogether insupportable? Here, as elsewhere, thus it is with those tender mercies, in the vaunting of which, neither the tongue nor the pen of the lawyer ever tires: begun in selfishness, continued in hypocrisy, it is in cruelty that they end.

After having been examined in his own station in this mode, the defendant is liable to be examined, with or against his consent, in the station of a witness, in a quite different, and (as far as concerns the extraction of the truth in plenitude and purity) much superior mode. But this case will come more fully and advantageously into view, when we come to speak of the case which presents divers persons on the defendant's side.

IV. Case civil: procedure by common law and equity together.

In speaking of the plaintiff's side of the cause, we had occasion just to note the fact, that in some cases, by the assistance of a court of equity, either party may obtain the testimony of the other, to be employed on the occasion of the *trial*, at common law. Either party, consequently the defendant: — but the plaintiff (*i. e.* he who means to become such) in the court of common law, is the party with whom the application to the court of equity, for that purpose, will most naturally and frequently originate.

In this most natural of the two cases, the person who proposes to himself to become plaintiff by action at common law, begin

with occupying the same station in a court of equity. A bill having this for its object, is distinguished by a particular name. a bill of discovery.

Had the bosom from which it was to be drawn been that of an extraneous witness, the self-same testimony would have been compelled by an instrument called a *subpœna*, and delivered, in the best shape possible, that of *vivâ voce*, subject to counter-interrogation and counter-evidence on the spot — delivered in the compass, perhaps, of a couple of minutes. By the assistance of a court of equity, it is obtained, in an inferior shape, without the security afforded for correctness and completeness by the scrutiny of *vivâ voce* counter-interrogation, obtained at the end of as many years, perhaps, as it would have occupied minutes if delivered in the most trustworthy shape. I speak of minutes for even though the article of testimony thus required be ever so simple (authentication of a deed, for example, or communication of the contents,) a quantity of time more than sufficient for the circumnavigation of the globe, may be to be consumed in seeking for it.

As to the rational, the justifying cause — the ground, in point of justice and utility, on which, to the extent of this class of cases, the direct exclusion, coupled with the indirect and circuitous admission, rests, — what it is not, and what it is, are points equally out of the reach of dispute. It is not the fear of deception; for the same testimony which is excluded in the more trustworthy, is admitted in the less trustworthy, shape. Still less is it the fear of producing vexation, *i. e.* vexation beyond necessity, and in excess. What fear then is it? It is the fear of not producing vexation enough; viz. that vexation of which there never can be enough; the vexation with which delay and expense, and the profit (official and professional) extractible out of that expense, keeps pace.

By a recent decision, if the mischief is in one part limited and kept from spreading, its inconsistency is increased.

In the station of an extraneous witness, in a dispute with which he has no concern, a man may, in the direct mode (under the *subpœna* without a bill) be compelled to deliver his testimony, how heavy soever the burthen to which he thereby subjects himself; so it be that in speaking of it, the word *criminal* be not employed. A forfeiture to the amount of the whole of his estate may thus be imposed upon him, so it be that the forfeiture be not called a *forfeiture*.

If, for the extraction of testimony from unwilling bosoms, a bill be so much better an instrument than a *subpœna*, why not extend the application of it to extraneous witnesses? Unfortunately, the times admit not of any such improvement; it is now too late. In law, no abuse too flagrant to be cherished; but even in law, no new ones must now be made.*

V. Examination of bail.

By the two words *opposing bail*, a sort of examination is denoted, which, anomalous as it is, has, and under the present head, a claim to notice. Two persons, whose relation to the cause is designated by that appellation — a sort of parties added to the cause — present themselves in court, and are subjected to an examination analogous to that which is called *cross-examination* in the case of an extraneous witness. A species of examination this, which may be seen going forward any day, in any of the superior courts of Westminster Hall, the Court of Chancery excepted.

An action is brought, and (such is the established order of things) the defendant having, with or without necessity or use, been apprehended as a malefactor might be, — instead of being brought before a judge, for examination in the first instance, as a felon is, to be committed, or not committed, according as the necessity for that species of vexation has or has not existence — is committed to prison in the first instance — to a prison, with or without necessity, or (as a matter of favour) to a spunging-house: — that the money which might have gone to his creditors, may be shared among the lawyers, who have given themselves a better title to it. To liberate him from this vexation, two friends of his come forward, and engage themselves, in the event of the defendant's losing his cause, to do one of two things: to pay the money that he should have paid, or to give back his body to the harpies of the law. Out of court exists, having existed time out of mind, a sort of officer called the sheriff, a common subordinate to all the four courts, something between a constable and a judge: to purposes of vexation, a judge — to purposes of relief, anything but a judge. As to the use of him in the present state of things (I mean to the purposes of justice, — for to the purposes of established judicature he is of admirable use,) conceive this personage, with his subordinates, interposed, in a cause before

* I have spoken of the case where, in connexion with oral testimony, written evidence is required, required at the hands of a person prompted by interest to suppress or withhold it. But to this purpose, neither common law nor equity, nor both together, are adequate: if a man who has money and resolution to stand out, when proceeded against in the regular course of civil procedure, ever produces a deed, or anything else that he would wish not to produce, it is his attorney's fault. Powers such as unlearned magistrates exercise every day in cases of felony, with so much promptitude and success — powers for tracing effects from hand to hand — are altogether unknown to learned ones. Such promptitude accords not with the ends of judicature.

a court of conscience, between the court and their beadle; in a cause before a justice of the peace, between the magistrate and his constable. This interposition supposed, conceive the improvement it would make in those instances, and you will have a tolerably distinct view of the necessity and use it is of, in the several instances in which it continues to have place.

The bail are now in court: for at that august seat of judicature the presence of those incidental parties, at that early stage of the cause, is as necessary as, at every other stage but the last, the presence of the principal parties is (for so it has been made) impossible.* The bail are in court: a cause, a sort of incidental cause, is to be tried, viz. whether, to the purpose of affording to the plaintiff an adequate security for the performance of their engagement to him, they are in a state of solvency. If *unopposed*, the fact is sufficiently proved by their own statement, made in general terms, but upon oath: if opposed, the opposition is made by employing an advocate to counter-interrogate them: to put questions to them, in such detail as the patience of the court admits of, concerning the particulars of their property.

Without any such scrutiny, because without any power of administering an oath, this same pair of guarantees, or another pair (for, of the chaos of complication in which the business is involved, this diversification forms one of the ten thousand elements,) the same pair of sureties, or another pair, have already been received by the sheriff in another place: so that these sureties, whose sufficiency is to become matter of dispute — these same suspected persons have, if the suspicion be well grounded, had time to convey themselves out of the reach of justice.

Ask a lawyer, whether, in a civil case, and at common law, a party is ever examined — examined in the way in which at the trial a witness is? Answer: No, never. Ask him whether such a thing, if done, might not be an improvement? Answer: *Neminem oportet esse sapientiorem legibus.* Ask him whether it could be done? Answer: Impossible, without throwing everything into confusion, and overturning the very foundation of Blackstone's venerable castle, the sole defence of English liberties.

Ask him whether he has ever heard of a sort of person called a bail; whether a bail is not, to the purpose of eventual responsibility, a party, and whether he never heard a bail examined — examined just as he might have been, had the court at the time had a jury in it, and he been a witness on that same side? Ask him once more, whether he has not heard of a sort of a thing called an *estoppel*,† — and whether there be not that in it that shall be a *bar* to his plea of the impossibility of examining a party at common law, without blowing up the old castle? Either you will find him standing mute like a prevaricating witness, struck by a flash of self-contradiction; or, if he says anything, it will be to some such effect as this: — A bail, party or not party in effect, is not a party in name: we never look beyond names.

Would it be less conducive to the ends of justice, to examine in this same mode, and for this same purpose, one principal party at the outset of the cause, than two subsidiary, and perhaps unnecessarily subsidiary ones, in the course of it? Would not the solvency of the debtor himself be rather better worth knowing in the first instance than that of two strangers? Might it not be better to know from himself whether he be solvent or no, than to begin with sending him to a jail or a spunging-house, and perhaps make him insolvent, for fear of his being so? Answer: May be so; but why talk to us about the ends of justice? What have we to do with them? What business is it of ours to look at the subject in any such point of view? What should lead us to it? Who would pay us for it? Who would so much as thank us for it?

What is that sort of information which is got from a man, under the name of bail, at common law, in the course of a few minutes? Exactly the same sort of information which, under the name of a defendant, would be got from the same man in equity, with less security for correctness and plenitude, at the end of as many months: if, for example, he were an executor or administrator, having possession of a mass of property, out of which the plaintiff, a legatee or creditor, called for his share.

In the examination of bail, if the account obtained by the inquiry be sufficiently detailed and satisfactory to prove a mass of property adequate to the sum for which he binds himself, there the inquiry stops, as in this case it is fit it should. In the case of the executor, it may be necessary it should go further: it may be necessary it should go to the utmost. Extending over the whole mass, and (to show that nothing is omitted) exhibiting a separate view of every elementary part of which that aggregate is composed, — it would be inade-

* Amongst other purposes, it serves that of saving the lawyers in both stations the pain of an interview with the parties whose fate they are disposing of. The presence of an exasperated creditor is not more intolerable to an insolvent debtor, than that of either of them, but more especially of both together, is to learned benches. In the greater number of instances it would render a regular cause as prompt and unproductive, though the value in dispute were above £40,000, as now in a court of conscience where it is under 40s.

† A man's own *deed*, for example, will serve as an estoppel to his averring or proving anything in contradiction to it. Co. Litt. 171.—*Ed.*

quate to the purpose, if a statement framed with that deliberation of which written discourse alone is susceptible, did not accompany, or rather precede, the elucidations extracted by *viva voce* interrogation. In the case of the executor,—to the *viva voce* responses, a document of this permanent nature (in equity practice in fact a succedaneum) should in propriety be a supplement, a concomitant, or a preliminary. In the case of the bail, it would not so constantly be necessary to justice But even in that case, instances in which it would be necessary, present themselves in every day's practice. Before the income tax, unless where extracted by a bill in equity, an occurrence of this sort was without example, therefore it was impossible. Now, it has existed, and existed in every house, therefore it is not impossible. Good logic in a court of common sense, if not in a court of common law

VI. Case criminal procedure summary

The guards to Blackstone's castle (the castle of lawyercraft) are numerous and vigilant. But the fortifications they have to defend are extensive. the assailants, though scattered and undisciplined, not a few. Here and there, in some neglected quarter, reason will steal in and take post one precedent lets in another

Jurisprudential law is law made by lawyers, never but for the benefit of lawyers· statute law is law made by the self-styled guardians and representatives of the people, sometimes for the benefit of the people Procedure called regular, is the work of jurisprudential law procedure called summary, of statute law Jurisprudential law is the miserable makeshift of inexperienced ages statute law, the regular work of power and experience, operating upon the raw materials shot down here and there by jurisprudential law As the sun rises, fogs disperse, as statute law advances, jurisprudential vanishes.

The legislator, who, in the reign of Philip and Mary, introduced the preliminary examination of defendants, in cases of felonious offences, by single justices of the peace, ventured not to intrust those magistrates with the power of deciding upon the evidence so collected. that power was reserved for a jury. Saving here and there an exception too intricate and absurd to be here particularized, a felonious offence was in those days a capital offence: *felony* meaning then (what unclergyable felony * means still) an inexplicable cluster of *punishments*, of which the only efficient and comprehensible one is that most absurd, and to English minds most favourite, of all punishments, into which all others are gradually ripening, *death*:† felony, the punishment, and (by a figure of speech congenial to jurisprudential rhetoric,) the name of the punishment become the name of an offence But the power of life and death was too much to be intrusted to a single magistrate; and as to the applying, to any offence that had ever been punished with death, any inferior punishment, it was a sort of anticlimax not at all to the taste of that age, nor much, as yet, to the taste of any age

Depredations, of which this and that particular sort of article were the subject, having excited the passion of revenge in the bosom of the owners of the individual articles; and these individuals happening to possess the requisite share of influence with the legislative body,—a fresh exertion of legislative authority came (as usual) to be made Though the rules of jurisprudential law are all of them *ex post facto* laws, having all the bad properties of that sort of law, with that of uncertainty to boot,—the iniquity of the practice, when applied to statute law, seldom fails to be recognised Feigning *notice* where there is none, lawyers, who, at so easy a price as the saying the thing that is not, have established themselves in the habit of dealing with men as they please, punish for disobedience, where obedience is impossible. legislators, acting in their own characters, shrink with just horror from such injustice But though the individual offence escapes unpunished, it is still the individual offender that is in view. Rarely do the optics of the legislator carry him beyond individual objects,—to stretch further, were it possible, might scarce be prudent it would be abstraction, speculation, theory. sounds employed by politicians who have not the gift of thought, for pointing the current of jealousy against those who have: means employed by him who has power without understanding, for keeping him who has understanding without power from giving the public the benefit of it Here it was the bird came and perched in hopes of catching that same bird, the net (a spick and span new one made for the purpose) is spread exactly in the same place Such is the logic of your practical statesmen.

Finance excepted (an important branch of legislation, but not the only one,) the care of the laws is not the charge, nor therefore the care, of any man. Method, consistency, are never thought of. what does not exist, cannot be disturbed. Lawyers love confusion. lawyers fatten on it: non-lawyers, born and bred with the yoke of the lawyer about their necks, if haply they have the wish, have not the wit, to remedy it

A quantity of lead and iron had been stolen: passions kindled, resolution taken to catch

* This distinction has been abolished by 7 & 8 Geo. IV. c. 28.—*Ed.*

† The frequency of this punishment has happily been much diminished by the 3 & 4 Will. IV. c. 44, the 7 Will. IV., & 1 Vict. c. 84, and other statutes. See Vol. VI. p. 382, note 13.

the thief if possible. Lead and iron have been stolen, and the thieves not punished: ergo, the laws against stealing lead and iron are insufficient. The laws against stealing lead and iron are insufficient: ergo, fresh ones must be made. The thieves unpunished: but how happened it? Because the fact could not be proved upon them: and how happened it that it could not be proved upon them? Because, when questioned about it, they knew better than to answer. Was it there the shoe pinched? this shows us how to frame the remedy. When a man is taken up for stealing lead or iron, provide that, if he won't answer, and answer to satisfaction, it shall be concluded that he stole it, and he shall be dealt with accordingly. Ay, but this is making him criminate himself: that is against the rule which forbids the putting it to a man to accuse himself: a mode of procedure which lawyers abhor, except where they find their account in practising it, and which non-lawyers, taking the interested clamour of lawyers for the voice of reason, abhor without reason.

True; and therefore we must not think of hanging, or so much as transporting upon such evidence. But a penalty really inflicted, such a penalty, be it ever so trifling, is better than a penalty, be it ever so severe, which is not inflicted: a substance, be it ever so small, has more stuff in it than the largest shadow. To make sure, say forty shillings and no more. To a member of parliament, forty shillings is as nothing: confine the penalty to forty shillings, what the evidence is, will be an object not worthy inquiring about.

So much for the penalty: then as to the jurisdiction; for that too must be changed. Before a jury? No; it cannot be: before them, putting questions to the defendant would never do: they are not used to it: they would not come into it: besides that, before the matter could come to them, the thief would be prepared and over-prepared. With this description tacked to it, the offence, if it come anywhere, must come before a justice. Singly or in pairs, when acting in this mode, people (it is true) are not used to see justices trying theft, and trying it without a jury. But penalties of forty shillings, and ten times forty shillings, are levied in this manner every day: therefore, confine the penalty to forty shillings: say nothing about theft, nor anything about questions, interrogations, or examination; mask the questioning by words which imply questioning without expressing it; lawyers will not see what you are about, or other people will not mind them: and thus, with friends and fortune on your side, your bill will pass.

Thus spake the bold, and fortune favoured them. Like the Lesbian rule of old, the rule bent, the bar opened, and let in protection for the two favoured metals.

Forty shillings' worth of lead or iron being worth forty shillings, how much less is the worth of forty shillings' worth of any other thing? Such is the question which common sense might have put, had she dared to raise her voice. But either she was not there, or she did not dare: had she spoken thus loud, lawyers would have taken the alarm, and protection, instead of being extended to other things, would have been lost to the favoured metals.

The direct course would have been free from danger: the indirect, the evasive course, teems with it. I speak of the danger which threatens innocence.

Pressed by pursuers, were a thief in a crowd to slip a purse into your pocket without your perceiving it, or to let drop a quantity of lead or iron into the area before your house, while you and your family were asleep; were any such chance to happen to you, to the satisfaction of what justice could you show how you came by it? The eye that reads this, sees, probably, no such danger in its own case: opulence and character afford you protections of stronger texture than are to be found in the tenor of this law: but, turning your thoughts for the moment, if your mind be strong enough, put yourself into the rags or the cellar that shelter the honest shoe-black who waits for custom near your door.

Metals, "lead, iron, copper, brass, bell-metal, or solder:"* cause to suspect that any such article, having been stolen, is concealed in such or such a place: complaint, on oath, to a justice of the peace, of the existence of such cause: warrant from such justice to search accordingly, in the day-time; finding therein accordingly: warrant thereupon, by such single justice, to cause the same, and the person in whose house, or other place, the same were found, to be brought before two or more such justices. These preliminaries adjusted, then comes the clause authorizing the extraction of self-criminating evidence. If such person shall not give an account, to the satisfaction of such justices, how he came by the same, or shall not, in some convenient time, to be set by the said justices, produce the party of whom he bought or received the same, he shall be adjudged guilty of a misdemeanor. Penalty for the first offence, 40s; for the second, £4; for every subsequent offence, £6: so that, if there were not other laws, by which, in case of other sufficient evidence, these same thefts are punishable under the name of theft, and with a degree of severity which certainly cannot be charged with insufficiency, this law, instead of being a prohibition, would operate as a licence.

Give an account, to the satisfaction of such justices, how you came by the same?—or,

* 29 Geo. II. c. 30.

in some convenient time, to be set by them, produce the party of whom you bought or received the same? If, as before supposed, you know nothing either of the thief, or of the stolen goods,—the same, after having been stolen *out of* some other place, having been stolen *into* yours, without your knowledge,—how should you? The probability is, that, notwithstanding your giving no such account as is required, and on failure of which the justices are required to convict you,—the probability is, that, you being innocent, they would not convict you. Be it so: but if so it be, then the case comes to this: that the magistrates, instead of pursuing the law of the land, pursue the law of reason, and that, instead of extracting, or rather receiving, testimony from you (the defendant,) in an imperfect mass, according to the terms of the statute, they extract it from you in a complete state—in that state in which (you being, by the supposition, willing) they would have extracted it from you, had they dealt with you, the defendant, as they would have done with any extraneous witness, or if, dealing with you as a defendant, they had examined you as persons apprehended for felony are examined, under the statute of Philip and Mary,—for the purpose of being committed, or not committed, for trial,—and as defendants charged with any sort of crime are examined under Roman law, for the purpose of being convicted or not convicted *

* One law for one sort of metal, another for another: one law for *lead*, with its etcæteras, as aforesaid; another law for *pewter* (21 Geo III c. 69.) Fancy not, that though pewter should have been stolen ever so much to the "satisfaction" of such two justices, it would be in their power to punish for the theft upon such evidence, or upon any evidence.

Moreover, lead, iron, and copper, are unmixed metals; brass, bell-metal, and solder, are, as well as pewter, mixed ones. But, out of any two metals that will mix in any proportions, without limit, you can make as many different sorts of mixed metals as you please: *à fortiori*, out of all the unmixed ones, taken in the aggregate. Of these mixtures (not to speak of possible existence,) besides the three that are mentioned, many there are that have actual existence, under actually existing names: pinchbeck, bronze, and so forth. Tinned copper, is it copper?—tinned iron (commonly called tin simply,) is it iron?—steel (iron compounded with a minute proportion of carbon,) is it iron, under the act? Forty shillings' worth of any one of the many non-enumerated metals, how much more or less is it worth,—how much more or less well entitled is it to the protection of the law in general, and of this law in particular (if the protection given by it be a proper one,)—than forty shillings' worth of any one of the few enumerated ones?

Against the enterprises of depredators, while sugar is in the same rational and therefore extraordinary way protected, honey is left unprotected; while iron is protected, manganese is unprotected; while turnips are protected, parsnips are unprotected; and so on without end. When honey, manganese, or parsnips, are the things stolen, it is a wrong and a cruel thing to make the thief accuse himself: when sugar, iron, or turnips, it is all right.

It is in this way that the existing chaos might be made, at any time, a hundred times as bulky as it is; and, at the same time, and by the same means, a hundred times as deficient as it is.

Such are the consequences, while a prejudice—which (unless all these clandestine laws, for there are more of them,[a] are so many petty nuisances) is itself a mighty nuisance, calling aloud for eradication—is, instead of being eradicated, pruned.

[a] 2 Geo. III. c. 28, commonly called the Bumboat Act, confined to the Thames:—forty shillings' worth of goods stolen on or near the Medway or Severn, being worth more or less than forty shillings' worth of goods stolen on or near the Thames.

See also the Thames Police Act. Also, 43 Eliz. c. 7, and 15 Car. II. c. 2, relative to wood-stealers.

CHAPTER IV.

IMPROPRIETY OF EXCLUDING THE TESTIMONY OF A PARTY TO THE CAUSE, FOR OR AGAINST ANOTHER PARTY ON THE SAME SIDE. EXAMINATION OF THE COURSE PURSUED IN THIS RESPECT BY ENGLISH LAW.

§ 1. *Absurdity of the exclusion*

In this more complicated case, as in the former more simple one, the task of determining what is right, receives not from the complication any additional difficulty. Already, over and over again, the determination has been formed for all cases but the difficulty of examining and exposing what is wrong, receives, from the same cause, an enhancement much to be regretted.

On this part of the field, as on every other, the rule of simplicity, the purest simplicity, will be seen to be the rule of utility and reason: the system of complication, to be a system of absurdity, inconsistency, and injustice, in all its shapes.

Of this case the modifications are—

I. Plaintiffs more than one. First question: Shall each be admitted, if willing, to give testimony at the instance of the other? Second question: Shall each, if unwilling, be compellable to give testimony at the instance of the other?

II. Defendants more than one. In this part of the case the questions likewise are two, and of the same import: Shall each, if willing, be admitted—shall each, if unwilling, be compellable—to give testimony at the instance of the other?

In this case, over and above all accidental anomalies and incongruities, a curious absurdity is generated by the very nature of the general rule. Parties, how numerous soever,

being excluded; while, in the character of an extraneous witness, the testimony of a single deponent is sufficient to warrant, and (if clear of contradiction, as well from within as without,) in a manner to command, decision; — a single tongue obtains thus a certain victory over a thousand, that would have sounded in contradiction to it, had they been suffered to be heard. Every defendant is, *par état*, by his station in the cause, a liar: a man who, if suffered to speak, would be sure to speak false, and equally sure to be believed. Every defendant is a liar. But every human being may, at the pleasure of every other, be converted into a defendant. Therefore, and by that means, every human being may, at the pleasure of every other, be converted into a liar, and, in that character, his capacity of giving admissible testimony annihilated. The *jus nocendi*, the power of imposing unlimited burthens by calumnies not suffered to be contradicted, is thus offered constantly upon sale, to every man who will pay the price for it.

§ 2. *Plaintiffs more than one — Examination of this case.*

Examine the subject in detail, you will find the mischief, as well as the absurdity, diversified by no small variety of modifications; none having any reference to the ends of justice, all arising out of the different modifications of the form of procedure: modifications agreeing but in two things; their subservience to the ends of actual judicature — their repugnance to the ends of justice.

In the first place, let the multiplicity be on the plaintiff's side

I. Plaintiff's testimony, — is it admissible in favour of a co-plaintiff?

1. In cases called criminal (from what has been brought to view already, it may be easily inferred) the multiplicity is not productive of any additional injury to the interests of truth and justice Where there is but one plaintiff, one prosecutor, his testimony is not excluded by the interest he has in the cause. As the testimony of one is not, so neither would that of two or twenty, if there were so many; but there are not usually more than one.*

2. Case called *civil:* mode of procedure, action at common law. Neither in this case, plaintiffs (*i. e.* persons having need to appear in that character) being plural, — neither in this case, in the hands of a well-advised attorney, need there on that side be any dearth of evidence. Two persons attacked and beaten by four: each of the two brings his action, supporting it by the testimony of the other. Two suits are thus manufactured out of one. So agreeable a circumstance may help to account for the establishment of the rule, and may be not unfriendly to the preservation of it.

But suppose a claim of the pecuniary kind, with or without injury — in short, a *demand*, preferred by two persons linked together by the tie of one common title: two tenants in common, two joint-tenants. Here, either both individuals are obliged to join in the suit, and thence become both of them plaintiffs; or, if one be plaintiff, and excluded on that score, the other is an interested witness, and excluded on that other score. True; but in the character of a purge to carry off the fæces of interest, the virtue of a release has been already brought to view:† to each of them let this specific be administered by turns; the peccant matter is discharged out of him, and he becomes a good witness for the other. True it is that the specific, admirable as it is, is not equally well adapted to the constitution of every case. Suppose two persons partners in trade; there might be an awkwardness in the arrangement, were each partner, as the exigency of the suit required, to give up his share of the business to the other.

To pursue the inquiry through the whole field of actions and actionable cases, would probably be thought rather a superfluous task. What, for the purpose of illustration has already been brought to view, may appear proof sufficient for the establishment of three facts: that in one set of cases, admission for the testimony of persons in the situation of plaintiffs may be gained; that in another it cannot be gained; and that in neither has the distinction anything to do with the interests of truth and justice.

A corollary is, that, in some cases, there may be a convenience in this sort of community of interests. As one good turn deserves another, each associate may thus, in his turn, discharge himself of his peccant matter, for the benefit of the other: whereas, when, in point of interest, a man has the misfortune of standing alone, it may not be altogether easy for him to discharge his bosom of peccant matter, for want of a friendly bosom to empty it into.

Could anything be done by a sale without warranty? or if with warranty, might not the interest attached to the warranty be purged off, as well as interest in other shapes, by the universal elixir? Apply this to immoveables

* In the case of an indictment, where the offence comes under the denomination either of a felony, or of a breach of the peace, there is usually some person (and but one) who, before the justice of the peace by whom the preliminary examination has been performed, has, by an engagement called a recognisance, been bound to prosecute.[a] By this engagement the personality of the prosecutor is fixed.

[a] Besides the prosecutor, the witnesses are bound in a recognisance of £40 by the justice, to appear at the trial and give evidence.—*Ed.*

† *Suprà*, p. 438.

and to moveables: to property, real, personal, and incorporeal: learning, curious learning, in any given quantity, might be spun out upon this ground.

3. Case called civil: mode of procedure, bill in equity. The mode of pursuing, or professing to pursue, truth, being altogether different, according as, in pursuing it, you pronounce the word *law*, or the word *equity*, —a different field is thus opened for the exercise of professional ingenuity The virtue of the purge is no less acknowledged in equity than in common law, but if reciprocity be the condition, and the suits, instead of contemporary, are to be successive, the condition of those who have to wait will be still more awkward here than at common law

Equity procedure is peculiarly adapted to the treatment of complex cases, or, to speak more properly, when a case becomes to a certain degree complex, in any mode pursued at common law it is so utterly impossible to administer anything that shall have so much as the semblance of justice, that cases of this description are shaken off, by necessity, into the lap of equity

If, in the field of common law, the inquiry might find matter for one volume, —on the ground of equity law it might find matter for another. Of the matter peculiar to equity, I shall content myself with giving one specimen: for illustration it will be sufficient, and more will hardly be desired

In equity procedure, in a multitude of cases it will happen, that whether a man shall be plaintiff or defendant is matter of contingency, matter of choice, as parties happen to agree * In regard to co-defendants, the rule in this behalf (as there will be occasion to state presently) is, that they cannot, in favour and at the instance of a plaintiff, be made to testify one against another —but, for himself, any defendant can employ the testimony of any other co-defendant, as extracted by the interrogatories administered to him on the plaintiff's side. Suppose, then, three persons, Primus, Secundus, and Tertius, who, in the most natural order of things, would have been co-plaintiffs, but Secundus and Tertius stand in need of each other's testimony instead of plaintiffs, let them be made defendants, leaving the part of plaintiff to be played by Primus alone, and the problem is solved

II. Plaintiff's testimony,—is it compellable at the instance of a co-plaintiff?

The modifications of this case are soon disposed of.

1. Cases called *criminal*. On an indictment (as already stated) it is neither natural nor usual that there should be more than one real plaintiff, more than one prosecutor. Supposing more than one (two, for example,) it is not natural that they should have become such, without such an agreement as would be incompatible with compulsion at that time. Men who agree one day, may, indeed, disagree the next, but if both are bound to prosecute, both are bound also to give evidence. But, bound or not bound to prosecute, no individual being in a criminal case recognised in the character of plaintiff, there is no individual (defendants excepted) who is not bound to give evidence.

The case is, in this respect, much the same on an information It is different, and indeed opposite, where the prosecution is by motion for attachment In those cases, all testimony is received in no other form than that of affidavit evidence On trial by affidavit, everybody testifies that pleases; add—and nobody that does not please †

Affidavit evidence is moreover (as has been already observed) the sort of evidence, the only sort, that is received on the preliminary and worse than useless inquiry, which, for the benefit and by the hypocrisy of the man of law, under the mask of tenderness, has been made to precede the trial on an information as likewise on the supplemental inquiry, by which, in case of conviction, as well on indictments as on informations, the trial is succeeded,—and on which, on the occasion of the original offence, the defendant may, without other evidence, be convicted of succeeding ones For it is a rule—an inviolable rule, with learned judges, never to receive testimony when it is for their own use, but in the most untrustworthy of all forms Compulsion is, therefore, out of the question in all these cases

In the case of felonies, on the preparatory inquiry performed by a justice of the peace antecedently to the trial, the testimony of every person without distinction is compellable, at the instance, as well as by the authority, of that magistrate. Thence, supposing in the first instance two prosecutors, and reluctance to supervene on the part of either, his testimony might, at the instance of the

* All the interests to be disposed of by the court, must be before the court, must have the opportunity of defending themselves. Will you join with me in my bill? No. Then I must put you upon the list of defendants.

† No man is compellable either to make, or to join in, an affidavit. Parties are virtually compellable, by the interest they respectively have in the cause: the prosecutor, lest he should fail in obtaining the service demanded; the defendant, lest he should be bound to render that burthensome service. Extraneous witnesses are at perfect liberty; they take part with one side or another, as interest (self-regarding interest or sympathetic) prompts them: so that here you have no witnesses but partial ones, and these free from the check of cross-examination: their testimony delivered in the least trustworthy form that can be found for it.

other, be compelled notwithstanding; viz. by the authority of the magistrate.

In the same cases, the same obligation extends to the other preparatory inquiry, — viz. that before the grand jury; supposing it preceded by the inquiry before the justice of the peace.

But in such indictable offences as do not come under the denomination either of felonies or breaches of the peace, no such previous inquiry before a justice can take place: nor in felonies, though usually, does it necessarily take place: still less in breaches of the peace. In these cases, therefore, probably, as in attachments certainly, justice is, on this occasion as on so many others, left to take her chance. On the inquiry before a justice, the mode of compelling attendance, for the purpose of testification, as well before the grand jury as on the trial before the petty jury, is by an engagement called a *recognizance;* into which, prosecutors, as well as extraneous witnesses, are by that authority, and on that occasion, compelled to enter: one person usually (possibly, in some instances, more than one) undertaking, by one recognisance, to prosecute as well as testify; another, or others, undertaking, by another recognisance, simply to testify, nothing being said of prosecuting.

Is there any other mode of compelling the appearance of a man, in either character, before a grand jury? None that I can find in the books: I know of none.

2. Cases called *civil:* procedure, by action at common law.

Compulsion is here altogether out of the question, as between plaintiff and plaintiff. We have seen how, in some cases, two men, having each of them the sort of interest that a plaintiff has in the event of the cause, may each purge himself of the legal part of that interest, while the moral part keeps its hold as firmly as ever in his breast. But where the patient is a human creature, this, like other purges, supposes consent: a suitor cannot be purged with a drenching-horn, like a horse.

3. Cases called *civil:* procedure, by suit in equity.

In the case of a single plaintiff, we have seen, that in that character a man can never be compelled to give testimony, — and also for what reason. The same reason would, if there were a thousand of them, be equally conclusive.

§ 3. *Defendants more than one — their testimony in favour of one another, how far excluded by English law.*

1. Can the testimony of one defendant be *received* in favour of another?

1. Cases called criminal: procedure, by indictment or information.

In these cases, as in all others, the station of defendant is a situation to which the plaintiff nominates: it depends not upon the nominee to resign it; if so, it would not be often filled. For the purpose of the principal inquiry, called the trial, a man cannot indeed, under this mode of procedure, be stationed in it without the fiat of a grand jury: but, unless the story appear preponderantly improbable, that fiat will naturally be (at least it ought to be) commanded by the evidence: and it is the characteristic of this species of inquiry, to hear evidence but on one side.

In this case, when the inquiry is the principal one (the trial,) can a defendant, with his own consent, at the instance of a co-defendant, give testimony in favour of such co-defendant? No, and yes. No, in words: yes, in effect. No: for in that situation, let a man say what he will, it is not evidence. No oath can be administered to him: not a question, as we have seen, can be put to him by anybody. Yes, in effect: for to the defendants, to each of them, be their number what it may, liberty is always given to say, or to read, whatever he may think proper, under the name of his defence. Being allowed to say whatever he thinks fit, — if, in what he says, there be anything capable of operating in favour of a co-defendant, — what he thus says in favour of another, will naturally operate upon the mind of the jury with no less persuasive force — will naturally, if there be any difference, operate with more persuasive force — than anything which, more particularly or exclusively, operates with the like tendency in favour of himself.

As to affidavit evidence, and as many inquiries (whether principal, preliminary, supplemental, or sole) as are carried on in this uninquisitive mode, and as many sorts of demands (penal or non-penal) as are judged of by the light of this most commodious sort of evidence, — we shall find, in the case of co-defendants, admission standing upon the same easy footing as we have seen it stand on in the case of co-plaintiffs. With the pen of an attorney to speak through, let a man present himself in the garb of a witness, — be he who he may, party or not party, interested or not interested, perjured or not perjured, — be the occasion what it may, — thus introduced, all doors and all ears are open to him.

2. Cases called civil: procedure, by action at common law.

In the case of plaintiff and co-plaintiff, the efficacy of mutual good offices and of purgative releases has already been brought to view. But, even in that more manageable case, we have seen it limited; and, as between defendant and co-defendant, — if the action be of the number of those in which conduct of an injurious nature is imputed, —

the specific is, of course, in this difficult case, no more applicable than in that more easy one.

In a case of this sort, as it is not necessary for the defendant or defendants to be present during the trial, so neither is it altogether natural or usual: whatever a man, guilty or not guilty, can find to say in his defence, he in general regards it as more eligible to trust to the learning and eloquence of his advocate, than to any chance he may have of gaining credit for anything he might wish to say, either in his own favour, or in favour of a fellow-defendant, in the character of testimony, though not allowed to be delivered under the technical name of evidence The sort of presumption here supposed, is of very rare occurrence Certain it is, that it will not experience either much inward satisfaction, or much outward encouragement, from the learned and eloquent gentleman, to the remuneration of whose learning and eloquence his money (if he has any) has been applied. If he is guilty, their opinion will be (and in this case it will probably be a just one,) that the duty of demonstrating his innocence cannot, with equal probability of success, be either trusted exclusively to any but themselves, or so much as divided with themselves. If he is not guilty, any endeavour which he may be inclined to use to make known his innocence, will naturally be regarded as a sort of invasion of their rights Success depends not upon truth and justice but upon that sort of learning which has been created for the purpose of being made the subject of a monopoly of that monopoly, of which, at the expense of so much money as well as so much labour, they have obtained their share.

Where punishment of so high a nature as that which is attached to offences of the rank of felony, is at stake, the judge is naturally averse to the task of suggesting any observation, the tendency of which may be, unjustly, or even justly, to diminish the chance which the defendant may have of making his escape from the severity of the law To the case between individual and individual, in which one cannot lose but the other must gain, this sort of tenderness does not (for the demand created for it by popular prejudice does not) extend. In summing up the evidence on the trial of an action, the judge would say to the jury without scruple, "Gentlemen, the defendant Nokes has said so and so in behalf of defendant Stiles; but the law requires you to lay all this out of the case, for it is not evidence."

In all purely pecuniary cases, to which the virtue of the mendacity-fuge diaphoretic does not extend, — the natural effect which, in the case of a plurality of defendants, results from the exclusion put upon the testimony of individuals in this situation, has already been brought to view. In English jurisprudence, in the class of cases here in question, this mischief operates with undiminished strength. To rid himself of a troublesome witness, an unscrupulous plaintiff has no more to do than to put him upon the list of defendants * Seeing a man upon that list, a learned judge wants nothing more to satisfy him, that the testimony of that man (be he who he may) is unworthy of all regard, and to engage him, of course, to give his assurance to the jury to the same effect.

If, indeed, to the same purpose, on the same occasion, the testimony of the same individual had been presented in the form of an affidavit, unchecked by cross-examination, the case would have been very different it would then have been good evidence and, like the testimony of any extraneous witness, have passed with him for what it was worth.

Nay, but the plaintiff has no such power: we are aware of the mischief, and have provided against it he may put a witness, if he pleases, upon the list of defendants; but if no evidence is given that affects such defendant, his testimony is received notwithstanding.

Yes, verily provision you have made; and against this abuse with about as much felicity and about as much zeal, as against the rest of that mountain of abuse which is the source and measure of your profit Every man who has a farthing to gain by lying, will always be sure to lie this is your theory this is what you are bound by you are *estopped* from questioning it If he be not, on what pretence do you exclude a defendant from delivering his testimony at the instance of a co-defendant? If, in a case affording, in point of moral interest, two plaintiffs, one of them has been cleared of legal interest, by the name of prosecutor, or by the relaxatory purge, — and the purge, though it has given him competency, has not given him veracity along with it, — to strike the defendant witnesses dumb, if there be a dozen of them, what has he to do, but to say a word or two against each?

Nay, but the case you are thus bringing out against us is an extraordinary case — Not so very extraordinary but, however, take this, which is but too ordinary a one Plaintiff, there is but one witness, an extraneous witness witness, but that one, which is sufficient. But this one witness is a liar bound to the plaintiff's side, either secretly by the only interest that you acknowledge to have any influence, or by any or all of the other

* If, after the evidence has been heard on the part of the prosecution, no case has been made out against some one or more of the defendants, it is usual to allow him or them to be acquitted at once, so that they may be able to give evidence on behalf of the remaining defendant or defendants, if required.—*Ed.*

kinds of interest put together: is it more unreasonable to suppose one liar on this side, than a dozen on the other? For if you are not sure of their being liars, or even if you are, what should hinder you from suffering them to be heard?

But it is vain to argue without data. The matter in dispute being given (and now let the case be a purely civil one, — nothing of injury supposed,) the question is, whether the testimony of the defendant, called for by a co-defendant, will or will not be trustworthy. His trustworthiness depends, — not upon the cause, or the relation the man bears to the cause, — but upon the station, the judicial station, which, at the instant of pronouncing the decision, you, his judge, happen to occupy. On this, as on so many other subjects, tell me your station, I will tell you your opinions: unless your station be ascertained, you know no more what your opinions are on the bench, than you knew what they were while at the bar, till you knew whether it was for the plaintiff or the defendant you were retained.

Are you a Chancellor, or a Master of the Rolls? The man is a true man. Are you a judge of the King's Bench? He is a liar, and one that would deceive your jurymen, as sure as you suffered them to hear him. Being a judge of the King's Bench, are you, moreover, a commissioner of the great seal? The man is trustworthy or untrustworthy, according as you sit on the one side or the other of a narrow passage. Are you a baron of the Exchequer? His character changes backwards and forwards, without your being at any such trouble as that of crossing the passage: — from the same bench, and without stirring, you serve out *law* or *equity*, whichever happens to be called for: if it be law, the man is a liar; if it be equity, he speaks true.

Tell us, then, what is law — tell us what is equity: these are both of your own making: each, whatever you are in the mood to make it.

The tissue of inconsistencies and absurdities is not yet at an end. In what court is it that the testimony of a defendant, called for by a co-defendant, is not receivable? In the court where, in case of mendacity, the most effectual means of exposing it are in use. In what court is it that the testimony from that same source is receivable? In the sort of court where no such means are suffered to be employed. In a common-law court, there is cross-examination. True; that is to say, provided a jury be there to hear it, — not otherwise. In a common-law court, there is cross-examination: in an equity court, there is cross-examination: in both, the cross-examination is the same sort of thing, in the eyes of those to whom the most different things become the same thing when called by the same name. Common-law cross-examination, — questions put in public, by the advocate of the party, to the deponent (were he to depose,) after the questions put on the other side, with the answers to them, have been heard. Equity cross-examination, — questions put in private, by a clerk, who, unless bribed, cares not a straw for either party, nor for anything but the getting through his task with the least possible trouble: questions framed for him by a person to whom it was not possible to know a syllable of what the deponent would say, in answer to questions put on the other side.

Tell me then, once more, on what bench and under what name you sit, and I will tell you what you will think; or at any rate (if the term *thinking* be improper) what you will do. Is it your business to cancel papers,* or keep rolls?† The sham cross-examination is the only one that you will suffer to be made: and it is upon the strength of this mock security, that you will give your confidence to the defendant's evidence. Is it your business to hear pleas before the king himself, when he is not there?‡ Nothing less than the true cross-examination will serve you; and with this best security at your command, forasmuch as you can get nothing better, — in this case, to make sure of hearing the truth, and the whole truth, you shut your ears against the evidence. Are you that double sort of man called a lord commisssioner of the Great Seal; or that other double sort sort of man called a baron of the Exchequer? The true and the sham cross-examination are the same thing to you: but, at any rate, with the good security in your hand, your ears are shut against the evidence: with the the bad security, they are open to it.

Be this as it may, — whether you are the single sort of man, or the double sort of man, you are at any rate that other sort of man, in whose judgment (where it is by himself that the decision is to be formed,) no examination at all, is a better way of coming at the truth, and the whole truth, than either the good mode of examination or the bad one. Should the man be sitting or standing opposite you, you know better than to put a single question to him, or to suffer one to be put to him by anybody else. It must be through the pen of an attorney, if you hear him; and through that medium you hear anybody.

Instead of missing, would you wish to find, the truth? Instead of common law and equity, would you wish to administer justice? Instead of learning and science, would you wish to judge according to common law and common honesty? Go to any court of conscience, — go to the study of any country justice: learn there to forget your learning; in that oblivion you will find the beginning

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* Chancellor. † Master of the Rolls.
‡ Court of King's Bench.

of wisdom. Among the shopkeepers, more surely; for before their court hangs a curtain, behind which (happily for the great body of the people) eyes such as yours have not been allowed to penetrate. In the study of the unlearned magistrate, more sparingly you must there content yourself with such remains of wisdom as your vigilance has not yet succeeded in rooting out of it.

II. Can the testimony of one defendant be *compelled* at the instance of another?

1. Common law. Case, criminal · procedure, by indictment or information occasion, the principal inquiry, the trial. The answer, in this case, is clearly in the negative. In the very nature of the case, obligation to testify supposes interrogation. But on the trial, no question can be put to a defendant by anybody: therefore, not by a co-defendant.

2. Law, common or equity case, criminal or civil · procedure, by indictment or information: inquiry, sole, principal, preliminary, or supplemental. form of testification, affidavit evidence. Whenever the evidence is delivered in this form, the answer must still be in the negative. No interrogation, no compulsion and affidavit evidence is, being interpreted, uninterrogated evidence.

3. Common law case, civil or (if in some respects considered as criminal, and spoken of under the name of penal,) — procedure, still by action. Answer still in the negative! No interrogation, no compulsion. no question can be put to a defendant by anybody, therefore, not by a co-defendant.

§ 4. *Defendants more than one — their testimony against one another, how far excluded by English law.*

Can the testimony of one defendant be compelled, to the disadvantage of another?

1. Criminal cases.

Procedure, by indictment. occasion, the principal inquiry, the trial

To an individual in this situation, no question, as already observed, can be put by anybody: therefore no evidence, to the prejudice of one defendant, can be thus extracted from any other. In regard to any statement that may happen to flow spontaneously from the lips of a defendant, speaking in his own defence (as above,) the same observations as above are applicable: with only this difference, that, when anything that falls from a person in this suspected situation presents itself to the judge as operating to the disadvantage of another individual in the same predicament, — the nullity of it, in the character of evidence, will, by an English judge, be much more apt to be noticed and held up to view, than in the opposite case.

Where the procedure is by information there is no other difference in this respect than what may be supposed to be produced by the inferiority of the maximum of punishment in this case, in comparison with the maximum of punishment applicable in cases prosecutable in the way of indictment. Seldom indeed, if ever, in the case of an information, will the occasion for any such remark on the part of the judge present itself.

Procedure, by attachment. evidence, affidavit evidence. Here, the evidence being all read of course, the judge makes whatever application of it he thinks fit In the cases which we shall come to presently, in which the testimony is also presented to the judge in the form of ready-written evidence, it is not heard by the judge, except in so far as, for that purpose it is especially called for. and the question, for or against whom it shall be employed, resolves itself into the question, at whose instance it shall be read. The evidence being, according to his own theory, of the deceptitious kind, he is, according to that same theory, constantly deceived by it

So much for persons actually in the situation of defendants But, of two persons having borne in the same criminal transaction exactly the same part, it may happen that one shall be put into that perilous situation, the other not This accordingly is the case, as often as, by a reward, of which impunity forms the whole or a part, one of two delinquents is engaged to come forward against another, in the character of an extraneous witness.

Of this ground of suspicion and untrustworthiness, and of the use which English law scruples not to make of this most suspicious of all imaginable evidence, to this most dangerous of all imaginable purposes, notice was taken at the outset of this research.

But what is done in this way in the strongest of all cases, is done in the same way in all other cases of inferior strength and the like complexion To dwell upon any of these inferior cases, would be an anticlimax Such admissions are most perfectly consistent with that gigantic exception all of them as completely repugnant to the general rule.

2 Civil cases. procedure, in the way of action at common law.

In this case, also, no question can be put to a defendant in behalf of anybody; therefore not in behalf of a co-defendant

3. Case, civil law, equity law: procedure, by bill in equity.

On this ground, confusion is in all its glory: the powers of darkness have mustered all their force

At common law, though testimony, in wholesale quantities, is pronounced deceptitious without knowing what it is, — still, take any given lot, it is either capable, or incapable of being true · it is not capable and incapable at the same time.

The absurdities and injustice of common law were not enough for equity: she has made improvements: and in equity, the self-same statement concerning a matter of fact—the self-same proposition, is true and false at the same time: for or against A, it is true; for or against B or C, it is false. You who read this, were you sitting this day twelvemonth, at one o'clock P. M., in your study? and in your answer, or your depositions, do you declare as much? It is true, as against yourself: it is false—false beyond all possibility of being true—as against me, a defendant along with you in the same cause.

Look to the origin of this difference, you will find it in the joint influence of several concurring causes:—in the practice of pursuing, on the occasion of such cause, two modes of collecting evidence, by *answer* and by *depositions*, agreeing in nothing but their unfitness for the purposes of truth and justice: in the confusion pervading the whole texture of the answer—claims and concessions confounded with affirmations and denials,—what a man says in the character of a party, with what he says in the character of a witness,—propositions concerning the question of right, with propositions concerning the question of fact.

Wherever the object has been to relieve, and not to plunder the afflicted, to mitigate, and not to aggravate their sufferings—where the object has been to bring to light the truth, and the whole of the truth, for the purposes of justice,—where such have been the objects, and the obtaining the simultaneous presence of all parties in court has been neither physically nor prudentially impracticable, the mode of collecting the evidence everywhere has been alike simple and effectual. Each party has been admitted to declare so much of what he knows, as promises to operate in favour of his own interest; each party, at the instance, at the interrogation, and thereby to the advantage, of every other:—the testimony of each party in his own behalf, allowed to be delivered, and received for what it is worth; the testimony of each party, when so delivered, allowed to be controverted by every other party, scrutinized by counter-interrogation, opposed by counter-evidence.

Such, accordingly, is the practice in the courts of conscience: such is the practice of the unlearned judges called justices of the peace, except in so far as, by exclusions forced upon them by their learned superiors, they have found themselves compelled to swerve from it. Such is even the practice on trials before juries: deduction made of the still more extensive exclusions, by which the budget of evidence is regularly defrauded of those parts of its contents which are likely to be most valuable; viz. the testimony of those individuals, to whose perceptive faculties the facts belonging to the cause were most likely to have presented themselves.

In equity (as already observed,) in one and the same cause, testimony is delivered in masses of two shapes, each different from the other, as well as from the only good one. One mass, in the form of what is called an *answer*, containing the ready written testimony extracted from a defendant by the ready written questions contained in the *bill*—an instrument drawn up by the plaintiff's law assistants, and without his perusal (or at least without his signature) exhibited in his own name; and in which those questions, the answers to which are expected to be true, are preceded by *charges*—a sort of testimony, which (as already observed) is allowed to be true or false at pleasure. In this shape, testimony is not called for at the hands of any persons that are not parties, nor, among parties, at the hands of any persons that are not defendants in the cause.

At common law, though the best evidence is so carefully weeded out, yet when once a lot of evidence has been permitted to come into existence, every use that is capable of being made, is permitted to be made of it. Capable of being true with relation to any one person, it is allowed to be equally capable of being true with relation to everybody else. Far otherwise is it with the sort of evidence extracted under the name of *answer*, by the process employed (as above) by the practitioner in a court of equity. The answer (the part of it in question) is good as against me, the defendant whose answer it is. But is it good, ought it to be acted upon as good, as against you, another defendant along with me in the same cause? To both questions the response must now be in the negative. Of what nature is the clause in question? An acknowledgment, having respect to the question of right? or an assertion, a deposition, having respect merely to the question of fact? If it be an acknowledgment of right, my right to give up a claim of my own is indubitable: but that I ought not to have any such right as to give up any claim of yours, is equally indisputable.

Is it a statement concerning a matter of fact? Even here, its title to be admitted, as against you, in the character of evidence, will appear to be bad, or at least questionable. Let the fact be even of the number of those, in relation to which, at the time at which it happened, I myself was, if I speak true, a principal witness—a fact which, if I am to be believed, I saw with my own eyes. That against myself, in relation to any claim that I have made, it may, and without any danger of injustice to my prejudice, be taken for true, is manifest enough: but as against you, and to the defeating of any claim of your's, has it an equal title to be taken for true? If

any, certainly not an equal one; for there is this difference: you, in your situation, possess not that faculty of counter-interrogation, which, for defence against injustice, is in your situation necessary, but in mine not. By misconception, I may have been confessing that to be true, which in fact was not so. In the view of favouring the plaintiff at your expense, and at the expense of truth and justice, with or without his privity, I may have been confessing that to be true which you knew at the time to be false. It ought not, therefore, to be taken for true as against you, without your having the faculty to controvert it, in the event of your regarding it as false: to controvert it, viz. by questions put to me in the way of counter-interrogation — of cross-examination. But questions in this way, the forms of the court do not, on the occasion in question, allow you to put to me. What they do allow and require is, that each of two defendants shall, in an instrument called his answer, make response to all such proper questions as the plaintiff in his bill shall have propounded to him: what they do not allow is, that either of two defendants shall, in this stage of the cause at least, put any question to the other.

In the first of these two cases, the exclusion is just in itself: would be just on every occasion, and in every court. But what is it that is here excluded? Not testimony, but unjust power: a power on my part to give away your rights.

In the other case, the exclusion may also be just, but if it be, it is so in no other than a hypothetical and relative sense, relation being had to the forms of the court — the forms actually in use. Setting aside that casual and adventitious and deplorable circumstance, the proper course is, not to exclude the one of two sets of evidence, but to admit the other: not to prevent my deposition from being taken into consideration as against you, but to allow you to put counter-questions to me, as you might do if I were not a party in the cause — if the interrogations put to me, were put to me in the character of an extraneous witness.

The judge would not then be reduced, as now, to the necessity of denying, explicitly or implicitly, a proposition which the weaker powers of Locke bowed down to as impregnable — *it is impossible for the same thing to be and not to be*. He would not have been reduced (as now he is every day) to declare, in deeds if not in words, that the same evidence is certainly true and certainly false. To the philosopher, by whom nothing was to be got by it, the task was an impossible one: but to the lawyer, into whose lap every day's profit is poured by every day's nonsense, neither this nor a greater absurdity (if the nature of things affords one) ever presents the smallest difficulty.

The other shape, in which, in the same courts, testimony is delivered, is that of a mass of *depositions;* a name extending elsewhere to all testimony, but confined, in English law jargon, to the designation of such testimony as is delivered in that particular shape. *Answer* is the name appropriated to the testimony delivered by a *defendant*, in reply to the questions propounded to him on the part of the plaintiff in the initiative instrument called the *bill*. *Depositions* is the name appropriated to the testimony delivered by a *witness*, in reply to the questions put to him *vivâ voce* in a closet, by a sort of judge or set of judges, whose authority is confined to the collection of testimony, without power to make use of it.

This mode is a mode appropriated to the collection of the testimony of persons spoken of under the name of *witnesses*. But in this same way a defendant, every defendant, may be examined as a witness — after a course of examination, the duration of which is always counted by months, not unfrequently by years, — re-examined in another and much worse mode, under this other name.

Examined but now, at whose instance, and for what purpose? By the *bill*, at the instance of the plaintiff only, against him the defendant only, his testimony not being at that time obtainable at the instance of anybody else, nor employable as against anybody else, that is, as against any other defendant, — as we have been seeing, and for the relatively good reasons that we have seen. By the *interrogatories* (the name given to the questions now put to him by the examining judge or judges,) he may be re-examined at the instance of the plaintiff or plaintiffs, as against any other defendant or defendants, he may be examined, now for the first time, at the instance of any other defendant or defendants, as against the plaintiff or plaintiffs, or as against any third defendant or defendants.

Collected in this mode, his testimony may now be employed against others beside himself employed, and with propriety, but if with propriety, for what reasons, and thence on what conditions? On condition that every person against whom it is employed, shall have the faculty of employing his exertions for the correction, completion, and (upon occasion) contradiction of it, by counter-interrogation and counter-evidence. In this mode, — is it at the instance of the plaintiff that he is examined? This faculty the plaintiff possesses of course for — with relation to the self-serving testimony, which the defendant, as far as conscience and prudence will give him leave, will not fail to bring forward — the interrogatories formed by the plaintiff's agents, and from them received and employed by the examining judge or judges, will have an effect analogous to that of the counter-interroga-

tories propounded to, and in the case of, an extraneous witness.

On this footing stands, it should seem, the law of reason; and on this same footing, for aught I know, may stand the actually established law.

But, to the faculty of administering to a defendant interrogatories from all those various quarters to all those various purposes, actual law adds a limitation, a saving clause: *saving all just exceptions.* These exceptions, self-styled just, — what are they? Exceptions on the score of interest. Of what interest? This is more than I can undertake to answer, at least with any full assurance. A defendant without interest in the cause? How can that be? If he is without interest, this very exemption from interest is recognised as a circumstance, the effect of which is to preclude the plaintiff from dealing with him in the character of a defendant.

On the score of interest, a defendant not to be re-examined against himself, at the instance of the plaintiff? Why not? Good or bad, the interest did not exclude him from being examined against himself at the instance of the same person the first time; why should it a second?

On the score of interest, a defendant Primus not to be examined against himself, at the instance of defendant Secundus? Why not?

Applied to the present case, the import of the word *interest* is indistinct and obscure. Speaking of a defendant as having an interest in some cases (viz. in the cases in which, on the score of that interest, his testimony is excluded,) implies that there are other cases in which he has no interest, viz. those cases (for such there are) in which his testimony is admitted. But a defendant — a party in the cause — and yet without interest in the cause? How can that be?

But it may happen (it may be said,) and every now and then does happen, that a person is actually made defendant in a cause in which, whether he be thought or no to have an interest, he really has none; for in every cause it rests with the plaintiff to put upon the list of defendants any person and every person he thinks fit. True; but when cases of this description are laid out of the question, the difficulty remains notwithstanding. In this case (supposing the existence of it ascertained,) the name of the defendant, the name which ought not to have been put upon the list, may be struck out of it. Those cases in which the defendant has clearly no interest to any sort of purpose, being set aside, there remain cases in which he has not, and at the same time has, an interest, — has an interest, to the purpose of the continuance of his name on the list of defendants, — has not an interest, to the purpose of his testimony's being regarded as inadmissible.

1. First, let it be proposed that he be examined at the instance of the plaintiff. It must then be either as against himself, or as against another defendant or defendants: for though two or more persons happen to find themselves together on that side of the cause, it may happen to them to have interests as opposite to each other, as that of any one of them to that of the plaintiff, inasmuch as it rests with the plaintiff to put upon the list of defendants whatever persons he pleases.

Moreover, what may also happen is, that on the plaintiff's side of the cause there may be more persons than one; say two: that, as between those two plaintiffs, there may be, to some purpose or other, an opposition of interests, as between two defendants; for though no person can be upon the list of plaintiffs without his choice, yet so it may happen, that in consideration of a community of interests in some respects, two natural adversaries may enter into this sort of alliance.*

On this occasion, as against the defendant himself, it is a conceivable case that the plaintiff may wish to examine the defendant, though a case not likely to be frequently exemplified. A defendant cannot come to be examined on behalf of the plaintiff, under the name of examination (viz. by interrogatories put to him by a clerk in the examiner's office, or a master in chancery, or a set of commissioners appointed for the purpose,) without having already been examined by the plaintiff himself, that is, by the law-assistants of the plaintiff himself, without the name of examination, — viz. in and by the instrument called the bill.

But, in general, the interrogation by bill — the examination that extracts the testimony in the shape of an instrument called an *answer*, — that examination, notwithstanding the time and opportunity it affords for concerting with an attorney the means of evasion and safe perjury, will be much more efficient than the examination performed through the medium of the judge or judges *ad hoc* (the examining clerk, the master, or the commissioners;) viz. the examination by which the testimony is produced in the shape of an instrument composed of *depositions*. More efficient? Why? 1. Because, by bill, the plaintiff, that is, his law-assistants, with the help of exceptions to the answer, and amendments to the bill, keep on examining the defendant till the plaintiff and his law-assistants are satisfied with the completeness at least (if not with the correctness) of the answer; or

* Four co-claimants on an insufficient fund: two put themselves together on the list of plaintiffs: the two others are put by them upon the list of defendants: between plaintiff and plaintiff there is here the same opposition of interest as between defendant and defendant, or between either defendant and either plaintiff.

at any rate till, in case of contestation, they are informed by the judge *ad hoc*, that they have reason to be satisfied. 2. Because it is *probable* that, at least in the judgment of the plaintiff and his law-assistants, better care will in this respect be taken of his interests by those assistants, than by the examining judge or judges, even where half of the number are (under the name of a commissioner or commissioners) nominated by these assistants themselves and *certain*, that, in the judgment not only of those assistants, but of every impartial person to whose consideration the case presents itself, better care will be taken by those same assistants, than (speaking of situations and not individuals) is likely to be taken by the judge *ad hoc*, if he be an examining clerk, or a master sitting in his closet,—that is, in both cases, by a person who, in the nature of things, cannot have any other wish or object, than either to get the business out of his hands as soon as possible, for the sake of his ease, or to keep it in them as long as possible, for the sake of the fees.

After having then, and on every point of the cause, carried the examination of his adversary, the defendant, to its utmost length, in the more efficient mode (that is, in the mode which, in general, bids fairer for being efficient,)—is there any incident or consideration that naturally and reasonably may engage him to add to it by another examination in the less efficient mode? Such incidents or considerations may not in every case be wanting. Despairing of being able to extract the truth, where the defendant, with an attorney at his elbow, has month after month for concerting the means of successful evasion and safe perjury (the cause being, in point of locality, of that sort which, under the name of a *country* cause, affords examining judges, under the name of commissioners, that may be awake, instead of one that will be asleep,) it may happen, that, in the person of a particular lawyer, in the character of commissioner, nominated by himself, the plaintiff may see an examiner, who (with the advantage of *viva voce* interrogation—examination in a form which, calling for responses on the spot, cuts off the opportunity of mendacity-serving suggestion and premeditation) promises to his expectation a better chance for the effectual extraction of the desired truth, than could have been obtained in the mode of examination by bill, under the disadvantages above mentioned.

Another case that may happen is, that the defendant, after having given his answer, may go into some foreign territory, and a pair or a set of commissioners being to be sent into or found in, that foreign territory, for the purpose of taking, at the instance of the defendant, the depositions of extraneous witnesses,—it may be deemed more convenient to take the benefit of that opportunity, and extract the ulterior testimony of the defendant through the same channel, than, after adding amendments to the bill, to aim at the extraction of the ulterior testimony in the shape of a further answer to the bill.

2 At any rate, the case just mentioned will be comparatively an uncommon case. But what cannot be an uncommon case is, that, as against one defendant, the plaintiff shall have need of the testimony of another defendant

But has he not, in the way of bill, been examining them both, and examining them to the utmost? Yes, but (not to revert to the rare incidents and considerations above mentioned) against the making use of the testimony of one defendant against another, there is this objection As against himself, defendant Primus has been sufficiently examined for, to extract from him such facts and circumstances as make for his own advantage, no counter interrogation can be necessary But as against defendant Secundus, defendant Primus has not been sufficiently examined for, in order to extract from defendant Primus the whole of the facts and circumstances within his knowledge that make for the advantage of defendant Secundus, counter-interrogation may be necessary, and such counter-interrogation defendant Secundus has had no opportunity of administering.

But if, in behalf of the plaintiff, and as against defendant Secundus, defendant Primus has been examined in the character of a witness—if, *pro tanto*, his testimony has been extracted from him in the shape of *depositions*, as above explained,—he having been examined (as against defendant Secundus) in the character of a *witness*, defendant Secundus has had, or at least might have had, and ought to have had, the faculty of counter-interrogating him of performing upon him that operation which, by an abuse of words, is called, in equity language, *cross-examination* (just as if it were the same operation that in common-law procedure goes by that name,) upon exactly the same plan, how imperfect soever, in which the operation so denominated is performed upon an extraneous witness.

Suppose two plaintiffs, and suppose either defendant (say, as before, defendant Primus) to be examined at the instance of plaintiff Primus as against plaintiff Secundus; the case may be much the same as the last. By the interrogatories put in the bill, and therefore put by both, as much of the facts and circumstances as make in favour of the one will have been extracted, as of those which make in favour of the other. True; if he to whom the truth, taken in its totality, is believed by him to be adverse, will consent to the inter-

rogations necessary to the complete extraction of it: but such candour is too much to be in every case expected. Suppose, then, a failure of union in this respect, — the resource will be, on the one hand, an examination performed on defendant Primus, on the footing of a witness, at the instance of plaintiff Primus, as against plaintiff Secundus; on the other hand, cross-examination of the same defendant-witness by plaintiff Secundus.

Now, then, in regard to interest. Some interest, opposite to that of the plaintiff, defendant Primus must have, or be liable to have; else, even though the cause were what in equity law is called an *amicable* one, there could be no cause.* But it may be, that — though the two defendants have each of them an interest opposite to that of the plaintiff — defendant Primus, as to some point in dispute between the plaintiff and defendant Secundus, has an interest of his own, opposite to that of defendant Secundus.

In this case, supposing the interest to be of that sort which in equity law ranks under that name — and supposing the interest to be of that nature, that, by defendant Primus's deposing to the prejudice of the interest of defendant Secundus, the interest of defendant Primus would be served, — the allowance of an objection to the admission of the testimony of defendant Primus, would, if made on the part of defendant Secundus, be consistent enough with the general principle.

But now, let it be at the instance of defendant Secundus, that the testimony of defendant Primus is called for: and let the interest of defendant Primus be such, that, by delivering the testimony so called for, his own interest would be disserved. Would an objection, on the score of interest, lie, in the mouth of defendant Primus, whose testimony is thus called for, to his own prejudice and against his own will?

With the general principle which gives to every man in the character of plaintiff the remedy by bill against every other man in the character of plaintiff, such objection would certainly not harmonize. For, among the distinguishing features of equity law, one of the most characteristic is, the affording to the plaintiff that power which the gentle hand of common law will not trust him with — the power of extracting testimony in his favour from the bosom of his adversary.

But, — on the ground of another principle, acted upon at least, if not openly recognised, in equity law, — testimony adverse to the interest of a defendant ought not to be extracted at the instance of any co-defendant — at the instance of any person but a plaintiff. From a plaintiff, testimony is not allowed by equity law to be extracted in any shape, by or at the instance of a defendant: why should that of a defendant be allowed to be thus extracted, by or at the instance of another defendant? Not from a plaintiff; because, were that allowed, the lawyers would be defrauded of the benefit of another cause, under the name of a cross cause. How should it, therefore, from a co-defendant? Would not a loss of the same nature be incurred? It would not be called a cross cause, indeed; but so long as it had the beneficial properties, names would not be worth thinking about.

The man of law is not consistent in anything — not even in rapacity. Where, at the instance of a defendant, the plaintiff is to be examined, they will not suffer it to be done without a cause on purpose: where, at the instance of a defendant, another defendant is to be examined, it may, perhaps, not have occurred to them to discover the same impediments.

CHAPTER V.

PROBABLE ORIGIN OF THE ABOVE EXCLUSIONARY RULES.

We may now take our leave of the two Latin maxims, under which, when laid together, little less than the whole subject of the present Book may be comprehended: —

1. *Nemo debet esse testis in propriâ causâ.*
2. *Nemo tenetur seipsum prodere.*

Of each of them we see that —

1. In the character of a general declarative proposition, undertaking to represent the actual state of the established law, it is notoriously false; it swerves most widely and notoriously from the truth.

2. That, when compared with the ends of justice, and the dictates of utility in that behalf, it is, in so far as the fact declared by it is true, deplorably pernicious.

3. That, in delivering these rules (each of them) as true without exception, as Blackstone (for example) and so many others have done, they have uttered so many most palpable and notorious untruths; trusting — for

* In equity, about half the number of causes that come before the court (at least in by far the busiest of the two great equity courts, the Court of Chancery) are amicable causes. At common law, there is scarce such a thing as an amicable cause. In equity, what is there that should be so much more prolific of amity than in common law? To friends, as well as foes, the younger sister is a still more merciless vampire than the elder. To the uninitiated, the problem will have all the air of an enigma. The solution will be to be found in the complicated nature of the greater part of the causes that come before a court of equity (the original courts not having powers adequate to the treatment of complicated cases;) so complicated, that, to save themselves from an infinite swarm of contingent suits, parties submit, by general consent, to the pressure of one actual one.

the reception of the propositions in the character of true propositions, and for their own escape from the disgrace generally and worthily attached to improbity in that disgraceful shape — to the confusion in which the subject has been involved by their arts, and to that general and indefatigably cultivated ignorance, by which all who do not stand engaged by sinister interest to defend and propagate the misrepresentation, are debarred and disqualified from detecting it *

4. That, in favour of the rule pretending to oppose an effectual bar to self-disserving, under the name of self-betraying, testimony, the plea of humanity and tenderness is a mere pretence.

5. That, by the unhappy success with which this pretence has been played off, a most pernicious and widely spread correspondent superstition has been propagated and rooted in the public mind insomuch that the people, having been generally duped by this imposture, have been to such a degree deceived, as to regard with emotions of respect and gratitude the treachery by which their dearest interests have thus been sacrificed

The truth of the above propositions is, it is presumed, tolerably well established But, being thus mischievous, how came it to be established? By what considerations did it recommend itself to the minds of those by whom it has been established?

Interest, sinister interest, though in every country it will account so satisfactorily for the jurisprudential system, will not afford a separate account for every particular arrangement. In some instances, interest would really be neuter in others, its indications might fail of being perceived and wherever there is nothing to be got by thwarting public opinion, there is everything to be saved by conforming to it.

The maxims, or general propositions, to which the most extensively applicable notions of jurisprudential law have been consigned, have owed their origin (when not to official and sinister interest) to some play of the affections or the imagination — to some antipathy, sympathy, or caprice — now and then to some view of utility, though almost always either too scanty or too wide For the times when these maxims have been formed have been times of inexperience — times in which, for want of the requisite mass of experience, something was omitted, that required to be either added to the extent of the proposition or subtracted from it, ere it could be rendered commensurate to the exigency of the public interest on that ground

Suppose the maxim to have had its root in general utility By the inordinate extent assumed by it, it would spread far beyond the root, including particular propositions in abundance, for which no root could be found either on the ground of utility or any other.

From the observation of the prevalence of self-regarding interest in every human bosom (a principle upon which the individual and the species depend for their preservation,) and of the undesirable influence which this principle was so apt to exercise upon human testimony, — judges — men delegated by the sovereign to dispose of the fate of others for whom they had no regard, sometimes by punishing their offences, sometimes by terminating their disputes — formed to themselves, at an early period, this general proposition or maxim, — No man ought to be a witness in his own cause It is susceptible of more senses than one but in no sense would it ever have gained footing, had it not been for the indifference of those by whom it was applied, to its effect upon the feelings and interests of those to whose concerns it was applied At bottom, in the breast of the judge by whom it was first broached, it could have had no more warrantable origin (whether he were or were not aware of it) than that of a desire to save his own time and trouble: for, be he who he may, — let his existence have occupied this or that portion of space and time, — what he could not but be conscious of, is, that in those instances in which, having a real interest in forming a right decision, he has felt a real anxiety to render it conformable to the truth of the case, — in a word, as often as, in the character of the father or master of a family, he has been really solicitous to come at the truth, and the whole truth, — his conduct has never been such as this maxim prescribes Pursue its application to the daily concerns of a family, and extend it to every family, you will find it incompatible with the

* Blackstone scruples not to assert, in express terms, that "the law of England .... to avoid all temptations of perjury, lays it down as an *invariable* rule, that *nemo testis esse debet in propriâ causâ*" — Comm. III c. 23 (p. 371.)

From this, than which a more rank misrepresentation never was committed to paper, let any one judge of the sort of information by which the minds of all the rising generation, and (in a word) of all who are not professed lawyers, are condemned to be poisoned, on a subject so important as that of law, — that rule of action, for the ignorance or misconception of which they are punishable every moment of their lives!

Thus much as to matter of fact: and note, that, as to matter of reason, it is on this notorious and wide-stretching falsehood, in conjunction with a real truth, — viz. the "sufficiency of one witness," and he the sort of witness on whom an exclusion is so falsely represented as put by that rule, — that Blackstone grounds "the superior reasonableness of the law of England," as to the point in question: a superiority "acknowledged" (he gives us to understand) by the Roman law, and by the Scotch law as a branch of it. From the correctness of the picture in point of fact, here (as elsewhere) judge of the value of the praise.

existence of the species for any considerable length of time.

Whatever was the real reason,—the ostensible reason, the reason assigned to the public, is evident enough: the danger of deception—the danger lest the judgment of the judge should be misled, by testimony issuing from a source from which it was so liable to receive a direction deviating from the path of truth, the only path that leads to justice.

In this way the system of exclusion first introduced itself: attaching upon both parties in a cause, defendant as well as plaintiff; but in the first instance, and with greatest effect, upon the plaintiff, with whom every suit originates: upon the testimony of the plaintiff, considered as proffered by himself.

By favour of the weakness of the human mind, and the indistinctness and variability of language,—under the influence of supervening circumstances,—maxims (more especially maxims of jurisprudence) have received an extension, sometimes for the better, sometimes for the worse. By the maxim of English constitutional law, "the king can do no wrong," nothing more was probably meant by the first framer of it, than to express the inviolability of that functionary, under favour of the ambiguity of the sense attached to the word *can*, some opposition lawyer of the day took occasion, by a happy exertion of professional art, to graft upon that manifestation of power a declaration of impotence. Had lawyercraft never exerted itself to any worse purpose, the demand for these pages would never have existed.

From the observation of the perturbation that would naturally manifest itself in the countenance of a malefactor, when questioned on the subject of his misdeeds, some judge (actuated by misapplied compassion, or possibly by corrupt partiality, or society in guilt) took occasion to desist from the inquiry, grounding the dereliction, perhaps, on a new and strained interpretation of the maxim, No man ought to be a witness in his own cause. If the practice originally rested on that ground, it did not long remain there; since a fresh ground was made for it in the narrower and more apposite maxim, No man is bound to *criminate*—or (in language more rhetorical, more delusive, and therefore better adapted to the purpose) to *accuse*—himself.

Be this as it may; the system of exclusions came in this way to be extended to the testimony of a defendant, considered as called for, against his will, by his adversary the plaintiff, or by the judge.

The case thus far under consideration is a simple case: parties, at most but two; one on a side. In a suit of the criminal kind, instituted and carried on by the judge alone, without the intervention of any individual in the character of plaintiff, the number of the parties is even reduced to one.

In a case thus simple—so far as exclusion takes place—there can be no room for doubt (as far as utility, or the semblance of it, is concerned) in which quarter (that is, in which of the two maxims above mentioned) the prohibition originates. Is it by the party himself that the judge is called upon to receive his testimony? Fear of deception is the reason or the pretence, and the maxim is, No man ought to be a witness in his own cause. Is it by the adverse party that the judge is called upon to receive, and (as it is not in the nature of the case that it should be delivered willingly) to compel, the testimony? Fear of vexation is the reason or the pretence, and the maxim is, No man is bound—or, No man ought to be bound—to criminate, accuse, or (to slide it on to non-criminal cases) hurt, harm, injure, prejudice, himself.

But, for this long time, causes have from time to time appeared, of a more complicated texture: causes presenting, either on one side (and on either side,) or even on both sides, parties in greater number: two, or a number indefinitely greater; but on this occasion, for exemplification, two will serve as well as twenty.

Suppose two on each side: what is to be done here? Apply the true reason, fear of deception, fear of vexation; you will now find cases in which they will not hold. No matter: the maxim is framed; it has attained its full growth: it has taken root of itself: it has become familiar to many a tongue, the head containing which saw no reason for it, nor ever thought it worth while to look for one.

If this be so, on this ground then we must look for the origin of the practice in one or other of the two maxims; giving up the idea of looking for a reason, in the conduct of men to whom it never occurred to look for a reason—to look for anything beyond the rule.

PART VI.

OF DISGUISED EXCLUSIONS.

CHAPTER I

EXCLUSION OF EVIDENCE FOR WANT OF MULTIPLICITY

§ 1. *Impropriety of exclusion on this ground.*

On the several preceding grounds, the impropriety of the practice of excluding evidence has been rendered, I am inclined to think, sufficiently apparent: if so, on the present ground, it must be much more palpable. In those cases, a cause of suspicion, and for the most part not an ill-grounded one, exists: and the error consists in employing exclusion, where watchfulness alone would have been the proper remedy. In the present instance, not so much as the slightest cause of suspicion is so much as fancied to exist; and yet a man is excluded without mercy. Excluded, and for what reason? For this, and this alone, that another man, having it in his power to give evidence pertinent to the case, is not to be found.

When suspicion is the ground of exclusion, the assumption is, that some men (*i. e.* all men belonging to any of the suspected classes) are liars. Where want of multiplicity of evidence is the ground, the assumption is, that all men — all men without exception, are in this unhappy case. Take any two men, men of the most trustworthy complexion, as well in respect of individual character as in respect of station in life: take these two men; if a demand for their testimony happens to be presented by two different causes, they are both of them incorrigible liars, and neither of them ought to be heard: if, on the contrary, the like demand happens to be produced by one and the same cause, both of them ought to be heard — both these liars become good witnesses.

I have already had occasion to remark the incongruity of the law's taking upon itself to know more, and that in all cases, of the degree of credit due to evidence, than those who have the evidence before their eyes. Here the incongruity is still greater. In the case of the inadmissibility — the incapacitation, the judge or jury have not formed any opinion, because they have not been allowed to hear the grounds on which, and on which alone, an opinion could have been formed. In the case of the requisition of two witnesses,* they have heard evidence, and such evidence as hath appeared satisfactory to their minds. The jury are satisfied, the judge is satisfied; the prosecutor is satisfied, the advisers of the crown are satisfied, everybody who has had any opportunity of knowing anything of the matter is satisfied: it is in the midst of all this satisfaction, that the legislator, who knows nothing about the matter, who has no possibility of knowing anything about the matter, chooses to remain unsatisfied. He chooses rather to suppose that a witness, whom he knows nothing about, is perjured, and a jury, a judge, a set of ministers, whom he knows as little about, deceived, than that that one accused person, about whom he knows as little, and whom all these persons have concurred in believing guilty, was really so.

In speaking of the witness, I say *perjured*: and such accordingly is the supposition, and the only supposition, proceeded upon, in the case upon which this provision has been grounded: for, as to any particular danger which the witness may be supposed to be under, of having fallen into an involuntary mistake, there is nothing in any of the cases in which this regulation has been ever applied to warrant any such supposition, nor is the regulation ever supported on any such ground. Such then is the supposition, which the legislator chooses as the most probable, that one man, of whom he knows nothing, has made himself guilty of perjury — a man whom all who have had the opportunity of knowing anything about him, concur in believing innocent, — rather than that another man, whom all who have heard the case concur in believing guilty, was guilty, of another offence.

Thus much as to the impropriety and inconsistency of the rule. Next, as to its mischievousness in comparison, as before, with the rules by which an exclusion is put upon witnesses of a particular sort. In the latter case, the witness or witnesses, on whose persons or in whose presence a malefactor is allowed to commit whatever crimes or other offences he pleases, must, to give the malefactor the benefit of the licence, be taken out of the suspected classes. In the present case, all individuals, without exception, are allowed to be pitched upon as victims or witnesses.

In a particular state of things, it is true, the mischief is greater in those cases than in this. In those cases, the number of witnesses in whose presence the crime or other offence is allowed to be committed, is without stint:

* As in cases of treason and perjury.—*Ed.*

on the present ground, the number of witnesses in whose presence it is lawful to commit the crime or other offence, extends not beyond one. But the facility given to delinquency by the removal of the restriction in respect to *number* in those cases, will scarcely be found to be equal to that which is afforded by the removal of all restrictions in respect of *quality* in the present case.

The accomplice, who is sufficient to enable a man to commit the crime, not being sufficient to produce, by the testimony of his lips, his conviction of and for such crime, — each malefactor has thus a ticket of exemption to dispose of, in favour of any associate who may be disposed to join with him in any forbidden enterprise.

Thus much as to the effect of the exclusion in causes of a penal nature. In regard to those of a non-penal complexion, the effect is still the same in kind, varying only in respect of the importance of the cause. Following the same rules, the task of giving it a separate exemplification under this separate head, may be dispensed with.

Such is the price paid for the security in question: viz. for the difference in point of danger between the case where there are two witnesses in proof of guilt, and the case in which there is but one. Such is the price paid for this security; and after all, what is it worth? In the multitude of counsellors, says the proverb, there is safety; in the multitude of witnesses there may be some sort of safety, but nothing more: it is by weight, full as much as by tale, that witnesses are to be judged. *Pondere, non numero.* From numbers (the particulars of the case out of the question) no just conclusion can be formed. Nothing can be weaker than the best security that can be derived from numbers. In many cases, a single witness, by the simplicity and clearness of his narrative, by the probability and consistency of the incidents he relates, by their agreement with other matters of fact too notorious to stand in need of testimony, — a single witness (especially if situation and character be taken into account) will be enough to stamp conviction on the most reluctant mind. In other instances, a cloud of witnesses, though all were to the same fact, will be found wanting in the balance. There is no man conversant with the business of the bar, whose experience has not presented him with instances of dozens of witnesses opposed to each other in the same cause, line against line, and whose testimony has been of such a nature, that (howsoever it may have been in regard to mendacity) falsehood must have been on one side or the other. Naval trials are pregnant with instances in favour of this remark. According to Hume, on the subject of an engagement between Blake and Tromp, the unanimous testimony of the English captains was contradicted by the unanimous testimony of the Dutch. Let any man read the trials of Keppel, Palliser, or Molloy, and then say whether security resides in numbers.

Let me not be mistaken. I do not mean to insinuate (it would be absurdity to insinuate) that the requisition of a second witness adds nothing to the security against perjury. No doubt but that, the greater the number of witnesses you require, the greater the security against perjury. All I contend for is, that that security (be it greater or less,) is not so necessary as that you should pay so great a price for it, as you do pay, and must pay, by the licence you thereby grant to commit the crime in the presence and with the aid of any *one*.

"Reason," says Montesquieu,* "requires two witnesses, because a witness who affirms, and a party accused who denies, make assertion against assertion, and it requires a third to turn the scale." This, by way of proof of the proposition immediately preceding: — "The laws which cause a man to perish upon the deposition of a single witness, are fatal to liberty." This observation, short as it is, teems with errors.

1. The equality maintained turns upon this supposition, and no other, viz. that it is as unlikely that a person accused, being guilty, should aver himself to be innocent, as that a party accused, being innocent, an accuser should aver him to be guilty: in other words, that it is as likely a man should violate truth for the purpose of injuring an innocent person, as for the purpose of saving himself. Such is the supposition; but surely nothing can be more ill grounded. The assertion of the witness amounts to something — the denial of the accused amounts to almost nothing: for he speaks under the terror of the law, which devotes him to certain punishment in the event of his not denying.

2. Another error is, the supposing that any rational conclusion can be drawn from the mere circumstance of number, as between accusers and defendants, without taking into the account the particular circumstances of each case.†

3. A third incongruity is, the confounding

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* Esprit des Loix, liv. xii. c. 3.

† It is on the same ridiculous plea, that the testimony of a single witness has been determined in English law to be insufficient to ground a conviction for perjury: "because," we are told, "there would only be one oath against another." Irrefragable logic this, if all oaths be exactly of equal value, no matter what may be the character of the swearer, and to the action of what interests he may be exposed. It is on the same ground, that no decree can be made, in equity, on the oath of one witness, against the defendant's answer on oath. (See the following section.)—*Editor.*

the case of witnesses with that of judges: for though witnesses are the persons he speaks of, the situation he places them in is that of judges.*

4. A fourth incongruity is, the making up the proposition and the demonstration in such a manner as not to fit one another in point of extent; in consequence of which want of just coincidence, nothing can be concluded — The case necessarily supposed, extends over no more than one of the two divisions into which the field of law is divided, — viz the criminal: and the reason is one that applies to civil as well as to criminal, though it appears not that Montesquieu was aware of the application

The occasion to which his view seems to have been confined, the only occasion specified, is still narrower — that subdivision of the criminal law, which concerns offences that have been punished with the punishment of death. He might have been right in saying that laws which cause a man to perish upon the evidence of a single witness, are fatal to liberty, and yet not right, if he were to extend the same observation to cases in which death was not included in the punishment

The expression *cause to perish* — *font périr* — would of itself be sufficient to ease the case of the weight of Montesquieu's authority, if authority were capable of weighing against reason It alludes, to all appearance, to the practice of the Roman law (the law under which he had been used to act,) which makes conviction, and thence in capital cases death, a *necessary* consequence of the adverse deposition of two witnesses, — leaving no option to the judge

Another circumstance that contributes to lighten the case of the weight of his authority, is, that the trials to which alone he had been used, and which alone he can be understood to have had in view, were trials in the judge's closet, without a jury, and on which cross-examination on the part of the accused was but imperfectly allowed — cross-examination by his counsel not allowed.

"Fatal to liberty?" What means *liberty*? What can be concluded from a proposition, one of the terms of which is so vague? What my own meaning is, I know, and I hope the reader knows it too *Security* is the political blessing I have in view security as against malefactors, on one hand — security as against the instruments of government, on the other. Security, in both these branches of it, is the benefit, the making due provision for which, in the case in question, is the object of these inquiries

Where two witnesses have been required, the principle of determination is obvious enough it has been the fear of giving birth to the conviction and punishment of innocent persons, if in each case the testimony of a single witness were held sufficient. Engrossed by the view of this danger, the attention has overlooked the so much greater danger on the other side

For a single witness to produce by his testimony the conviction of an innocent person, it is not sufficient that false testimony on the side of conviction should have been given; — it must also have obtained credit with the judge, it must have produced in his mind a degree of persuasion, of sufficient strength for the purpose

But, even among the vilest of malefactors, as I have already had occasion to state, nothing is more uncommon than false testimony on the inculpative side

What the argument supposes is, that falsehood will prevail over truth falsehood on the inculpative side, over truth on the exculpative

The giving security to the innocent, is the object and final cause of this ill-considered scruple Of what description of the innocent? Of those, and those alone, to whom, by false testimony, it might happen to be subjected to prosecution in a court of justice. On the other hand, those to whom, in consequence of the licence granted by this same rule, it might happen, and (if the rule were universally known) could not but happen, to suffer the same or worse punishment at the hands of malefactors, are altogether overlooked. The innocent who scarcely present themselves by so much as scores or dozens, engross the whole attention, and pass for the whole world. The innocent who ought to have presented themselves by millions, are overlooked, and left out of the account.

It is to this ill-considered scruple, that the European nations have been indebted for the use of what is technically called *torture;* I mean in the most usual, and most exception-

* "Les loix qui font périr un homme sur la déposition d'un seul témoin, sont fatales à la liberté. La raison en exige deux, parce qu'un témoin qui affirme et un accuse qui nie, font un *partage*, et il faut un tiers pour le *vuider*."— Esp. des Loix, liv xii. chap 3.

I have made the best sense of the passage I could; but to make any, it was necessary to depart from the expression: for the expression is as confused as the opinion is ill grounded.

Voiding, *emptying* a *division*, may be good French, and I suppose is, since it is Montesquieu's; but the image would be an incongruous and ill-constructed one in any language. The division, be it what it will, may be *terminated;* but how a division can be *emptied*, seems not very easy to conceive. The sort of division to which the phrase seems to bear allusion, is a division in the number of persons (judges, for instance) having a *voice*, as the phrase is (meaning a *vote*,) in any assembly invested with the form of a body corporate. This supposes the two assertions to stand on equal ground, like the opinions of two fellow judges; but the case, we have seen, is otherwise.

able, application of it. The testimony of a single witness was not sufficient for the conviction of a defendant; but, in a case capitally punished, it was sufficient to warrant the applying torture to him, for the purpose of compelling a confession. Combined with this tremendous exercise of severity, what then was the effect of this false tenderness? — In some cases, to produce, by dint of terror, a not very satisfactory confession: in other cases, to add to the regular punishment this accidental and unnecessary torment: in here and there an instance, to enable a guilty man, by patience under torment, to escape death, the ultimate punishment, in cases in which he would have been subjected to it under the English mode of procedure.

Under the best system of jurisprudence, it must happen now and then, though under the worst I believe it to be extremely rare, that a man completely innocent shall suffer as for a capital crime. In these deplorable cases, under the English system, which admits the grounding conviction on a single witness, the innocent victim will suffer the instantaneous and in a manner insensible infliction, and no more. Under the general law of the continent, wherever the application above spoken of under the name of torture was in use, the unhappy innocent would suffer death in whatever was its prescribed form, but with the previous addition of a state of torment more terrible than twenty deaths; unless, to free himself from it, he could succeed in inventing a credible, though false, narrative of guilt.

In the complication and intricacy of the discussions, of which a rule requiring a multiplicity of evidence will naturally (not to say necessarily) be pregnant: — in this, though comparatively a minor inconvenience, will be found a certain degree of force. Assuming that a multiplicity of evidence is necessary, how is it that it must or may be composed? Say that there must be at least two witnesses; the difficulty is, in appearance at least, in a considerable degree obviated. Happy would it be for the interests of truth and justice, if the task of decision were attended with no other difficulty than that which attends the distinguishing of two individuals from one. But, where nature has made not an atom of difficulty, lawyers will make a mountain; where common sense would not find a speck to disturb the clearness of the case, science (I mean always jurisprudential science) will find means to raise a cloud. Two witnesses: — good: but to what fact? If one of them be to the principal fact, may not another be to an evidentiary fact, — his testimony constituting a *presumption*, in the language of the Romanists? Or, in fine, in consideration of the number, might not two presumptions (since there are two of them) suffice? Then comes in the question, though in language much less clear, — what, in all cases, and in the case in hand, is the principal fact? what an evidentiary fact?

Two witnesses again:—good. But in what shape must, or may, their evidence be exhibited? If one be a witness, examined as such, in the regular judicial mode, may not the place of the other be supplied by a lot of written evidence? especially if it be of a nature so superiorly trustworthy as those several species of written evidence which come under the head of *preappointed* evidence — a deed, an entry in a register, a judicial record of any kind. Or, again, — considering how great the security for trustworthiness derivable from number, — may not one of the two pieces of evidence be of some one, or of any one, of the species of inferior evidence which have been brought together under the general denomination of *makeshift* evidence? Or, — if one such piece of inferior evidence, added to the regularly extracted testimony of an unexceptionable witness, be not sufficient, — may not the deficiency be supplied by two or three, or any and what greater number, of these inferior evidences, and of any and what sort or sorts? And, in short, if the number of these lighter and make-weight evidences be to a certain (and what) degree considerable, may not their abundance supersede altogether the necessity of a lot of heavier evidence?

A piece of written evidence, again — say a conveyance bipartite, to which there is a grantor and a grantee, with or without one or more attesting witnesses. The evidence presented by this instrument, — is it the evidence of one witness only, or of more? and how many more? All these difficulties, with abundance more, may be started (as some of them have been started) from the rule laying down the necessity of two witnesses: and in any, or at least in some, of these ways, may the number required have been made up, without any violence to common sense.

All these reasonable modes of splitting hairs have not yet sufficed to exercise the industry of lawyers. Not content with splitting hairs, they have proceeded to split men: out of one and the same man, they have made two witnesses.

When one man of law has laid down a foolish rule — an ill-considered and palpably pernicious rule, — his successor, not to fall into the sin of the sons of Noah, and uncover a father's nakedness, makes his obeisance to the rule, throws a cloak over it, makes a leak in it, and, according to the measure of his dexterity, draws out the force and efficacy of it. We shall see presently, when we come to speak of the Roman law, to what a degree of refinement this policy has been pursued in the present instance.

Such, then, is the precept which excludes

one witness for the want of other witnesses. impropriety, inconsistency, mischievousness, are the qualities which characterize it Exceptions, however, in appearance at least, are not altogether wanting to the mischievousness of it.

1. One is the case where, from the nature of things, witnesses, principal witnesses, in numbers, cannot have been wanting The scene, for example, in a spot where individuals cannot but have been collected in multitudes a place of worship, a theatre, a market-place in market-time, a fair, a barrack, a dock-yard, a parade. In such a state of things, what harm, it may be asked, can result from the requisition of two, or even of three witnesses? I answer, — Seldom any harm, but never any advantage.

The case in which the restriction would be proposed, will naturally be rather a penal than a non-penal one quarrel, smuggling, embezzlement, sedition, riot the side to which the restriction is applied will as naturally be that of the plaintiff, the object, real or pretended, will be the security of innocence — the preservation of obnoxious innocence from the enterprises of oppressive power But if, on the supposition of guiltiness, the facility of finding witnesses qualified to make proof of the affirmative is so great, on the other hand, on the supposition of non-guiltiness, the facility of finding witnesses qualified to make proof of the negative, will at least be equally so. The consequence is, — granting the exclusion to be harmless, it will still be useless

Not that it always will be harmless, the publicity of the place does not necessarily suppose the publicity of the act A secret blow or wound may be given — a secret word of insult or conspiracy whispered — a secret act of pilfering committed or attempted, as well in the most crowded apartment as in the wildest desert: in some instances, the closeness and bustle of the throng will even be favourable to secrecy

Another observation The multiplicity of *percipient* witnesses, how great soever, is not always sufficient to secure so much as a single *deposing* witness still less any greater number. Let ten persons have seen what passed, — if they be all of them ill disposed to the plaintiff's side, or well disposed to that of the defendant, it may happen that none shall have given spontaneous information to the plaintiff, none but such as, on being questioned, with a view to prosecution, and before the commencement of prosecution, and consequently without those securities for veracity which are afforded by examination *coram judice*, may have given an account purposely false; although the same persons, if examined upon oath, and under the controul of the concomitant securities, would not go the length of seeking to accomplish their wishes by perjurious evidence.

2. Another seeming exception may be composed of the cases in which it may appear that the mischief of the offence depends (if not altogether, at least in a considerable degree) on the number of the persons present at the commission of it. Such are those in which the mischief consists in the wound given to the psychological sensibilities of the persons present, by acts or discourses offensive to their affections or their taste: acts or discourses savouring of indecency discourses expressive of contempt for any of the objects of their worship or respect, — for the established religion, for the established government, and, in particular, for the person of the chief magistrate, where there is one, especially if invested with the rank of royalty The greater the number of the persons present on any such occasion, the greater the danger of mischief, in each of two opposite ways If, in the company in question, there be any to whom the obnoxious exhibition, or the discourse, is offensive, the mischief of the act respects the present pain of which it is productive If there be any by whom it is regarded with complacency, it becomes mischievous on another account on account of the danger lest, by the spread of the same obnoxious practice or sentiment, the shock given to men's feelings may become more and more extensive.

By requiring that, in support of a prosecution of this sort, there shall be two witnesses at least, or three witnesses at least, provision (it may appear) is made, that, for the act to be converted into a punishable offence, there shall have been present at the commission of it at least that number of persons.

That, among the effects of an arrangement of this sort, may occasionally be found that of operating as a check to over-industrious antipathies, and that check a salutary one, is not to be denied But that this is the most proper mode of applying such a check, cannot be admitted If a regard for the liberty of private intercourse forbids the treating the act on the footing of an offence, unless a certain number of persons be present at the commission of it, the direct and proper mode is to say so at once to word the condition in such a manner as to apply it, not to the number of persons appearing in the character of *deposing* witnesses, but to the number of persons existing at the time, in the character of *percipient* witnesses.

A consideration which there has already been occasion to bring to view, is, that amidst any abundance of persons present in the character of percipient witnesses, there may be a scarcity, or even an absolute want, of deposing witnesses: the two characters are therefore, by no means, either identical or convertible. Another consideration is, that, unless the objection be obviated by a special provision, the function of a deposing witness may be per-

formed by a person who was not a percipient witness, — who was not present at the commission of the offence; as, where the evidence stands in the relation of a discourse of the confessorial kind, held by the party accused; or where, in any other shape, it wears the character of circumstantial evidence.

From an institution improper in the main, useful results may flow by accident. That, in this way, occasional good may result from the species of exclusion here contended against, is not to be denied. In this way, the mischievousness of it may now and then receive occasional palliation. Thus much may be said, but this is all that ever can be said, in favour of it.

In this way, as in every other, the effect of an institution putting exclusion upon evidence upon the plaintiff's side, is, to enervate the substantive law to which it applies. So far as the substantive law is bad, so far (according to an observation we found occasion to make in a former instance) any such debilitating institution, in the line of adjective law, may be of service. So far, therefore, as it may be possible to confine the drag, the adjective incumbrance, to a perniciously active law, so far that which is in general a nuisance may have a particular use. Amidst the pulling and hauling so frequently exemplified in legislative bodies, it not unfrequently happens, that a party which has not power enough to stop the wheel altogether, finds means in this way to attach a drag to it. But the very circumstance that constitutes the utility of the institution in these particular cases, is its mischievousness in all others. The proper remedy is, not the establishment of the bad adjective law, but the abolition of the bad substantive law.

In the case of capital punishment, but in that alone, the Mosaic law requires two witnesses. From that source, perhaps, was derived the European rule: I should look upon this provision as a great improvement, if introduced in England. Why? Not as deeming the requisition of two witnesses a proper one, but as deeming the punishment of death an improper punishment. To authorize such punishment, if three witnesses were made requisite, so much the better: if three dozen, better still.

But, from the necessity of two witnesses, to authorize the infliction of death in the character of a punishment, what follows? Not that, in case of one witness, and but one, acquittal should take place; but that some other punishment should take place, different from, and thereby inferior to, capital.

§ 2. *Aberrations of Roman and English law in this respect.*

In the Roman law, two witnesses are pronounced indispensable. In the penal branch (the higher part at least,) what followed? Torture. By fewer than two witnesses, a man was not to be consigned to death; but by a single witness he might at all times be consigned to worse than death. If, then, being guilty, he had it in his power to relate and circumstantiate a guilty act, at any time, if he thought fit, he might, at the price of future suffering, release himself from present torments. But if, not being guilty, and in consequence not having it in his power to circumstantiate the guilty act, he had it not in his power to release himself at that price, he was to suffer on: perishing or not perishing, under or in consequence of the infliction, as it might happen.

Upon the face of it, and probably enough in the intention of the framers, the object of this institution was the protection of innocence: the protection of guilt, and the aggravation of the pressure upon innocence, was the real fruit of it.

In the non-penal branch, the experienced mischievousness of the rule forced men upon another shift, of which, if the mischievousness be not so serious, the absurdity is more glaring. I mean the contrivance already hinted at, — the operation of splitting one man into two witnesses. Proposing to himself to make a customer, or non-customer, pay for what he has had, or not had, — a shopkeeper makes, in his own books, an entry of the delivery of the goods accordingly, and by this entry he makes himself one witness. A suit is then instituted by himself, against the supposed customer, for the value of the goods: he now takes an oath in a prescribed form, swearing to the justness of the supposed debt, and by this oath he coins himself into a second witness — the second witness which the law requires. By the same rule, if three had been the requisite complement of witnesses, two such oaths might have completed it; if four witnesses, three oaths; and so on. With a splitting mill of such power at his command, a man need never be at a loss for witnesses.

In every cause, the plaintiff, to gain it, must make full proof (*probatio plena.*) The tradesman's books make half a full proof (*probatio semiplena:*) his oath, as above (his *suppletory oath*, it is called,) makes the other half.* Sixteen paragraphs before, in the book of authority, from which, for reference sake, the instance has been taken, the reader has been assured (and that without exception, and in the most pointed terms,) that a half-full proof, though composed of the testimony, regularly extracted, of a disinterested witness, of the most illustrious and consequently trustworthy class, goes absolutely for nothing.†

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* Heinecc. (ad Pandect.) iv. 134.

† "Juris interpretes probationem in plenam et minus plenam, et hanc iterum in semiplenâ majorem semiplenam et semiplenâ minorem, dispescunt. Quamvis ver us sit ex juris Romani principiis, unius testimonium plane non admit-

From this inexhaustible source of inconsistency and injustice, the English law (the jurisprudential branch of it at least) is free. I say the jurisprudential part: for, on this and that occasion, the legislator has interposed, and required two witnesses.

From the first of Edward VI. to the thirty-first of the late reign inclusive, seventy-four exemplifications of this unwarranted and perfectly inconsistent scrupulosity may be counted.

If anything like principle or reason for the distinction were looked for in this catalogue, the search would be in vain If, in this or that instance, a seeming reason, of the nature of those above displayed and refuted, glimmers through the cloud, at the next step the light deserts us altogether In several instances, cases naturally more sparing of evidence than any others present themselves as having been selected for the requisition of this superfluity of evidence; as if for the express purpose of exposing the substantive law to derision. Poaching, smuggling, gaming, nocturnal destruction, forgery, bribery, and extortion, are of the number * Bribery has, in this way, received the protection of the law on three several occasions and on these occasions so effectually has the cankerworm eaten out the substance of the law, that it is difficult to say by what means the corrupter or the corrupted, the giver or taker of the bribe, can possibly be convicted, unless they were to join in laying in a stock of evidence for the purpose, ambitious of martyrdom in so honourable a cause

Consistency, or any steadier principle than the passion of the individual and the moment, not being to be found in any part of the existing chaos,—it were in vain to look for any such treasures amidst the scraps of legislation tacked together by so casual a tie The sphinx would have broken her neck a hundred times over, before she had discovered why, for convicting a man of abusing, insulting, or obstructing a set of half-yearly officers, composing what is called a jury of annoyance,† it should require double the quantity of evidence in Westminster, to what it would require on the inside of Temple Bar, or on the other side of the Thames. This for one. but the same narrowness and the same shallowness may be seen in all the other seventy-three instances.

'By the single testimony of a self-acknowledged malefactor — of a character stained with the blackest infamy, swearing to save his life, and put money into his pocket, any man, without exception, may be consigned to capital punishment. And with this case every day repeating itself before his eyes, shall a legislator, when a fresh patch comes to be put upon the motley tissue, stand up in his place and say, Nay, but upon this occasion justice and humanity call upon us to require two witnesses?

Among the cases in which, under English law, two witnesses are required to support a conviction, is that of high treason.

If, in some ancient book of travels in some such country as Monomotapa, or among the Amazons or Topinambous, we were to read of a people who were governed by a king, but among whom it was lawful for any man at any time to kill the king, provided no more than one person were privy to the fact, or in the company of any number of persons, being persons of certain descriptions, — we should be apt to reject it at once as fabulous, and fabulous to a degree of extravagance Were a poet to come out with a play, in which the plot turned upon the supposition of such a law, we should turn aside from it, as grounded on an improbability too glaring even for fable We should rank it with the story of that monarchy which held out the highest of rewards for the successive assassination of every monarch that sat upon the throne, by bestowing the throne itself upon the assassin for his reward Human blindness has not yet, since the Saxon times, gone so far as to offer a secure reward, together with impunity, for the assassination of the sovereign, in this enlightened country It goes no further than to offer impunity — impunity indeed only in certain cases, but those such as are constantly liable to occur

It might be worth the consideration of the gentlemen of the long robe (and no incompetent subject for the exercise of their ingenuity,) whether the king be a man, and whether George Gwelph, commonly called George the Fourth, may not have as good a claim to the protection of the law against assassination, as John Brown or Thomas Smith; and whether, accordingly, if any partaker or abettor of any pop-gun plot, past or future, successful or unsuccessful, were to be arraigned for shooting, or shooting at, the said George Gwelph, the court would be obliged to take notice that the said George Gwelph happens to be king of Great Britain, for the purpose of affording impunity to his murderers, or intended murderers.

It seems, for this purpose, high time to know whether the king be a man or not: and were it to be determined, by the twelve judges for example, in the negative, it might then

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tendum esse, licet præclaro curiæ honore præfulgeat; adeoque non meliorem esse conditionem ejus qui semiplenè, quam ejus qui nihil, probavit."—*Heineec.* iv. 118.

* This anomaly no longer exists. The statutes now in force relating to these subjects are 1 & 2 Will. IV. c. 32; 3 & 4 Will. IV. c. 53; 4 & 5 Will. IV. c. 13; 7 & 8 Geo IV. c. 28; 2 & 3 Will. IV. c. 123; 49 Geo. III. c. 118.—*Ed.*

† 29 Geo. II c. 25, §§ 10, 12.

be not amiss to inquire, whether it might not be advisable to strip him of a part of his royalty — of so much of his royalty as excludes him from the protection given to all other men, for the purpose of declaring, that neither shooting him, nor shooting at him, should be punishable.

Picking a pocket of a handkerchief, value one shilling, is capital felony;* its being the king's pocket does not make it treason: for picking the king's pocket of his handkerchief a man might be hanged on the testimony of a single witness: shooting the king being treason, a man may shoot the king in the presence of anybody he pleases, and not a hair of the murderer's head can be touched for it. Blessed laws! under which it is as safe again, to shoot the king as to pick his pocket![†]

So long as this regulation subsists, a law which, taking up any of those offences against personal security, which in the case of an individual are capital felonies, should, in the case of its being levelled against the person of the sovereign, declare it to be high treason, would, instead of adding anything to the personal security of the sovereign, diminish it by at least one half — leave it, in respect of such offences, but half as great as it was before.[‡] This consequence will not be intelligible to a legal understanding. To such an understanding it will be impossible ever to comprehend how so high-sounding a word as *treason*, especially with the word *high* before it, should fail of giving a better security than any that can be given by so ordinary a word as felony. I would never allow myself to entertain a hope of rendering the proposition intelligible to a lord chief-justice or an attorney-general; but I should have no doubt of its being understood, at the first word, by the man who blacks their shoes.

But this provision forms part of a statute of King William;[‖] and that statute is an excellent statute: it forms a link, and a most valuable one, of the chain of securities framed for the subject in the course of that illustrious reign. This is the grand argument; and here stands the stronghold of prejudice, declamation, and common-place. Were I to be forced to say whether jet and snow are black, and yes or no were the only answer that would be admitted, I should find myself a little puzzled. Were I asked, in like manner, whether this be a good statute or no, I should be puzzled in the same way: if I were obliged to give an answer, I suppose it would be in the affirmative: but were the benefit of a distinction to be allowed me, I would most certainly pick this clause out of the statute; and an answer in favour of the remainder would not lie heavy upon my conscience. This clause, whatever may be thought of it by itself (if ever it has been thought of by itself,) it is natural should derive no small degree of favour from the good company in which it has been always found. How far it is entitled to any such favour by its own merits, has been pretty fully seen.

The statute is indeed a statute of King William: it was passed by King William: but as to this clause, at least with equal truth may it be said to have been passed *against* as *by* that useful and meritorious, but ungracious and ill-beloved king. It was forced upon him by the party who, at that very time,

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* Picking pockets is now a simple larceny by the 7 & 8 Geo. IV. c. 29.—*Ed.*

† This singular rule of evidence is now no longer in force as regards any direct attempt against the person of the king, but it still subsists as regards any other kind of treason.—*Editor.*

‡ In the description of the mode of execution there is indeed some difference, but only a nominal one. In felony, the convict, after being hanged till he is dead, is buried in that state: in treason, after being hanged till he is insensible, his bowels may be taken out, and his body divided into quarters, and then either buried or not buried.[a] What would otherwise be done completely by the worms, or by the worms and a surgeon together, is done partially by the executioner. The words of the judgment are, that he be cut down while he is yet alive, and his bowels taken out, and *burnt before his face*. But when a man neither feels nor sees anything, what becomes of his bowels, and whether, if burnt, they are burnt behind his back or before his face, is not that sort of difference by which human conduct can be governed. That a man about whose neck the fatal rope has been tied, ceases to feel as soon as the weight of his body has been applied to the tightening of the rope, has been ascertained over and over again by the report of those, who, after a suspension, voluntary on their part, or involuntary, have, in a great multitude of instances, been recovered into life.

The bodies of those who die a natural death are frequently laid open, to satisfy the affectionate curiosity of relatives, or the more useful curiosity of the medical attendant. The bowels of kings themselves have been taken out to be embalmed: the bowels of traitors are taken out and burnt: that is, disposed of in a manner that was preferred to embalming in the instance of Roman emperors. If drawn to execution in a carriage, the felon is drawn in a carriage with wheels, the traitor in a carriage without wheels. No one can seriously suppose, that variations so frivolous and minute can add anything to the security. No man can seriously suppose, that he who would be content to risk the punishment of a felon, would not equally risk the punishment of a traitor, as here described.

[a] By the 54 Geo. III. c. 146, in cases of high treason, the sentence to be awarded is drawing on a hurdle, hanging by the neck, and beheading and quartering. But the king may, after judgment, direct that the traitor shall be simply beheaded.—*Ed.*

‖ 7 Will. III. c. 3.—*Ed.*

were pl——g, all of them his expulsion, and many of them his death. It was accordingly so constructed, with the benefit of this clause, that, besides the protection it afforded to the innocent, it afforded most ample protection to whoever might have numbered themselves, or might be disposed to number themselves, among the guilty. Looking at this clause of it, before I had adverted to the history of the time, I wanted no farther proof to say to myself, the design of it seems to be "to make men as safe in all treasonable conspiracies and practices as possible." Turning afterwards, for curiosity's sake, to Bishop Burnet's History of his own Time, I found the same thing said already in the same words. So said Bishop Burnet: but little did the good bishop know, though we know now, half the ground there was for saying so. No wonder the parliament should have been overpowered by disaffection, when the cabinet was governed by, if not exclusively composed of, traitors. No wonder that the necessity of two witnesses to conviction was contended for with so much anxiety—was put at the head of this protecting statute: a minister might thus correspond (as so many ministers were then actually corresponding) with the exiled king by single emissaries, and be safe. Turn to the papers which Macpherson has brought to light, read over the names of the Marlboroughs, the Russels, the Newcastles, the Leeds's, the Normanbys, the Shrewsburys, the Godolphins, the Sunderlands, the Abingdons, and I know not whom besides: we shall see how far this licence was from lying unemployed. As to the other provisions, then, all of them have their merit: some of them were no more than the removal of barefaced injustice, but as to this, it was specially levelled, not against false accusations, but against true ones.

The consequences are instructive: nowhere can reasonings receive a stronger confirmation from events. Scarce had the legislature passed the act, when the incongruity of this part of it stared them in the face. A conspiracy broke out—a conspiracy, of the reality of which no one ever entertained a doubt—a conspiracy confessed afterwards by the conspirators: and for the proof of this conspiracy, at the trial, no more than one witness could be found. I speak of Sir John Fenwick's case. Two witnesses the case *had* happened to afford; but one of them (Goodman,) between the finding of the bill and what would have been the period of the trial, the friends of the defendant got hold of, bought off, and sent out of the way. What was to be done? The case was flagrant: the nation called for justice. An act of attainder was passed, grounded on that same insufficient evidence. Proscription was resorted to, because justice had been made impracticable. The flaw that had been made, was to be covered; but the covering was a cobweb of the moment, which left the flaw just as it was, for the benefit of future traitors.

The mischief was permanent,—we are saddled with it to this day, the remedy was momentary: nor, at the moment for which it served, was there an argument for it that did not prove the incongruity of the law which had created the demand for it.

Under rules of law, which, had they been calculated for the express purpose of the destruction of society, could scarce have been better adapted to it than they are, how is it that society is kept together? The question presents itself at every page, and the answer is still the same.—By the unintelligibility and inaccessibility of those rules,—by the darkness of the chaos of which they form a part. It is on the being known, that what there is good in the system of law depends for its effect: it is by the being unknown, that the mischief of what there is bad in that system is diminished.

One abuse finds its corrective, its palliative at least, in another, each particular abuse in one enormous universal one: each weakness, not in a corroborative application, but in another weakness, each particular negligence, not in particular vigilance, but in general negligence.

If society hangs together in the manner which we see, it is not so much by what the law does, as by the expectation of what it will do, grounded on the conception of what it ought to do. Fascinated by a variety of prejudices, pernicious in one point of view, salutary in another,—a man, from conceiving that the law ought to do so and so, concludes that so in each individual case it will do. The affirmative conclusion is most favourable to the tranquillity of society, the negative would probably be found in most cases the one most conformable to the truth.

In the case of the particular exclusion now under consideration, I will venture to suggest a few possible modes of remedying the mischief. If these remedies should appear to have little to recommend them in the eye of reason and common sense, it will be only because they are cut as closely as possible to the rich pattern of the common law.

One expedient might be, the having in every court of penal jurisdiction a wooden evidence, or man of straw, under some such name as that of the common witness, or common vouchee, whose office it should be to vouch for the truth of every deposition given by a single witness, in the event of his not having the support of a special evidence of his own kind. If, as in the case of a common recovery, indemnification may be given where there is no property, why may not evidence as well be given where there is no knowledge?

The testimony of a dumb witness is as good as that of a speaking one; and there needs not the skill of a Kempel, a Droz, or a Merlin, to make a wooden or a straw witness capable of kissing the book, and giving the requisite tokens of affirmation. If extraordinary powers of digestion should be thought requisite for the oath, Merlin has an anthropomorphic stone-eater ready made.

If the expense of the attesting puppet should be grudged, the part of the puppet might be enacted by a living person, such as the crier of the court: the same respectable person who for so many centuries has supported the character of the common vouchee or indemnificator general, in the Common Pleas, so much to the satisfaction of the best judges.

It might be objected to this expedient on a hasty view, that this, on the part of a living witness, would be perjury: and that it would be an indecent mockery, a gross profanation, and a practice subversive of the foundations of justice, were a judge thus openly to lend his countenance to perjury. But it seems difficult to say how, if it be proper for a judge to countenance perjury in a juror, it should be otherwise than proper to encourage it in a witness; or how the perjury should have less of *piety* in it in the one case than in the other. If in the instance of the juror it is *in favorem vitæ*, in the instance of the witness it is *in favorem justitiæ*, which is worth many lives.

Another mode might be, the passing a statute for the purpose of declaring that in all cases where two witnesses are or shall have been required by law, one witness shall be deemed, adjudged, construed, and taken to be two witnesses. This mode would be perfectly of a piece with the established practice, the object of which is to add knot after knot to the entanglement, avoiding with religious care the solution or removal of any part of the existing mass.

Another mode might be, to produce the same effect by practice or rule of court, as often as occasion called for it: which would save the three or four hundred pounds which it costs the country every time to make a statute. This, it might be said (since there are those who will say anything,) would be a barefaced usurpation — a direct attack by the judicial power on the legislative, — an act tending to the subversion of private and public security, by planting uncertainty in the very fountain of legal certainty, and destroying all confidence on the part of the subject in the dispensations and threatenings of the law. If this were to be allowed, judges (it might be said,) whose special duty and cardinal virtue is obedience, would thus be suffered to erect themselves, not into a fourth estate, but into a separate estate, independent of, and paramount to the three others. I answer, that this has been done in effect, as often as, by exclusion of witnesses, or *ex post facto* invalidation of legal acts, conditions have been annexed to conviction, which have nothing to do with innocence, and which have not been annexed by the legislature.

Thus much in a general point of view. But the practice of the King's Bench, the first criminal court of ordinary jurisdiction in this part of the United Kingdom, affords (as has been already seen) a special precedent, which, if not exactly in point, seems as near to the being so as can easily be conceived. Divers statutes give in divers cases treble costs. These treble costs, the court of King's Bench in all these cases refuses to give: giving, in the room of them, rather more than half what the legislature has ordered to be given.* There would be no greater stretch of authority in requiring but half the number of witnesses that the legislature orders to be required, than in giving but half the money under the name of costs that the legislature orders to be given. Nothing of misconstruction here — nothing of misapprehension: that which is done here, cannot have been done with other than open eyes. Legal learning, how consummate soever, can never have fairly unlearned a man the difference between three and one and a half — between two and one. He who continues to know the difference between his right hand and his left, must continue to know that right and left together are more than either right or left alone.

In the common-law branch of jurisprudential law, we have seen the arrangements on this head conformable to reason and utility: what defalcations have been made from the general rule, we have seen made by the legislature, in consequence of those conflicts and compromises to which a mixed sovereignty is more particularly exposed.

In the equity branch of jurisprudential law, the principle of Roman law, which requires two witnesses — which excludes every witness without distinction, who comes not with another witness in his hand — predominates.

The defendant, a party in the cause, is but one witness, just as much so as an extraneous witness. At the same time, though the common law in its wisdom refuses to hear this evidence, — in equity law, adopting in this instance the decision of common sense, in probative force it is looked upon as superior to that of a host of extraneous witnesses. To the general rule which requires two witnesses, the admission thus established will be an exception or not, according to the interpretation put upon the word *witness*. If (be-

* See Book VIII. *Technical System*; Chap. XXV. *Contempt manifested to the authority of the Legislature* (*supra*, p. 311.)

ing co-extensive in its import with the words to *depose*, *deposition*, to *examine*, *examination*, and so many others) it be understood to include the *party* when performing the function of a witness, the admission operates then as an exception to the rule if the word *witness* is understood to be confined in its application to the designation of *extraneous* witnesses, the admission given to the testimony of a party has nothing to do with the rule. For simplicity's sake, let us conceive the rule as having no application to parties — as having no testimony in view but that of extraneous witnesses

Taking the rule, then, in this sense, equity law does not adopt it in all its rigour The defendant's testimony (such as it is) the plaintiff never can be without for the suit can no otherwise be instituted than by the instrument called a bill, of which the interrogatory matter by which the defendant's testimony is called for, and to which he is bound to make answer, forms an indispensable part But in regard to this or that fact (facts as material as any to the cause,) what may easily happen, and what continually does happen, is, that the defendant knows nothing about the matter If, then, knowing nothing about the matter, he declares as much, the testimony of a single extraneous witness speaking to that fact, is, with regard to that fact, sufficient evidence

But if, among the facts inquired of by the plaintiff, there be any one, the establishment of which is necessary to form a ground for a decree operating in any respect in the plaintiff's favour, — and if, in relation to this fact, the defendant delivers his testimony, denying the fact, — an extraneous witness, and but one, affirming it, here, the law requiring two witnesses has always been conformed to and in this case, as in the other cases where two witnesses are required, the testimony of a single witness goes for nothing

English equity law having been, in its first concoction, Roman law imported from the continent, — the first equity judge to whom it was proposed to ground a decree in favour of the plaintiff upon the testimony of a single extraneous witness, contradicted by that of the defendant, would (how thoroughly soever persuaded of the truth of the witness's testimony — of the falsehood of that of the defendant) have acted, according to Roman law, illegally, had he made a decree on the ground of the true evidence. If a single testimony, though uncontradicted, is insufficient, still more must it be so if contradicted

So far as precedents, judicial precedents, being contrary to truth and justice, are not contradicted by other precedents, it is not lawful (at any rate it is not necessary) for a judge to decree according to truth and justice: it is incumbent on, or at any rate it is lawful for, him to decree according to precedents. The equity judge who, at this time of day, refuses to pay any regard to the testimony of an extraneous witness whom he believes to be trustworthy, because contradicted by that of a defendant whom he believes to be perjured, — this Anglo-Roman judge probably thinks nothing at all about the original Roman law all he has to do, is to think of the English precedents that have been grounded on it

If, thinking nothing of the precedents in his own law, or of the foreign law on which they were founded, he were to consider himself as an English judge, in putting any such exclusion upon the testimony of the extraneous witness, his decision would be as inconsistent with the decisions of his predecessors, as well as with the interests of truth and justice, as any of their decisions have been, when compared with that same standard.

Here are two conflicting testimonies (one might say to him.) the one liable to no objection, — the other, that against which, in order the more effectually to come at the truth, your predecessors, in quality of English judges, have thought it incumbent to shut their ears To the testimony clear of all objection, you pay no regard The sort of testimony which (according to the rule you are bound to pursue) is unworthy of all regard, — it is by that you govern yourself

On the present head (not to speak of others,) the practice of English equity is reconcilable neither to Roman law, nor to English law, nor to common sense Not to Roman law, since, where the defendant is silent, it decrees in favour of the plaintiff, upon the testimony of a single witness * Not to English law, since, where the defendant contradicts the witness, it counts testimonies without weighing them. Not to common sense, for the same reason, and because it gives the turn of the scale to that one of the two sorts of testimony, which, according to the principles of human nature, has least weight in it

The ground on which this arrangement is placed by the account given of it in the books, is curious enough here is oath against oath; therefore nothing is to be done † The judge who should allege this contrariety as a reason for doing nothing, would recognise himself unfit for his office.

Injured suitor To weigh testimony against testimony in a jury-box, is the business, the every day's business, of the same sort of man whose business it is, when behind a counter, to weigh lead or brass against bread or candles. What then? Is the task too hard for

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* 3 Atkyns, 649.

† 3 Atkyns, 649, and abundance of authorities there cited.—Lord Hardwicke several times.

you? do you sink under it? such imbecility, is it the fruit of all your science? Sue, then, for a place in the jury-box; and learn your business from bakers and tallow-chandlers.

The task the juryman has to perform, every day to perform, is the deciding between the testimonies of two witnesses, both of them equally unobjectionable. What are the two between which you profess yourself unable to decide? One of them worth as much as anybody's; another (at least if your rules are good for anything) worth nothing.

Lord Chancellor. It is not but that, if I were at liberty, I could weigh testimony against testimony as well as any tallow-chandler: but the mode of inquiry which I am bound and content to conform to, does not allow me to weigh evidence. Where truth is at all doubtful, equity is altogether unfit for the discovery of it. This we are all sensible of: accordingly, as often as evidence is worth weighing, we send it to the tallow-chandlers: they have a method of their own, which it does not suit the purpose of equity to follow. They are allowed to hear witnesses examined and cross-examined, in that natural mode which every man who is really desirous of coming at the truth, and has power to inquire into it, pursues of course, whether in a court or in a closet. Equity receives evidence in a scientific way — a way which was designed, not for the discovery of truth, but for better purposes. I am a learned English judge: it is a rule with all learned English judges to receive evidence in any shape, except the only proper one; they leave that to the tallow-chandlers.

CHAPTER II.

EXCLUSION BY LIMITATION PUT UPON THE NUMBER OF WITNESSES.

§ 1. *Excess of evidence an evil — Peremptory limitation not a proper remedy.*

THERE are some topics on which, on a superficial glance (especially if directed by the contemplation of established practice,) a fatal dilemma presents itself as hanging over the footsteps of the legislator; and, on one side or other, the very nature of things seems to have imposed on him the necessity of injustice. On a closer view, to him whose eye has strength to penetrate this mist, the difficulty may be seen to be in a great measure factitious; and to arise out of some irrational practice, into which, under the pupilage put upon him by the man of law, the imbecility of the legislator has been misled by the imbecility or improbity of his guide.

Of the above described state of things, an exemplification may be found in the arrangement which forms the subject of the present chapter.

What number of witnesses shall a party be allowed to produce? Put a limitation anywhere upon the number, you lay the party under the necessity of leaving the mass of evidence on his side incomplete: you pave the way to deception, and consequent misdecision. Put no limitation anywhere upon the number, you put it in the power of a *malâ fide* suitor (if superior to a certain degree in respect of opulence) to overwhelm his adversary with an indefinite load of testimony, and the expense, vexation, and delay, attached to it.

In the case which came under review in the last chapter, the ground of the exclusion (so far as, in respect of reason and utility, it had any ground) appears to have been the fear of deception. In the case now before us, the consideration of vexation appears to have been the ground.

The vexation liable to be produced by multitude of witnesses, or (to speak more extensively) by the quantity of evidence, has two branches; which, being in themselves perfectly distinct, require to be kept so in the mind of the legislator. Why? Because, according as it is in the one shape or the other that the inconvenience presents itself, so, in so far as the inconvenience admits of remedy, will the remedy.

There are two stations in the cause to which the vexation, considered in its first stage, is apt to apply itself: that of the parties, and that of the judge.

To the station of the parties, considered in the aggregate, it is pregnant with delay and with expense. Consider them separately, the expense attached to the production of each witness falls, in the first instance at any rate, upon the party by whom, or at whose instance, he is produced: ultimately, either upon that party or another, according to the arrangements made by the judge in respect to this part of the costs.

Upon the judge, this inconvenience will not naturally fall in any other shape than that of vexation, properly so called: expense, out of his pocket is not destined to come; by delay he will not, in the manner that a party would, be affected. It is in the shape of labour only, that the vexation falls upon the judge: perplexity, followed by the labour consisting in the exertions made to remove it.

The judge being a member of the community, as truly as the sovereign by whose authority he has been appointed, or the servant by whom his shoes have been cleaned, — any pain that, on this as on any other occasion, falls upon him, constitutes as large a part of the pain of the community, as an equal pain falling upon either of the other two. But on the present occasion, be it what it may, it can never enter into competition with the mischief that would ensue from the removal of the dolorific cause, viz. the labour of weighing the mass of evidence: that mass, by the

supposition, being in every part necessary to be weighed,—in every part such, that the exclusion of it would be productive of a correspondent chance in favour of injustice

The burthen, thus, on the particular occasion in question, sustained by the judge, is a part of that aggregate burthen, the pain of which cannot but be regarded as balanced, and more than balanced, by the remuneration, in whatever shape (dignity at any rate,) attached to his office and even setting aside such recompense, it can hardly be supposed that the mischief of the utmost vexation liable to fall upon that single individual, can come into competition with the mischief falling, in the other case, upon the community,—the notorious, and consequently extensive, mischief attached to the corresponding chance in favour of injustice

In respect of serious importance, the sort of vexation which in this case is borne by the judge, is, therefore, as nothing, in comparison with the mischief which, in consequence, is liable to fall upon the parties, that is to say, upon that one of them who has the direct justice of the cause on his side The greater the mass of evidence in the cause, the heavier the burthen imposed by it on the mental faculties of the judge the heavier the burthen on the judge's mind, the greater the probability that his force of mind will not be adequate to the sustaining of it—to the acting under it in such manner as to extract the truth from the mass of matter through which it is diffused, to frame to himself a right judgment respecting the principal facts in dispute, and to decide in consequence

In the shape of danger, the mischief will in this case be considerable, even supposing the clearest impartiality and most consummate probity on the part of the judge These qualities being supposed, the state of the law being supposed clear, and, in respect of the question of fact, the cause being supposed not to be attended with any extraordinary degree of intricacy or difficulty,—the probability in favour of a right decision will be very great say, for example, 100 to 1 But suppose the faculties of the judge in a state of complete confusion, and the force of his mind altogether unequal to the task of framing a right decision under the pressure of the burthen thrown upon it by the aggregate mass of evidence,—this chance of 100 to 1 will be reduced to an even chance, or chance of 1 to 1: at which point, the party who is in the right will have no greater chance of prevailing, than the adversary who is in the wrong At this point, the advantage possessed by him who is in the right is equal to 0 and to this point, every additional quantity added to the load of evidentiary matter, tends, in proportion to its pressure, to reduce the cause

Such is the case, even where the probity of the judge is at its highest point, and the state of his affections entirely neutral. But, let either self-conscious partiality or bias be supposed on the part of the judge, the danger is much increased. Every addition seen to be made to the pressure of the burthen of evidence on the mind of the judge himself, contending against it with the peculiar advantages attached to his station and appropriate habits of exercise, will naturally press with still greater force upon every other mind not bound to the task by duty, and less qualified for it by exercise The greater, therefore, the pressure is by the public eye seen to be, the more difficult will it be for the public judgment to detect any aberration on his part from the line of rectitude and, moreover, even to any man to whom his decision may present itself as taxable with error, the greater will be the probability that the error will present itself as standing clear, if not of intellectual, at any rate of moral, blame

In a word, the greater the burthen of the evidence, the greater, in appearance as well as reality, the difficulty in judging of it and the greater that difficulty in reality, the more natural will erroneous judgment be and the greater the difficulty in appearance, the more venial in appearance will the error be—the less apt to expose him, whose error it is, to public censure

The evils, therefore, which arise from excess of evidence, are very great and that they form a proper subject for the legislator's consideration, is out of the reach of dispute But, that the propriety of allowing them to be productive of actual exclusion—of giving them in practice the effect of a conclusive reason, depends upon *proportions* (viz upon the preponderance of the collateral inconvenience in the shape of vexation, expense, and delay, as compared with the probability of direct mischief resulting from deception and consequent misdecision for want of the evidence proposed to be excluded,) is a point upon which a decision has already been pronounced, on grounds which the reader has had under his view

Proceeding on this ground, the necessary conclusion is, that everything that on this field has been done, in any of the established systems, is wrong For whatever has been done, has been done by limiting the number of witnesses receivable, without regard to the demand

Regard being paid to proportions, one most obvious consideration is, that, in respect of number, the demand for witnesses will depend upon the subject-matter of the suit

1 Even where the claim which is the foundation of the suit is itself simple, it may happen that the number of witnesses which it may be requisite to hear has no certain limits take, for example, a claim of a right of way, a claim of a right of common; a suit,

the object of which is to determine the bounds between portions of land, the property of different owners.

2. The nature of things affords several sorts of suits, in which, in respect of the subject-matter, the demand itself is complex; and complex to a degree altogether without limit. In this case, the suit, though in name and to some purposes but one suit, is in fact a cluster of suits. Thus, in case of an account, the complex suit includes as many simple suits as there are items on both sides. Not one of them but is capable of being taken for the ground of a separate suit: in which suit, the number of witnesses to whose testimony it may be necessary to have recourse, has no certain limits.

§ 2. *Remedies suggested.*

As it is with a physical burthen, so is it with a psychological one: undivided, the patient sinks under it; divide it, he performs the task without difficulty.

You have a burthen, which you wish to have carried, within a certain time, to a certain place. Having called a porter, you propose the job to him: he declines it—he pronounces it impracticable. Your job, must it for that reason remain undone? By no means. Common sense indicates a variety of expedients, all of them practicable, one or other preferable, according to the circumstances of the case. The burthen may be divided, and distributed between two porters: being divided, it may be carried by the same porter at two turns: perhaps even it may be taken by him at one turn, if he be allowed a little more time.

The burthen being thus of the physical kind, the remedies thus applicable to any extraordinary weight that may belong to it will never fail to be applied: common sense will dictate the expedients; — self-regarding interest will secure the application of them. Understand, if the burthen be mine, and if it be for a purpose of my own that I wish it carried, and if it be by myself that the charge of getting it conveyed is undertaken: for if, instead of being managed by myself, the business be committed by me to a servant, who is lazy, or careless, or ill-affected to me, or who has anything to gain by having the burthen miscarry or arrive too late, it may make a difference.

Where the burthen is of the psychological kind, the remedies will be no less obvious: unfortunately, the application of them will be far from being alike secure. In this case, as in the other, the advice of common sense, if consulted, would be equally sure: but, unfortunately, the hands on whom the business rests are such whose purpose is not answered by the taking any such advice.

Had the ends of justice been the ends of actual judicature, this, like so many other mischiefs with which the technical system swarms, or rather of which it is composed, never could have taken place. Had the foundation of every cause been laid in the simultaneous appearance of the parties *coram judice*, no such danger as that of an inordinate influx could have existed. So much as the cause really required, and by its importance was capable of paying for, just so much would be delivered, and no more. When in this way anything of excess takes place, it is only for want of those explanations which, in case of the sort of meeting above described, cannot fail of taking place, but which can scarce ever take place with effect on any other terms. This, accordingly, has already been stated as one of the uses, though but one, and (from the rarity of its occurrence) one of the least considerable of the uses, of that meeting; without which, judicature is no better than a game, in which justice, in spite of design, turns up now and then by accident.

Of the established system of procedure, it is a fundamental principle not to hear the parties, not to suffer either of them so much as to come into the presence of the judge, till the very conclusion of the cause. Not hear the parties? Whom, then, would you hear? Not till the end of the cause? What, then, is the sort of work that is to be going forward in the mean time?

Under a system set up in opposition to the ends of justice, the idea of the ridiculous hangs over every step of an inquiry that has for its object the pursuit of any of those ends: it is as if a plan for the more effectual propagation of Protestantism were to be presented to the Pope.

To find the average quantity of time really in demand for a cause, turn to any of those courts in which the path of judicature leads to the ends of justice, — turn, for example, to the courts of conscience, — you will find it only a few minutes. But as the nature of that jurisdiction admits not of any very complex causes, and as here and there a cause will present itself which may require as many months; putting all causes together in hotch-pot, the average upon the sum-total may thus come to be doubled or trebled.

In a vast majority of the individual cases that turn up, not the faintest glimpse of any such difficulty will present itself: such is the simplicity of the vast majority of cases that call for the exercise of judicial powers. But, when a cause is to a certain degree complex, then comes the necessary task of sketching out a plan of the mass of evidence. What is your demand, what your title, and what your evidence? Three questions these, to which a plaintiff, if he knows what he is about, will always be more or less prepared to give an answer: and which a judge, if he knows what

he is about, will of course put to the plaintiff, wherever the plaintiff, for want of distinct conceptions, has not put them to himself.

What, then, is this plan or table of evidence? In every cause in which a question of fact is involved, the nature of it may be seen at the conclusion of any one of those instruments which among English lawyers are called briefs: facts which, in the character of principal facts, are to be proved, persons or scripts, by which each such fact is expected to be proved. To the plaintiff's table of evidence add that of the defendant, you have the sum-total of that mass of proposed evidence, concerning every article of which, the judge will have to consider whether at all, and if yes, then in what event, and at what time, it shall be delivered.

1. Where the demand itself is of a complex nature (*i. e.* where the cause, though in form and denomination but one cause, is in reality an aggregate of a number of causes,) analyze this artificial whole resolve it into its elementary parts. Suppose an account-current, with a hundred items on each side — a hundred items, to any one or every one of which it may happen to be contested How absurd in this case to think, by means direct or indirect, to limit the multitude of witnesses! But there being in fact two hundred causes to try under the name of one, there is not one of them that may not, without prejudice to the interests of truth, be tried at a different time, at a different place, by a different judge or set of judges. In a cause of this composite order, two witnesses may be one too many, two thousand may be not sufficient Behold now the legislator, with shut eyes, and Procrustes for his guide, by arrangements direct or indirect, fixing the number of witnesses which, in a cause of this denomination, a plaintiff or a defendant shall be permitted to produce.

No grievance, no remedy. Here is in truth no grievance: but if in this way a remedy be attempted to be applied (that is, anything under the name or notion of a remedy,) then indeed there is a grievance, for the pretended remedy is a real grievance

At his own pleasure, and by and with the advice of his attorney (who in the temple of equity puts on the more respectable and profitable title of solicitor,) a man who has a business of this sort to settle with an unwilling adversary, addresses himself to common law or to equity. If to common law, — after six months or twelve months spent in doing worse than nothing — spent in affording the occasions for learned pillage, the two hundred causes, if tried at all, must be tried in a day, or in the remnant of a day. If to equity, — after the number of months, not to say years, employed in doing worse than nothing, as above, — when the matter in dispute comes to be tried in good earnest, the cause is wire-drawn through a hole in the judge's closet, and instead of the one day, as above, is drawn out perhaps to a thousand the judge (called in this case a Master,) under the eye of a conniving Chancellor, taking care to be paid for three attendances for every one he bestows, and cutting out each day into hours, that each hour may have its fee

On either side of the passage, what in all this can there be that could be better than it is? On the one side, is not work made for a jury? On the other side, is not everything done by *equity*? by equity, the *bona dea* of English lawyers, made by their own hands for their own use, unknown to all the world beside?

2 In a cause in which the matter in dispute is a man's right to a station filled by election, there may be as many causes as electors, including persons assuming to be electors, the right of each elector depending upon an indefinite quantity of evidence, generally very small, but susceptible of extension, without any certain limit Squeeze now a complex cause of this sort into the compass of a day, and observe the consequence. Before the Grenville Act, causes of that sort were compressed each into the compass of a day; and the consequences were such as at length gave birth to that not inconsiderable effort of innovating and meliorating wisdom. The condensing engine being broken, the quantity of matter which by fiction had been compressed into the compass of a day, has now been found to fill in reality the compass of sometimes not so few as a hundred days, and a hundred days fully employed. But as a cause of this sort consists, in truth, of so many dozen, or score, or hundred of causes, — if constitutional prejudices and misgivings would but permit, what a prodigious load of vexation and expense might not every now and then be saved, if in these causes the witnesses could be heard within a reasonable distance of their own doors, instead of being imported from the Orkneys, or the Land's End, to be fed for an indefinite time at London prices.

3. Suppose a cause in which the matter in dispute is the supposed disturbance or abuse of the rights annexed to some station or condition in life, domestic or political. The disturbance or abuse constitutes one group of facts — the entrance into the station another. Entrance and disturbance, — marriage and adultery entrance and abuse, — appointment to an office, and abuse of the powers of it. The scene of the entrance lies at any number of miles distance from that of the disturbance or the abuse Two groups of facts thus distinct and unconnected, what need, or even what use, that the proof of both should be crowded together into the same portion of time — into the same portion of space, only that they may

come under the eyes of the same judge or judges? In London, cohabitation between man and wife on the one hand — adultery of the wife on the other: actual marriage, in the East Indies. The cohabitation public and notorious, the adultery susceptible of proof, — why must redress be made to wait, not only for the definitive result, but even for the preliminary steps, till proof, in form, of what no one doubts of, shall have been sent for and fetched from the East Indies?

The mass of evidence thus decomposed in idea, and resolved into its ultimate elements, — frequently it will happen, not only that by an apt distribution of it among different portions of time and space, the quantity of vexation, expense, and delay, attached to the delivery of the evidence, may be reduced; but that the quantum of the evidence necessary to be delivered, may itself be reduced. It is in this way, and this alone, that, by any management, a retrenchment may be made on the mass of evidence (understand relevant evidence,) and without prejudice to the direct ends of justice. A second mass of evidence, No. 2, may be relevant — may be indispensable; but it is only on the supposition that the mass of evidence No. 1 has already been delivered (or not delivered.) Take away the one, you take away the demand for another. Keep back the testimony of Titius, the proof that would have been offered of his bad character, or of his having been elsewhere at the time, is no longer relevant.

Expedients upon expedients, on a review of the circumstances of the individual cause, might be employed for reducing the amount of the evidence, and of the vexation, expense, and delay, attached to the delivery of it, within the narrowest limits compatible with the due regard to the direct ends of justice. 1. What is it that each man is expected to prove? 2. By what circumstances is he enabled to prove it? 3. From which of the witnesses on both sides is the most decided and satisfactory evidence to be expected? 4. Which are those between whom an irreconcilable contradiction may be expected; and in whose instance it is most particularly requisite that they be brought face to face? 5. Are there any masses of evidence, by the use of which, if the decision be in a certain way, the demand for the other may be superseded?

Where no such preparatory explanation takes place (that is, under all technical systems,) superfluous evidence is poured in in abundance: not only all that will be wanted, but all that by possibility may (it is supposed) be wanted, is provided. In continental Roman procedure, and in English equity, the shelves are thus loaded with depositions, which, when they come to be looked at, are found not to be necessary, and which accordingly are not employed in argument. At common law, before a jury, crowds of witnesses are in attendance, who, when the trial comes on, remain unexamined, either because there is really no need of their evidence, or because there is no time for hearing it.

At the same time that the number of the witnesses, and in general the quantity of the evidence of all sorts, that may or may not be necessary, is thus brought forward on all sides, — all circumstances which, in the case of this or that witness or other article of evidence in particular, may operate in enhancement of the vexation, expense, or delay, attendant on the production of that witness or other article of evidence, in like manner should be brought under review. And thus, and thus only, it is, that the judge finds it in his power to do what justice requires him to do in respect of collateral inconvenience: in the first place, to take the arrangements necessary for reducing it to its least dimensions; in the next place, to determine whether (a case which, though rarely, may sometimes happen) the injustice that would result from the production of the proposed evidence, would not preponderate over that branch of injustice which stands opposed to the direct ends of justice, viz. the frustration of a just demand: or, on the other hand (not to make an unnecessary sacrifice of the principal to the collateral ends,) whether, provisionally at least, inferior evidence may not be employed, instead of superior from the same source: makeshift, instead of regular: transcriptural, for instance, instead of original.*

In causes that are fortunate enough to find themselves removed out of the hands of the regular courts into those of special arbitrators, mutual and preparatory explanations take place of course: at any rate, there is nothing to prevent them from taking place, but those accidental deficiencies in point of probity or intelligence, to which all tribunals, and all human affairs, are exposed. In these tribunals, it is to the judge that any failure in this respect ought to be imputed: for if, on a requisition made by the judge, any backwardness in regard to compliance be manifested on either side, such reluctance will but afford an additional reason for insisting upon compliance.

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* A curious enough and instructive comparison might, on any sitting of Nisi Prius, or still better on any circuit, be afforded by two lists: — 1. List of the persons summoned to attend as witnesses; 2. List of the number of persons actually examined at that same place, or succession of places. Of the first of these lists the materials are at any time to be found.

On the last occasion that has happened to fall within my knowledge, of four witnesses that attended on one side, one only was examined: yet, under the uncertainty that, for want of the sort of explanation in question, hung over the cause, there was not one of the three whose attendance could prudently have been dispensed with.

These observations, if well grounded, will be worth the attention of those public tribunals, whose hands are not tied up by any of those manacles which have laid the regular courts under the not altogether unwelcome impossibility of obeying the voice of justice. I speak of parliamentary election courts, courts martial, and courts of inquiry, military and naval; for as to the courts held by justices of the peace out of sessions (I speak of the case in which their jurisdiction is definitive,) it is seldom indeed that a cause coming before any such tribunal will be complex enough to afford the matter for any such arrangement and the same observation may be applied *à fortiori* to the courts of conscience

In these, and all other courts in which the ends of justice are the objects of judicature, inasmuch as the preparatory explanation in question always may be called for, so (proportioned to its obvious utility to all persons concerned, and more especially to the judges) is the expectation one should naturally form of seeing it called for in each individual instance. But against this expectation there are two circumstances which operate on the other side: 1. The propensity which all tribunals of inferior account have to imitate the practice of their superiors, and 2. The propensity which all tribunals have to shackle themselves by general rules, extending an arrangement from the one case—the one individual case in which it was found conformable—to an unknown succession of other cases in which it would not be conformable, to the ends of justice.

What? Shall my client then be compelled to disclose the plan of his defence? As well might you call upon him to criminate himself, or upon me to betray the trust he has reposed in me. Such is the objection which, on an occasion of this sort, the consciousness of a bad cause will put of course into the mouth of the experienced advocate. such the sort of argument which finds all ears open to it, under that system of which the *spiritus rector* is the spirit of insincerity. For, under the technical system, such is the state of things towards which everything gravitates—such the notions attached to the word *equity;* viz that on every occasion, justice and injustice, fraud and sincerity, shall have an equal chance.

With reference to this topic, causes, whether criminal or non-criminal, may be distinguished into three classes:—

1. The sort of cause in which, on the first meeting, the whole stock of evidence which the cause affords is visible at once · as, where the cause turns on the testimony of one or both parties, with or without an adducible script or two, or an adducible witness or two, on one or on each side. Under this description will be included the vast majority of causes. In this case, the cause is already ripe for decision.

2. The sort of cause in which,—though the whole stock of evidence be not adducible on both sides,—yet, on each side, every article of evidence proposed to be adduced, is capable of being indicated In this case comes the demand for the mutual explanations above indicated, and the operation of marshalling the witnesses and documents, in consequence. Ripe for decision the cause may in this case be, perhaps the next day, perhaps not for any number of years afterwards. For who shall say, in every case, at the end of how many months a witness shall be forthcoming, in a country in which voyages to the antipodes are in every day's practice?

3. The sort of cause in which a man believes or suspects a fact (a principal fact) to have taken place, but, even supposing it to have taken place, knows not as yet by what evidence it may be proved *e. g.* that an act of murder has been committed, the author suspected or not suspected that an instrument produced in the character of a deed or will, is spurious or falsified that the parentage attributed to a child is false that a deed or will, though genuine, was obtained by fraud or force. In this case, the cause is neither ripe for decision, nor ripe for any such exhibition or analysis of the mass of evidence, as above.

To this sort of cause applies the demand for investigatorial procedure, that sort of procedure which Roman law has confined to criminal cases—English law (to the extent of the regular system) has denied to all cases, feloniously criminal cases alone excepted,* in which, through the medium of the preliminary examinations prescribed by statute, it has been blown in, as it were, by a side wind.

To pursue, through any further exemplifications, the decomposition of the aggregate mass of evidence, would be beyond the design of the present Book what is above, will, it is hoped, be found sufficient at once to indicate the nature of the operation, and the use

§ 3 *Aberrations of established systems in this respect.*

In the next chapter we shall have occasion to examine the indirect modes in which all evidence, over and above a certain quantity, has, under established systems, been excluded. In some cases, however, the indirect and disguised exclusion not being strong enough, and the only rational remedy, the preparatory explanation and arrangement, being unendurable, exclusion was to be applied without disguise, and in direct terms Such, accordingly, upon the continent, has been the resource: take French and Spanish law for examples.

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* Depositions are taken by the justices in misdemeanors of a grave character, as well as in felonies.—*Ed.*

To any given fact or question (*fait* [fact,] French—*pregunta* [question,] Spanish) thirty witnesses were and are allowed by Spanish law; ten only are, or at least were, allowed in French law. Are both right? One French witness, then, is equal to three Spanish ones.

Of these limitations, what upon earth could be the design? To make work for advocates? —to give the judge a facility for favouring whom he pleased? If so, it was well aimed: to any good purpose, completely useless.—On the nature of the cause, no distinction grounded: under this direct exclusion, as under the indirect one, the same allowance for all causes.

Fact—question:—of the unity of the fact or question, who shall give the criterion? Nobody: criterion there is none. You are a French judge: a man who has produced ten witnesses wishes to produce more. Would you have him lose? Stick to the unity of the fact, and you stand firm upon the law. Would you have him gain? Split the fact into two, you may then allow him as many as twenty witnesses. Are twenty not enough? Take up the metaphysical wedge, and drive it in once more. We have seen, that to split one man into two witnesses is every day's practice.* That was a clumsy trick: men, like oaks, are "gnarled and unwedgeable;" facts, like deals, are fissile.†

* *Supra*, p. 525.

† Instituciones del Dericho Civil de Castilla. Madrid, 1791. 4to. p. ccci. Titulo vii. de las Pruebas, cap. iv. de la Prueba de Testigos, p. cccl. "Se segue 1. Que solamente hagan fé en juccio dos testigos: . . . . no pudiendo exceder el numero de treinta para cada pregunta (question) diversa." From *Recompilacion*, i. 577. Lib. iv. tit. 6, sec. vii.

Ordonnance Civile de Louis XIV. anno 1667. Tit. xxii. des Enquêtes. Art. xxi. "Ne seront oüis plus de dix témoins." Conferences, p. 305.

Art. xxi. "Défendons aux parties de faire oüir en matière civile plus de dix témoins sur un même *fait*, et aux juges ou commissaires d'en entendre plus grand nombre; autrement la partie ne pourra prétendre le remboursement des frais qu'elle aura avancés pour les faire ouir, encore que tous les dépens du procès lui soient adjugés en fin de cause."

In a cause of the civil class, the French code of procedure forbids and admits the receipt of more than ten witnesses, at the instance of any party, to each fact (fait:) so that, if an eleventh witness be produced by any party, the judge, according as he likes or dislikes the party, admits or rejects the witness. The law admits him: but under this condition, viz. that the expense attached to the testimony of that witness shall rest on the party by whom he is produced, although costs of suit be adjudged to him at the conclusion of the cause. The law excludes him: for, over and above this condition, operating as a licence or as a penalty according to the point of view in which it suits the judge to contemplate it, there is an express prohibition: a prohibition as express as words can make it—a prohibition without any condition, and addressed not to the parties, but to the judge. We forbid them (judges and commissaries) to hear any greater number.

At the conference, great debate between Pussort, who appears to have been the author of this code, and the Premier President of the day. The President disapproves of the limitation, but yields; saying, that, the case of a party wishing to produce any greater number not being likely to happen frequently, the matter is of no great consequence. Pussort defends his article, and prevails. On the condition specified, a party (he insists upon it) is at liberty to produce as many witnesses as he pleases. You have to give judgment on this article: would you let in the supernumeraries, refer to the condition; and if that will not do, pray in aid the common vouchee, the author of the code. Would you shut them out? stick to the text, and turn a deaf ear to all histories and commentaries.

CHAPTER III.

EXCLUSION PUT BY BLIND ARRANGEMENTS OF PROCEDURE UPON INDETERMINATE PORTIONS OF THE MASS OF EVIDENCE.

A PROPOSITION that seems neither to require, nor (any more than a postulate in geometry) admit of proof, is, that every arrangement of procedure, the effect of which is to exclude an indeterminate portion of evidence—of that stock of evidence, which the cause, in the individual instance in question, happens to afford,—and that, too, without the plea of preponderant inconvenience in the shape of vexation, expense, and delay,—is irreconcilably repugnant to the ends of justice. In every cause to which the operation of the principle of blind defalcation happens to extend, the effect of it is, to reduce to an equal chance whatever preponderant probability of success a good cause may, under the system of procedure in question, give a man as against a bad one.

Such is the result, and such the mischief, supposing the composition of the defalcated mass to depend altogether upon blind chance. Suppose, on the other hand, that it is capable of being influenced by arrangement—by arrangement on the part of either of the parties,—the probability of success, instead of being equal, will be preponderant in favour of injustice. He who, being in the right, is persuaded of his being so, will not naturally have recourse to this or any other sinister artifice: at least he will not be urged so to do by so strong an impulse as that by which the opposite party, supposing him to be in the wrong, and conscious of being so, will be urged.

Had the ends of justice been, in every country, the ends to which the system of procedure had, in the course of its formation, been directed, no arrangement pregnant with any such effect would perhaps anywhere have

been established. But in no country has the predominant part of that system been really directed to those ends: accordingly, arrangements pregnant with that absurd and pernicious effect are to be found established in both of the two systems of technical procedure, between which the more enlightened part of the population of the globe has, in such unequal proportions, been divided.

In the Roman system may be seen one example of an arrangement, by which an indeterminate portion of the obtainable mass of evidence is shut out.

In the English system may be seen an example of another arrangement, which, discordant as it is with the Roman in other points of view, agrees with it in this.

The Roman arrangement here in view, is that by which, whatsoever part of the evidence can by possibility be kept secret from the parties respectively (viz every part of it but that which has been extracted from a party himself,) is, with the most anxious care, kept from the knowledge of both, until the time when the process of collection is closed

From this arrangement is apt to result the exclusion of an indeterminate and indefinable mass of counter-evidence. The portion thus excluded is divisible into two distinguishable branches. — 1. The additional mass, which, had the already extracted portion been known to them in time, might and would have been extracted by the parties respectively, whether from the witnesses on their own side respectively, or from those on the other, — 2. Any such further portion as, in explanation, confirmation, or contradiction of the testimony actually delivered (as above,) might have been extracted from the bosoms of other witnesses.

Such, then, in a few words, is the effect exclusion of ulterior evidence obtainable by counter-interrogation of the same witnesses; exclusion of counter-evidence extractible by interrogation and counter-interrogation from ulterior witnesses

The English practice is that which, in civil cases, limits the mass of evidence to the quantity the delivery of which can be squeezed into the compass of a single sitting * deducting the quantity occupied by the introductory statements made by the advocates on both sides, and the recapitulation made by the directing judge.

Of the nature of the mass of evidence thus shut out, it is not easy to give any the loosest estimate: not so much as the sort of estimate, than which nothing can easily be more loose, given of that which is shut out by Roman practice.

To assist conception, cross over from time to space. Suppose a court (and you need not look further than Westminster Hall to find four such) which, in the case of a cause of a nature to excite that sort of interest, on which the purity of judicial conduct so essentially depends, shall be capable of affording hearing and seeing room to no more than a tenth or a twentieth part of the numbers that would be there if they could Nine persons out of every ten are thus excluded from the exercise of the functions of a member of the open committee of the public, charged with the inquiry into the conduct of the courts of justice Who, in each individual instance, are the persons on whom the lot of exclusion falls? When for this question a precise answer has been found, on the back of it will be found an account of the articles of evidence excluded by that law of the judicial drama, which (substituting the dramatic unities for the ends of justice) requires the business to be compressed within the space of time during which a mixed multitude of persons are capable of continuing together in the compass of the same close room, without prejudice to the free exercise of their intellectual faculties

Incompatible as this system of condensation is to the ends of justice, it wants nothing of that which is necessary to adapt it to the ends of established judicature. Sufficient or insufficient to the purpose of doing right to the parties, the time is never less than sufficient to the gathering in of fees

The door, — does it happen to have been shut against this or that article of necessary evidence? So much the better Then come other exigencies, far better adapted than any evidence to the use of lawyers: At law, necessity for new trials, and motions for new trials in equity, necessity for bills of review, or bills partaking of, or in some convenient shape or other approaching to, the nature of bills of review An entire cause, with all its evidence, does it happen to be shut out in the lump, because there was not time so much as for the opening of it? Causes are not like strawberries or mackerel at the end of six months, or of twelve months, they are as fresh as ever, and then they come garnished with fresh fees

It is only in causes of a complex nature, that the operation of this principle of exclusion can attach. causes which, whether in any other respect or no, are complex at any rate in respect of the number of witnesses from whom relevant evidence might have been extracted Call twenty-four hours the utmost extent of a single judicial sitting. There are some causes (and of this description are the major part of the causes instituted,) for which a quarter of the number of minutes would be more than enough: there are others for which three or four times as many days might be a scanty allowance.

* Civil, as well as criminal cases, sometimes occupy several days. One of the trials at Lancaster, in the case of Tatham *v.* Wright, occupied nearly a fortnight.—*Ed.*

Where the allowance of time presents itself as insufficient, the quantity of evidence discarded by each party (at least if acting *bonâ fide*,) will naturally be that which in the judgment of the party can best be spared.

Of either party, if *in malâ fide*, one resource will be, the crowding in evidence in such quantity as to generate confusion; and, by blinding the eyes of those to whom it belongs to judge, to raise in this way the unfavourable prospect to the level of an even chance.

In any case, the undue advantage from the compression gravitates towards the plaintiff's side. His evidence being the first heard, the more he introduces of his own, the less he leaves it possible for the defendant to introduce. Out of the supposed maximum of four and twenty, the greater the number of hours occupied by the one, the less the number left to be occupied by the other. The advantage of this policy will, however, be clearer, if the plaintiff who avails himself of it be *in malâ*, than if *in bonâ fide*: for, in the latter case, what he gains by the exclusion of his antagonist's evidence, may be lost in some measure by the confusion produced by the multiplicity of his own.

In the midst of all this darkness, a difference may, however, be observed between the effects of the Roman, and those of the English practice. Of the disguised exclusions, wrapped up in the system of concealment, the influence extends, without distinction, to the most simple, as well as to the most complex causes: for upon the Roman plan of inquiry, there is never any want of time for the extraction of evidence, if the demand presented for ulterior evidence, by the evidence already extracted, were but known in time.

In the English mode, the genius of exclusion confines his operations (as hath been seen) to complex causes. The mischief produced by the English is, therefore, not nearly so extensive as that produced by the Roman mode.

The systems here distinguished by the names of Roman and English, are both of them (it must not be forgotten) alike in use in England. But on the continent of Europe, the Roman practice extends to all courts, at least to all regular courts: in England it is confined to the courts called *equity* courts and *ecclesiastical* and *admiralty* courts.

The compression (that is to say, the defalcation) produced by the rule which confines all causes to the short allowance of time above mentioned, is not, however, by any means the only defalcation to which, under the English system, the pabulum of justice is condemned. Those common-law causes alone excepted, which are furnished by the neighbourhood of the metropolis,—in the whole stock of causes, the mass of evidence is subjected to an ulterior compression and defalcation, to an amount equally indeterminable. A certain portion of time, two days or thereabouts, is allotted with the utmost regularity to whatever number of suits it may happen to a whole county, to a thirtieth part of England, to have supplied in the compass of half the year. Six hours, for example, may by this means be the whole allowance made to a cause, which, had the scene of it lain within the privileged spot, might have had the benefit of the full allowance, sufficient or insufficient, as above described.

In both cases, how fares it with the aggregate mass of causes, in number and bulk unlimited, shut up within a limited compass of time? As it fares with a multitude of men or other animals shut up within the walls of a town or any other boundaries, with a limited and insufficient quantity of food: their fate is disposed of by the three co-regent powers, force, fraud, and fortune: some batten, some are pinched, and some are starved.

Ever and anon, the fruits of necessity in this line are brought to light, as it were by chance. The nature of the cause opened, or begun to be opened, — Stop (cries the judge;) what sort of a cause is this to try! I can't try it—not I; I won't so much as attempt it: it is not to be done. Necessity, by which every thing is justified—necessity, thus invoked, comes in and justifies denial of justice. From a tribunal which does not afford itself so much as a possibility of doing justice, the cause is then shuffled off to another, which, having time for collecting evidence, wants nothing but the means: the cause is referred to unlearned judges, under the name of arbitrators: pressed by the tide of authority, though without direct and adequate coercive power, the parties (whether *in bonâ* or *in malâ fide)* are wrought upon, in some way or other, to consent to this arrangement: arbitrators chosen, one on each side: the foreman, or some other distinguished member of the jury: some advocate, mutually agreed on, as not being engaged on either side: nothing deficient but the power of compelling the production, and providing for the trustworthiness of evidence.* The instruments they possess for bringing the truth to light, are good against everybody but those who are dishonest enough to wish and endeavour to suppress it.

As often as this necessity betrays itself, just so often does it appear, that in cases of this description, trial by jury, conducted as it is conducted, is incompatible with justice. What matters it, in the view of lawyers and their dupes? What in their creed is this sacred institution? Not a means to an end, but itself an end. The use of judicature is —what? Not to render justice, but to make work for juries.† And why make work for

* This defect is remedied by the 3 & 4 Will. IV. c. 42.—*Ed.*

† Always understood, that in the progress of

juries? — Why but because trial by jury is trial with lawyers, with forms upon forms, heaped together for the use of lawyers?

The mutilation of the body of necessary evidence, or, in other words, the exclusion of an indeterminate part of it, has thus far been brought to view as an effect produced in every technical course of procedure. Two arrangements, one of the Roman, the other of the English system, have at the same time been brought to view in the character of so many efficient causes, by which that effect has actually been produced.

That, under the English system, the production of any such effect was, so much as in the anticipation of the authors, among the final causes of the arrangements themselves, is what there seems little reason to suppose.

But in speaking of the Roman system, the design of producing this very effect (pernicious as we have seen it to be) has been expressly stated as a final cause, or rather as the final cause, of the arrangement, the systematic concealment, by which the effect is produced Concealment, a practice so natural to iniquity — a practice, unless under special circumstances and as against special mischiefs, so unnatural to justice, so abhorrent to the general complexion of English judicature, — required (it seems to have been thought) a reason to justify it in the sight of English lawyers, when the Roman system came to be planted in English soil.

Problem. — In all cases (except, in criminal cases the preliminary *ex parte* inquiry,) the receipt of evidence being public at common law; *required*, to find a reason for its being kept as secret as possible in equity Such being, on one hand, the problem, — such was, on the other hand, the solution — the only solution that could be found for it.

First, let us observe the practice, then, Gilbert's reasons for it.

State of the practice.

1. In the oath taken by the persons who to this purpose act as judges *ad hoc* (viz in the district of the metropolis, the examining clerk — out of the district of the metropolis, the commissioners nominated by the parties) are these words: — "And you shall not publish or show the same depositions to any person or persons before publication in the court, without consent of the same court "*

2. "Neither the examinations or depositions, which are taken by commission, can be published, in any case whatsoever, till publication is duly passed by rule in the office, or by motion or petition, for it may be done either way."†

3. "And in this case" (viz. where the party applies to have the time for publication put off) "the plaintiff or defendant (as the case falls out) must make oath, and so must his clerk in court, or solicitor, 'that they have neither seen, heard, read, or been informed of, any of the contents of the depositions taken in that cause, nor will they see, hear, read, or be informed of, the same, till publication is duly passed in the cause.'"*

Then comes a story of a solicitor, who, to prevent the solicitor on the other side from gaining the further time necessary to the examination of his witnesses, read over to him the depositions already taken on his (the reader's) side

Such being the practice, behold now the learned lord chief baron's reasons for it. —

1 "If the commissioners on both sides attend the execution of the commission, and the one side examines, and the other neither examines nor puts in any interrogatories, he shall never afterwards examine, unless upon special order of the court, upon good cause shown, *because he must not form his interrogatories upon the discovery made to his commissioners, of what the other side examined to* "†

2 "The fair examination by commissioners is not to adjourn without necessity, ... but if it be necessary, they may adjourn, not only in time, but place And this affair must be performed, as far as possible, *uno actu*, that there be as little opportunity as possible to divulge the depositions, *that neither side may better their proof* "‡

3 "If it shall appear to the court . . . that the defendant's commissioners attended during the whole time of the execution of the commission, and never exhibited any interrogatories, in this case the court will never grant the defendant another commission, and he must take it for his pains, since he lay upon the watch and catch, only to see what the plaintiff proved, and then, at another commission, to exhibit interrogatories adapted to such matters and questions *as might tend to overthrow all that had been done*, and he shall never be admitted to have this unfair advantage over his adversary for *if he is admitted, after having knowledge of all that his adversary hath proved, to exhibit interrogatories, he may easily conceive what interrogatories to exhibit, and how to hit the bird in the eye* "‖

Then, immediately after, follows a passage, to state, that, if a new commission is granted, no addition ought to be made to the interrogatories framed for the former one, "without special leave of the court; and [then] they are to be settled by a master, and are never done [*i. e.* this is never done] but in extraordinary cases."

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the cause no such word as the word equity be pronounceable. For, equity being still more propitious than law to lawyers, speak but the word *equity*, and the use of juries vanishes.

* Gilb. p. 142. † Ibid. 144.

* Gilb. 146. ‡ Ibid. 127.
† Ibid. 131. ‖ Ibid. 137, 138.

4. "Afterwards (after publication of the depositions already taken) there could be no examination of witnesses, unless by the special direction of the judge, upon good cause shown, and an affidavit of the party, that he, or those employed by him, had not, nor would, see the depositions of the witnesses which were published; *by reason of the manifest danger of perjury and subornation of witnesses, in case examination should be allowed after publication.*"*

5 One reason comes in the form of a parenthesis, and that parenthesis an assumption; the truth of the observation being supposed too self-evident to be disputed: "Since the very life and vitals of almost every cause, and of every man's property, lies in keeping close, and secreting his evidence till after the depositions are published, because after that, there is an end of examining . . . ."†

The view taken by the learned jurist is altogether curious. That either of the parties should possess the possibility of "bettering his proof,"‡ he considers as a result fatal to justice: a result to be prevented at any price. For, of such melioration, what might be the consequence? "It might tend to overthrow all that had been done:" "the bird" (according to his ingenious metaphor) might be "hit in the eye."‖

At the time of his writing this, or before, the learned author was head shopkeeper of that great double shop, in which common law or equity is served out, according as the one or the other happens to be bespoke by the plaintiff customer: for the clause in Magna Charta which precludes the sale of justice, precludes not the sale of common law, or of equity. On the common-law side, whatever truth is to be served out is warranted entire: the truth, and the whole truth, as well as nothing but the truth, are the words of the oath, expressive of what each witness undertakes for the delivery of. But to what purpose is it, that, from each witness, the whole of such part of the facts belonging to the case as happen to have come to his knowledge are required? To this purpose, surely,—viz. that, from all the evidence together, including the depositions of all the witnesses, the whole assemblage of facts which the case furnishes may be collected. What, then, on this occasion at least, is the aim of common law? To come at the truth entire. What, on the other hand, is the aim of equity? To get it mutilated; to get it in a state in which it shall, at any rate, be to some degree or other imperfect, and no one can say in how great a degree. Right and wrong shift their places or their natures, according as the judge sits as a common-law judge or as an equity judge: according as the article is served from the one counter or the other.

On the Tuesday, the learned judge, sitting at common law, grants a new trial. There his birds are set up by him, all in a row, though there be a thousand of them—set up like cocks on a Shrove Tuesday, ready to be "hit in the eye" by anybody who has a stone to throw at them. The next day the same reverend person sits in the character of an equity judge—and now secrecy is the order of the day; and now "the very life and vitals of the cause lies in secreting the evidence."

But if such counter-interrogatories, or counter-evidence from counter-witnesses, were admitted, the danger of "subornation" of perjury, and of "perjury," he says, "is manifest."*

Yes, indeed—but too manifest. Open the door to evidence (meaning sworn evidence,) you open the door to perjury. Would you shut the door, shut it effectually, against perjury? Two ways are open to you, and both sure ones: shut the door against all sworn evidence, or shut it against all evidence.

But, when the mass of evidence thus to be shut out is anything short of the whole, observe the consequence. True it is, that in such evidence as is not produced, no perjury will be contained. But how is it in regard to the evidence which, being allowed to be produced, has been produced accordingly. Assurance against being cross-examined, against being opposed by counter-evidence; assurance against being exposed to contradiction, from themselves or others; security against ulterior contradiction from any quarter:—such is the security proposed as proper to be applied—such is the security actually applied, against mendacity and temerity on the part of witnesses.

That the arrangement proposed by the learned judge, in the character of a security, and that a necessary one, against the mischief of perjury, is naturally (not to say necessarily) productive of that very mischief, is not only manifest enough to everybody, but to nobody more so than to the learned judge himself. For by what is it, that, when one party only (say the plaintiff) has examined his witnesses, the commissioners of the other party (the defendant) having been present at such examination, the defendant is enabled "*to hit the bird in the eye?*" His commissioners, in violation of the letter of their oaths, communicate to him (the party) the depositions extracted by the commissioners on the other side: for, unless this were the case, whatever were the demand for such suppletory and complementory counter-evidence and counter-interrogation, the party could not have any knowledge of it. So that, in the perjury with which the

* Gilb. 120.
† Ibid. 141.
‡ Ibid. 127.
‖ Ibid. 137, 138.

* Gilb. 120.

arrangement is seen to be pregnant, consists the reason, and the only reason, given in justification of that very practice.

This precaution is exactly of a piece with the policy which, in some ages and countries, has, under the auspices of Roman law, governed the arrangements in criminal cases. The prosecutor, on his part, producing his evidence, the defendant, on his part, was not to be allowed to produce any Why? Because, at this rate, the charge might come to be contradicted, a licence which was not to be suffered.

Being relevant, the ulterior evidence thus excluded, would it have been true or false? If true, no great harm, one should have thought, would have been done by it. If false, — but what is there that should make it false, this subsequent, rather than any antecedent, mass of evidence?

Evidence (the testimony of an extraneous witness) delivered in a preceding cause between other parties, is not received in a succeeding one. Why not? Because, in the preceding cause, the party against whom it operates in the succeeding cause had no opportunity of endeavouring at the correction or completion of it, by counter-interrogation or counter-evidence In this case, the propriety of the exclusion is not in question here What is to the purpose, is, that such is the established rule — established, not at common law only, but in equity.

The depositions having been published (*i e* communicated to the parties,) evidence respecting the character of each witness may be poured in without stint * evidence on the one side attacking his character — evidence on the other side supporting it Evidence of this sort, "generally speaking," says the learned judge, "ends in nothing more than putting the party to an expense to no purpose." Here, then, if superfluity of evidence were the mischief to be cut off, — here would be a species of evidence for the knife to operate upon. No such thing. Where the evidence is known, and known to be of that sort which is extendible *ad infinitum*, and after all of little or no use, no such idea is started as that of excluding it. Where the importance of the mass of evidence in question is beyond all estimate, then it is that it is to be barred out; and secrecy is the bar set up against it.

Those who introduced this arrangement into the system of procedure, gave no reasons for it: they did wisely, — they had none to give. On this, as on some other occasions, Gilbert has taken it into his head to give reasons:† here, as elsewhere, being given, they are worse than none. Under the technical system, the safe course, and the only safe one, to be taken with judges' reasons, is the course taken with them in the House of Lords: to enter them as given, and to give none, — none at least which the subject, whose conduct is to be governed by them, and whose fate depends upon them, has a possibility of being apprised of.

* Gilb. 147. † Ibid. 148.

CHAPTER IV.

EXCLUSION BY RENDERING A PARTICULAR SPECIES OF EVIDENCE CONCLUSIVE.

§ 1. *Impropriety of the exclusion*

ADMISSION of counter-evidence is one of those securities, of the necessity of which, much (it may be thought) would not require to be said.

Exclude out of the budget any article of evidence, whether on one side or another: in proportion to the probative force with which such excluded lot would, had it been admitted, have acted upon the mind of the judge, in that same proportion is the aggregate mass of evidence incomplete.

Exclude, on either side, the whole of the mass of evidence that would or might have been delivered on that side, leaving the door open to whatever evidence is ready to be delivered on the other misdecision in disfavour of the side on which the evidence is excluded, is not, indeed, by so doing, rendered the certain result (since there remains the possibility that the unexcluded evidence may not gain credit,) but, at any rate, the tendency of such arrangement to give birth to misdecision, seems too palpable to be matter of doubt to any one so palpable, as to produce, as it were, a mechanical and instinctive idea of one of the most revolting modifications of injustice

Audi alteram partem, says the common adage before you give judgment, hear whatever there may be to be said on the other side. As a memento, good for information, for guidance, not sufficient To be said? — In what way? In the way of evidence? in the way of observation upon evidence? There are few cases in which observation on evidence may not be of some use, there are none at all in which evidence itself is not absolutely necessary.

To exclude evidence indiscriminately on both sides, is turning fortune loose to do the work of justice. to exclude evidence from one side only, leaving the door open to it on the other side, is a sort of arrangement which, to judge of it in the abstract, could have been dictated, one should have thought, by no other principle than that of determination to do injustice.

Under the technical system, however, not only has evidence been excluded in detail — evidence of such and such a particular nature, in consideration of its nature; but evidence has even been excluded in the lump, without

any consideration of its nature: the whole mass of evidence: whatever evidence might, had it not been for the exclusion, have been delivered on this or on that side.

If it really be not conducive to the ends of justice to shut the door on either side against evidence — against all evidence in the lump, without knowing what it is — to show, in any instance, that by this or that arrangement in any established system, a door has thus been shut in this way against evidence, is to show that the arrangement in question is repugnant to the ends of justice. Thus to class it, is to condemn it: to condemn it, and on the surest grounds.

In one of two senses given to it, the word *conclusive*, as applied to evidence, seems in a manner peculiar to English law: the reason will appear presently.

In one sense, it puts no exclusion upon evidence of any sort. Evidence thus spoken of as conclusive, may be said to be spoken of as conditionally conclusive: conclusive *primâ facie* — conclusive *nisi*.

In another sense, it puts an exclusion upon evidence — upon all evidence on the other side. Not to speak of *real* evidence — not to speak of other circumstantial evidence, — it pronounces all witnesses on the other side liars: all witnesses, be they who they may, and in whatsoever number. In this sense, the absurdity of the propositions of which it makes the leading term, the rashness, the inutility, the mischievousness, of all decisions grounded on them, is, when once stated, too evident to be proved. It pronounces some fact or other impossible. Is it then really impossible? What probability, then, is there, that it will be not only asserted by a witness, but also credited by the judge? Is it not impossible? Then why will you pronounce it so?

Evidence spoken of as conclusive in this sense, may be said to be spoken of as *absolutely* conclusive. Evidence absolutely conclusive is that to which the effect is given of putting an exclusion upon all counter-evidence

The question concerning conclusive evidence — whether this or that lot of evidence shall be treated as conclusive, regards *species* of evidence: it regards the propriety of laying down a *generic*, or (as on this occasion we may term it) a *specific* rule, pronouncing that the truth of the sort of fact shall be inferred by the judge, as often as any evidence of the *sort* in question is produced. It regards, I say, the *genus* of the lot of evidence: for as to the *individual* lots, no decision is, or ever can be, grounded on any lot or body of evidence, but that lot or body of evidence is treated as conclusive with relation to the individual suit in hand.

But in so far as the lot under consideration is no more than the individual lot, the question whether it shall be conclusive or no, has no place in any book of jurisprudence — in any book in which, from the decisions pronounced in individual cases, the author takes upon himself, in the way of abstraction, to deduce general rules.

1. If the mass of evidence be made conclusive *absolutely*, observe the consequence. The nature of this will vary, according as the suit is of a penal nature or of a non-penal nature; and in each case, according as the side, in favour of which the evidence is thus made conclusive, is that of the plaintiff, or that of the defendant.

Let the mass of evidence thus rendered conclusive, be composed (suppose) of the concordant testimony of two persons — two witnesses exhibited on the same side.

In the penal branch, — to render the testimony of any two witnesses in this way conclusive absolutely against the defendant — to force the judge to convict a defendant upon the testimony of two witnesses, whether it does or does not produce in his mind a persuasion of the fact of their delinquency—whether the testimony thus exhibited appears to him correct or not, veracious or not, — is as much as to give to any two ruffians a power to ruin any individual whatever, or any number of individuals, at their choice, in point of property, person, reputation, or life, as the case may be.

In the penal branch, again,—to render the testimony of any two witnesses conclusive in this same way in favour of the defendant — to force the judge to acquit him, in consequence of the want of such evidence to convict him (believing him at the same time, as above, to be guilty,) — is as much as to confer on any two hireling perjurers a power to give a virtual pardon — to give, even beforehand, a certainty of impunity to any malefactor at their choice — to any number of malefactors at their choice, whatever be their crimes.

In the non-penal branch, — to render the testimony of any two witnesses conclusive in this same way in favour of the plaintiff — to force the judge, on the ground of such testimony, to confer on him the right he sues for (the judge at the same time not believing him possessed of any good title to such right,) — is as much as to confer on any two, and every two, hireling perjurers, a power of conferring a proprietary right of any kind upon any individual at their choice, or any number of proprietary rights of all kinds, and with reference to all subject-matters, upon any number of individuals at their choice: and thereby to impose upon any individual the obligation correspondent to such right: to impose, therefore, upon any number of individuals, the obligations respectively correspondent to all manner of proprietary rights with reference to all manner of subject-matters.

In the non-penal branch, again,—to render the testimony of any two witnesses conclusive in this way in favour of the defendant — to force the judge, on the ground of such testimony, to refuse to the plaintiff the right he sues for (the judge at the same time believing him possessed of a good title to such right,)— is as much as to give to any and every two hireling perjurers, a power of debarring any individual, or any number of individuals, at their choice, from the acquisition of all such rights, however necessary to their existence, for the acquisition of which the law has made it necessary for them to obtain the decision of a judge: to exempt, accordingly, any individual, any number of individuals, at their choice, from the obligations respectively correspondent to those rights, *i. e.* by the imposition of which, and not otherwise, those rights would be conferred.

Away with all exaggeration!—begone all false conceptions, on a ground on which so much depends on truth and accuracy! A power is one thing—a licence is another. Of a power, the virtue is, to enable a man to produce the effect in respect of which he is empowered. Of a licence, the virtue is, to exempt him from punishment, in the event of his producing such effect. To give to the two confederates in question the power of producing all these pernicious effects, would be the result of any such rules as these respectively contended against: to enable them to produce those same effects with certainty of impunity to themselves, is not among the results of any of those respective rules. For, by the supposition, perjury is necessary, in each case, to the production of the corresponding mischievous effect: and from the punishment (whatever it be) that happens to be attached to perjury, no exemption is given by any of these rules.

Of the sort of licence in question, in addition to the power, what would be the consequence? The utter destruction and subversion of political society in any community in which it should be established: the ruin of all innocent persons; the impunity and triumph of all malefactors: the ruin of all persons having a title, in each case, to the rights sued for, the exaltation of persons having no such title.

2. Where the effect of the rule is not to render the mass of evidence in question conclusive absolutely, but only conclusive *nisi*, the mischief is not so great, yet still the effect, if any, is mischievous, and it has no sort of advantage, in any shape, to help to balance it. It is only in default of evidence on the other side, that the certainty of prevailing is bestowed upon it. But in the case where this certainty takes place, what is it that truth and justice get by it? Here are two pieces of evidence, each of them susceptible of an infinity of degrees of persuasive force—each of them susceptible of the lowest degree. Both together, the degree of persuasion they would be productive of, in the conception of the judge, is not beyond the second degree in the scale of probative force.* — comes the rule, and forces him to act as if the degree of his persuasion were at least somewhere above the middle of the scale. The evidence appears false to him, and he is obliged to act as if it appeared to him to be true.

One class of cases there is, and that a most extensive and important one, in which it may appear that evidence, circumstantial evidence, of this or that description, is built upon as conclusive, and even absolutely conclusive; and that with perfect propriety and good effect. This is the case of those acts which, in consideration of their connexion with some principal act, obnoxious on its own account, and on that account put upon the list of crimes, are, therefore (though in themselves, and were it not for that connexion, not obnoxious,) also put upon that list: as in the case of those clusters of offences (each composed of a principal offence and an accompaniment of accessory offences) which come respectively under the titles of forgery, coining, smuggling, and the like.

But, in these cases, the truth (as upon a closer inspection will appear) is, that no such conclusion is really formed: or at any rate, that, to warrant the course taken by the legislator, it is not necessary that any such conclusion should have been formed. Of him, by whom an act of the description of the accessory act in question is performed, it has been deemed probable by the legislator, that an act of the nature of the principal act has been, or was to have been, performed, or that he has been, or was to have been, in some way or other, assistant to the enterprise of him by whom such principal act has been committed. But the propriety of the treatment, in the extent thus given to it—in the extent by which it embraces the cluster of accessory acts in question — depends not altogether upon the rectitude of the inference. Whatever be men's views, in the performance of the accessory acts thus converted into offences, the legislator is warranted in converting each of the acts in question into offences, if so it be, that the prejudice (if any) that results to the agents in question, and others, from their non-performance, is not equal to the advantage gained by the check thus applied to the principal offence.

Hence it is, that, in point of propriety, any conclusion thus formed rests on very different grounds, according as it is formed in the station of the legislator, or in that of the judge. Formed by the legislator, it is not necessary

* See Book I. *Theoretic Grounds*, Chap. VI. *Degrees of Probative Force.*

that it should be true in every individual instance: it may not be necessary that it should be true in so much as a majority of individual instances. Formed by the judge,—formed, that is to say, with such effect as to have served for the foundation of a general rule of jurisprudential law,—it is productive of mischief, if there be but a single instance in which it is not true: it is productive of mischief, at any rate, in that one instance. Why? Because the individual in question had no warning to abstain from the act:—like most other rules of jurisprudential law, it falls upon the victim with the weight, and is attended with the barbarity and iniquity, of an *ex post facto* law.

If the evidence, which, in the cause in hand, it is proposed to consider as conclusive, is evidence that has been exhibited, not in that same cause, but in another cause that has no relation to it,—the impropriety of the regulation is still more enormous. Of the inference drawn from a lot or mass of evidence in any preceding cause, no use, no mention ought to be made in any succeeding cause. Here, not only is mention made of it, but the judgment then passed upon it is made to command the decision, in such manner as to prevent the subject from being so much as viewed at all in its own proper lights. In the one case, extraneous matter is mixed with the proper matter, the proper matter not being excluded: in the other case, not only is the extraneous matter admitted, but, in consequence of that improper admission, the proper matter is excluded.

The case of conclusive *evidence* must be distinguished from the case of conclusive *decision*. The case in which the decision in question is considered as being commanded by the *evidence* already adduced, must be distinguished from the case where the decision is considered as being commanded, not immediately by any document of the nature of evidence, but by a document of the nature of a *decision*—a decision already pronounced: pronounced, whether in the same court or in any other court: if in any other court, whether in a court acting under the dominion of the same sovereign, or in a court acting under the dominion of a foreign sovereign.

Such is the distinction which has been rendered requisite by the inaccurate genius of technical nomenclature. For the purpose here in question, decisions, decisions of other courts, are spoken of under the name of evidence.

Supposing the decision of the other court in question to have been grounded on evidence received on both sides; it follows, that, from the admission of such decision as conclusive, in regard to the facts on which it was grounded, no such absurdity, no such mischief, follows, as from the giving to evidence itself, on one side, a conclusive, and thence an exclusive, effect.

On what occasions, and on what grounds, may it be proper for one court to allow (viz. with regard to the question of fact) this authority to the decision of another? A question alike curious and important; which belongs not, however, to the present head, but to that of *makeshift* evidence.*

There is one case in which, in the absolute sense, the term conclusive may be employed with propriety, and yet the evidence upon which the exclusion is put by such conclusive evidence, cannot with propriety be ranked under the denomination of counter-evidence. This is, where, on the ground of evidence in its own nature insufficient and inconclusive, appearing on one side, a sort of practical conclusion is built in favour of that same side, to the exclusion of all such evidence as might have been adduced on that same side. In the sort of case here in view, no exclusion is put upon any evidence on the other side: no exclusion is put on any evidence characterizable by the appellation of counter-evidence. Why? Because the circumstances in which the practical conclusion in question is drawn are such, that a conclusion of that sort must be made at a time when it is impossible as yet to know whether that side of the cause does or does not afford any counter-evidence.

The case in question is this: for the sake of simplification, take (as being the more common case) the case where it is on the plaintiff's side that the insufficient evidence is thus conclusive. The plaintiff, using the forms prescribed by the technical system, gives commencement to a cause—say a criminal one. On the defendant's side, the time being come in which, in the track marked out for defence, something should have been done by him, nothing in fact is done. In the state of things thus described, judgment of conviction is pronounced, or some grievous load of vexation imposed, on the defendant; the plaintiff, although able, neither being required nor admitted to establish the fact of delinquency by any better evidence.

In this case, the evidence (such as it is,) on the ground of which the burthen in question is imposed upon the defendant, belongs to the head of circumstantial evidence. It consists of two distinguishable lots, or evidentiary facts:—first evidentiary fact, the step taken, or progress made, by the plaintiff in his suit: second evidentiary fact, the negation of the step in question (the step made necessary to defence) on the part of the defendant. To these two evidentiary facts, corresponds, in the character of the fact evidenced, the delinquency of the defendant in respect of the offence charged.

* *Vide* Book VI. *Makeshift*, Chap. II. § 3.

This kind of circumstantial evidence never is — in point of reason never can be, of itself sufficient to support any such practical inference. Why? Because, if the defendant be really guilty, it is impossible but that some better, some more apposite and direct evidence, at any rate some ulterior evidence, must be to be had.

But the authors of the technical system have found their convenience in putting it into the power of any man in the character of a plaintiff, to put any other into a state of conviction, or into a state tantamount to conviction, on the ground of this flagrantly insufficient evidence: having their reasons for not requiring, nor so much as admitting, better or ulterior evidence, even when direct evidence of the most completely satisfactory description is to be had.

This abomination, the result of the most barbarous iniquity, or the grossest stupidity, has been adopted by every existing modification of the technical system; and, in every country, it covers a prodigious (though everywhere a variable) extent in the field of judicature.

But, in the exclusion thus put upon evidence, nothing, we see, that can with propriety be spoken of under the appellation of counter-evidence, is comprised Suppose all that evidence, that direct and satisfactory evidence, which is thus excluded — suppose it all delivered; there could not perhaps (or at least would not,) in that stage of the cause, be delivered any counter-evidence, any evidence on the defendant's side · on the part of the plaintiff, whether the defendant knows as yet what has been done against him, — what he knows, where he is, or whether he even exists, is not as yet known.

The fact inferred in these cases is, non-existence of evidence on the defendant's side, and thence non-existence of right

The inference, considered as being (what it is) a sweeping and all-comprehensive one, is big with injustice.

Everywhere there are two states of things, the existence of which, in the character of the efficient causes of the failure, is at least not less probable than the non-existence of evidence: *indigence*, want of the means of self-defence in the judicial field; *want of notice*, viz. want of knowledge of the obligation by which the party is urged to bring those means into action.

Want of notice is the but too natural and looked-for result of the contrivance employed by the genius of chicane, for preventing the means employed, under the notion of conveying notice, from being productive of that effect.*

* See Book VIII. *Technical System*; Chap. XIII. *Chicaneries about Notice.*

· In regard to *indigence*, — to estimate the comparative probability, as between this state of things, and the consciousness of the non-existence of evidence, and thence of title, — in the character of causes of failure in respect of the taking on the defendant's side the steps requisite for the continuance of the cause, say thus — Of the whole number of inhabitants in the country in question (England,) — as the number of those who are not able respectively to command, in addition to the sum requisite for their subsistence for and during the continuance of the cause (say a twelvemonth,) the least sum sufficient for the carrying it on on that one side (say £30,) is to the remaining number, — so is the probability that the failure is the effect of indigence, to the probability of its being the effect of the non-existence of evidence, and consequently of right, on that same side †

† A judge by whom a cause is decided without his knowing anything about the matter, — what need, it may well be asked, has such a judge to hear evidence? But that is the very way in which causes in general, causes between man and man, are, the greater number of them, decided by learned judges. A piece of paper or parchment is provided; the hand of the judge is applied to it; the mind of the judge is not applied to it. So strictly true is this, that by an intoxicated judge, if he had but sense enough left to write his name, the business might be done exactly as well as by a sober one: by an automaton judge, a judge made of brass and iron, as well as by either. Exaggeration? Not it, indeed: nothing but the very simple truth. Stript of the tinsel with which it has been bedizened all around by interested idolatry, by unblushing hypocrisy, and prostrate admiration, the technical system presents in all its parts enough to stagger belief, and make a man doubt the reality of the objects spread out before his eyes.

By what is it that in these cases the judgment is governed? The circumstances, the exigencies, and abilities of the parties? Alas! no: but by the single circumstance of time. The time is up; the time which the defendant's attorney had, to deliver in at an office some scrap or other of accustomed nonsense. that time is up, and the time for the judge to set his name to a writing, without reading it, is come. What then? And is no mind at all ever applied to the fatal parchment? O yes: a mind is indeed applied to it; but whose would you imagine? Not the judge's, but an attorney's. And in what way employed? In discovering truth? No; but in computing time. An attorney? — and what attorney? The attorney of the party (of the plaintiff) in whose favour the judgment is thus pronounced: it is the party who, by his attorney, is thus made judge in his own cause. Is the decision too prompt, too favourable? So much the better; that makes another cause: a cause of the sort of those that are commenced by motion, and carried on by affidavit evidence: in a word, a motion cause. Awakened by the chink of fresh fees, it is now, for the first time, that the ears of the judge are really open to the cause.

When in a great majority of causes, the property and liberty of the subject are thus dis-

The mischief being thus brought to view—the nakedness of iniquity, official and professional, being uncovered,—the remedy is almost too obvious to admit mentioning. Render not to the plaintiff in any case the demanded service, till after he has, on his part, produced appropriate evidence, of some sort or other, in support of it. Is it out of the mouth of his antagonist, the defendant, that the evidence, or an essential part of it, must come? Though in this case it is out of his power to produce that evidence, at the worst he may produce (though it be out of his own lips alone) evidence that shall be sufficient to satisfy the conscience of the judge, in such manner as to warrant him in subjecting the defendant to whatever vexation may be necessary for extracting from his lips (or, in case of necessity, from his pen) the evidence alleged to be necessary for the final substantiation of the demand.

posed of, by a set of men, none of whom so much as profess to know anything about the matter—when the decision is determined, not by any account of human feelings, but by lapse of *time*;—by whom should the judge be made? Not by that first magistrate, whose mind is the fountain of honour and of justice—not by the king, but by Jaquez Droz or Maillardet, in concert with Bolton and Watt. By the artizan in clockwork, to make each separate judge—by the artizan in steam-engines, to give dispatch and uniformity, where both are as yet unknown, by causing judgment to be signed in any given number of courts at the same time: in as many as Westminster Hall could be made to hold, in addition to the four by which, for so many ages past, it has been enlightened and adorned.

This mechanism,—would you view it in a true light, and without disguise, as the works of a watch are examined by the artist, when taken out of the gold and jewels in which they were embedded? Transport it in idea to some undignified tribunal—to the office of a justice of peace, or to a court of conscience. Conceive the magistrate, whose character depends not upon his rank but conduct,—conceive this unlearned judge copying the pattern set him by his learned superordinates, and, like them, signing judgment and enforcing execution, without having heard the parties, or knowing anything more of the cause than if the scene of it had been at the antipodes. Behold, in imagination, such conduct; consider what you yourselves would think and say of it: exactly what would be thought or said of it (at least said of it) by those very superiors, who in that station would be as sure to punish it, as in their own to practise it.

Conceive those shopkeeping judges, who, instead of equity on their lips, sit with conscience in their hearts,—conceive them, instead of consulting the feelings and weighing the necessities of the parties, lest forty shillings, extracted at once, should consign to ruin a family which a respite of a week or two might have saved,—conceive their conscience manifesting itself in the mechanical signature of judgments with shut doors, while the parties, unheard and unthought of, were, for their benefit, paying their way through the surrounding offices, like half-starved flies crawling through a row of spiders.

Obvious and effectual as is the remedy, the bar opposed to it is no less so. It supposes one party at least to be heard, and heard at the outset of the cause. But that neither party shall be heard (especially at that stage,) is of all established principles the most inviolable: a principle, the violation of which would reduce Westminster Hall to a heap of ruins. It would leave prisons empty: it would lead captivity captive: it would render offices neither worth selling nor worth giving: it would bring the greater number of suits to an untimely end, and leave the remainder not worth the continuance.

Confined to the *viles animæ*—to the souls too wretched to yield fees—the creatures to whom it would be beneath the dignity of law or equity to do justice,—the experiment was endured, the rather as it could not be prevented. Extended to those for whom alone that justice was made that is worth rendering, it would be subversive of the very ends of judicature.

It was observed above, that, in one sense, no exclusion could be said to be put by this arrangement: no exclusion put upon evidence on one side, as where an article of evidence produced on the other is made conclusive.

On one side alone, true it is that by this arrangement no exclusion is put upon evidence. Why? Because the exclusion that is put involves the evidence on both sides; in a word, all evidence. On the defendant's, because either he has had no notice, or it is out of his power to profit by it: on the plaintiff's, because, having done the needful, having run the gantelope through the offices, he is excused from giving evidence, lest he should have none to give.

Why should evidence be received? What is there to be got by receiving evidence? If anything, what is scarce worth stooping for. What is there to be got by receiving that which is not evidence? Look to those *arcana imperii* that have been divulged by the treachery of false brethren: look to the lists of fees.

§ 2. *An article of evidence may with propriety be made conclusive for the purpose of an incidental decision.*

A distinction requires to be made in regard to the stage of the cause, the stage to which the evidence in question applies.

The case in which this disguised exclusion is absurd and mischievous, is the case where,—the fact to which the evidence is applied is the principal fact (or among the principal facts) on which the demand or the defence is grounded,—the matter of fact upon which the ultimate decision has to be pronounced,—and the decision to be grounded on that fact is also an ultimate decision, as above.

Very different may be the case, where the

decision to be pronounced is no more than an incidental decision; and the conclusion to be drawn, a conclusion by which such incidental decision shall be warranted In this case, and for the purpose of grounding such incidental decision, frequently indeed does it happen, that this or that article of evidence may be treated as conclusive; this or that fact may, in the quality of an evidentary fact, with relation to this or that other in the character of a principal fact, be treated as conclusive

Such is the case, wherever, upon the application of one party, a decision is pronounced, a judicial act done as of course, upon an *ex parte* representation, no opportunity of contesting the truth of it having been given to the other: as where, upon a representation made by a person saying that goods of his have been stolen, and (as, from such and such circumstances, he suspects) by Titius, a warrant is issued for the arrestation and provisional confinement of the supposed thief

For the purpose of an *ultimate* decision, pronouncing Titius guilty of the theft, this evidence is not deemed conclusive for the purpose of the *incidental* decision, pronouncing the guilt of Titius to a certain degree probable (to such a degree as to warrant his arrestation and confinement, for the purpose of judicial inquiry,) this same evidence is deemed conclusive: and it is even made *absolutely* conclusive; for, by the nature of the measure taken, all faculty of combating the proposed decision by counter-evidence exhibited antecedently to the delivery of it, is taken away

To the purpose of an incidental decision of any sort, evidence of any description may be treated on the footing of conclusive, absolutely conclusive, evidence exclusive of all counter-evidence, — where the utmost mischief producible by the exclusion is outweighed by the advantage produced by the decision in relation to the several ends of justice

Thus, in the case just mentioned, the price paid for the advantage consists in the vexation (and that commonly attended with expense) produced by the restraint thus put upon locomotive liberty. the advantage itself consists in the security afforded for the forthcomingness, and thence for the justiciability, of the supposed thief. Give him the opportunity of contesting the necessity, and thence the propriety, of his confinement (the provisional and temporary confinement,) — if he is innocent, he will come in and contest it; but if, being guilty, he apprehends the proof will be strong enough for his conviction, he will make use of the summons as a warning not to comply with the requisitions of justice, but to elude them, and make his escape.

To a certain degree, every step on one side, which, on pain of greater inconvenience, calls for any step to be taken on the other side, is productive of vexation: for in judicial procedure every step that is taken is attended with vexation. In every instance, therefore, the evidence to which this effect is given, is, to a certain degree, productive of that sort of ill consequence which is attached to the giving it the effect of conclusive, and thereby of exclusive. evidence If, instead of a warrant for arrestation directed to a minister of justice, a simple summons addressed to the suspected thief, and requiring his attendance, had been employed, the vexation would have been lessened indeed, but it would not have been done away: and, so far as this minor vexation is concerned, the giving this effect to the evidence would have been productive of that sort of ill effect which is produced by the employing any lot of evidence in the character of conclusive. and thence of exclusive, evidence But be the vexation what it may, — if it be productive of preponderant benefit, and if, at the same time, the quantity of it be the least that it can be made, consistently with the production of that benefit, — it will always be warrantable

By this observation we are led to the practical caution, never to give to any lot of evidence the quality and effect of conclusive evidence, till, in respect of persuasive force, it has been rendered as strong as it can be rendered without the production of preponderant vexation, or other inconvenience, viz. to the person from whom the evidence is required: which is as much as to say, not to impose upon either party (in particular upon the defendant) the necessity of taking any step, or ulterior step, in the cause, without the other party's (the plaintiff's) having antecedently been made to produce whatever evidence he is able to afford without preponderant inconvenience.

General rule —

For the purpose of commanding an interlocutory decision, in what cases shall any (and what) lot of evidence be regarded as conclusive? Answer In such cases in which the certain mischief, — in the shape of collateral inconvenience by vexation, expense, and delay, attached to the receipt of counter-evidence with the consequent discussions, — would be greater than the contingent mischief, in the chance of direct injustice, incurred by the chance of untrustworthiness (understand proveable untrustworthiness) produced by the absence of the light that might have been thrown upon the subject by the excluded counter-evidence.

Such is the general description of the cases in which the exclusion of counter-evidence, in opposition to evidence for grounding an interlocutory decision, may be proper. To the propriety of the principle, no objection seems likely to be made. How, in each instance, to determine whether this or that particular case comes within this general description, is a

problem, the solution of which threatens to be attended with considerable difficulties.

But though it is not possible to lay down any general rule, indicative of the cases in which a certain portion of evidence may, for the purpose of an interlocutory decision, be treated as conclusive, and counter-evidence excluded, — it is not difficult to point out two cases at least, in which it cannot, without impropriety, be so treated: viz. 1. If the interlocutory decision is liable to be productive of irreparable damage; 2. If the decision, apparently on an interlocutory point, have the effect of a decision on the main point.

§ 3. *Aberrations of Roman and English law in this respect.*

In the Roman law I do not observe any traces of evidence regarded as conclusive in the improper sense.

To a hasty glance, the suppletory oath and the expurgatory oath wear somewhat of the appearance of it. Examined more closely, they seem not, either of them, to be productive of any such effect. The suppletory oath is admitted in default of other sufficient evidence on that side; and does not command the decision — does not put an exclusion upon any evidence on the opposite side. The expurgatory oath (on the defendant's side) is not called for or admitted, till after the plaintiff has had full liberty to adduce whatever admissible evidence he can obtain on his side.

In all these cases, the testimony in question is admitted in default of more satisfactory evidence, and is not understood to put an exclusion upon any other evidence.

In all these cases the arrangement is abundantly improper. But the cause of the impropriety has already been indicated in another place: it consists in the want of scrutiny: it belongs not to the present head.

In English jurisprudence there is one remarkable case, in which the effect of conclusiveness has been given to a mass of evidence: this is the case of *wager of law*.* The conclusive operation is confined to the non-penal branch of the law: it operates on the side of the defendant, and of the defendant only. On the other hand, the conclusiveness of it is *absolute*: and after all these reductions, the effect of it in practice is as pernicious, as it is absurd in principle: and from the degree of mischief of which it has been productive on this narrow ground, a sort of anticipation may be formed (how inadequate soever) of the mischief of which it would be productive, were the ground it covered more extensive.

In former days, when the practice called *wager of law*, that of a man's *waging his law*, was in use, the manner of it was this:†— The demand on the part of the plaintiff having been exhibited in the accustomed form, the defendant, if he thought proper, was at liberty to exhibit himself in open court, to go through the ceremony of an oath, and, under favour of that sanction, to deny the justice of the claim, in terms altogether general, prescribed by a formulary of the same tenor in all cases. No details called for or permitted; no other witnesses called for or permitted on that side; no faculty of cross-examination allowed to the adverse party, the plaintiff. A certain number of fellow-swearers were, indeed, not only admitted, but called for on his part. Swearers, but to what point? Not to any particular fact belonging to the case, but merely to the general and irrelevant fact, the *opinion* (a favourable opinion) respectively entertained by them in regard to the veracity of the party by whom they were thus produced. To whatsoever evidence of the direct kind the cause might happen to afford, — circumstantial evidence, and that of the most vague and inconclusive kind, evidence of character, was substituted.

So much for the absurdity: now comes the mischief.

Two sorts of claims were originally infected by this debilitating plague: 1. The sort of claim made by what is called an action of *debt*, a demand of a sum of money, a demand of the non-penal kind, by which the plaintiff, in making his application to the judge, called upon him to impose upon the defendant the obligation of conferring on the plaintiff the property of a sum of money liquidated in amount, payable of course in coin, of which the individual pieces were determinable by the defendant's, the intended collector's, choice; 2. The sort of claim called an action of *detinue*. In *debt*, the thing claimed was a mass of money: liquidated in value, — not liquidated — but (as in such case is necessary) left to the option of the debtor — in respect of the individual pieces of which the sum of money was to be composed. In *detinue*, the thing claimed was an individual article, of the moveable class: a horse, a piece of furniture, a picture, a trinket, and so forth.

By a conceit, of the number of those which, in the manufactory of legal decisions, occupy the place of reason, the effect of the wager of law on actions of debt, has, in one way or other, been got rid of. In some cases it was put aside; and in other cases, to which the pretence for putting it aside did not apply, another sort of action, an action with another name, was fabricated — an action to which, at the same time, and in this view, the wager of law was pronounced inapplicable. I mean the action of *indebitatus assumpsit*; which is the same thing as the action of debt, in other words. A promise, indeed, to comply with the obligation, is alleged: but the pro-

* Abolished by 3 & 4 Will. IV. c. 42.—*Ed.*

† Blackst. Com. B. III. Ch. xxii. pp. 341–348.

mise is presumed; that is, where there is none, feigned: averred by an assertion wilfully false.

The consequence is, that the demand of a sum of money is tolerably well cleared of this ground of defence by perjury and injustice. Relief is given, justice is administered, in a manner little, if at all, different from that in which it would be administered if the conclusive species of evidence in question, the waging of a man's law, were not applied to this case. The action, called an action of debt, is thus far spoilt; but in so far as it is spoilt, another action is given which answers the same purpose.

Far from being alike innocent is this remnant of ancient barbarism, in the case where the subject of the demand is a specific material object. In this case, the remedy originally provided is the species of action called the action of *detinue* By the same baleful influence by which the action of debt is spoilt, as above, this action is spoilt also In the case of the action of debt, for the part thus spoilt, a succedaneum (as we see) has been provided: in the case of the action of detinue, no such succedaneum has been provided, and the damage has continued for so many centuries unrepaired Upon the principle of analogy, nothing was more obvious, nothing would have been more easy, than the repair For the purpose of compelling the delivery of money where due, — to the fact of the obligation, you added, in the way of fiction, another fact, a promise to fulfil it why not for the purpose of compelling the delivery or re-delivery of a specific article? Yes analogy is the grand source and instrument of invention, in this as well as every other line but to apply it usefully, — to apply it steadily, comprehensively, and consistently, belongs to none but an inventive mind

The action of detinue is spoilt another action, called an action of trover, is given in the room. But by this new device, unfortunately, the purpose is not answered a blunder is made, and, instead of the specific thing which is a man's due, damages are given that is, a sum of money, according to the value, which, on the ground of the imperfect data that are commonly exhibited to them, the judges of fact think fit to put upon it the remedy, instead of that which belongs to the action of detinue, is the remedy that belongs to the action of debt

Whence came the blunder? Not from a regard — a more scrupulous than consistent regard, to truth. A falsehood is called in — a proposition is assumed, and a proposition more uniformly false in this case, than in the case of the *indebitatus assumpsit*. The story is, that the article claimed by the plaintiff has been *found* by the defendant: found by him, and by him converted to his own use. Thereupon comes the action, calling upon the judge to cause to be delivered to the plaintiff not the thing that belongs to him, but a sum of money in lieu of it The defendant takes note of the price thus put upon it: if it is more than he chooses to give for it, he restores it: if less (that is, if it be any advantage to him to keep it,) he keeps it. The plaintiff pockets the money and the injury. the defendant triumphs in improbity, under the protection of the law There are things, the value of which to a feeling heart is beyond all price. these are precisely the things which the law abandons to the wrong-doer, and to all wrong-doers

There is a remedy in kind, indeed, to be had in some cases, in that sort of a court which is called a court of equity But the optics of a court of equity are too high-seated to spy little things and a mass of value equal to the expense of more than a year's subsistence to an individual of the most numerous class, is set down by every court of equity to the account of little things * So much for the remedy itself, and the cases in which it is to be had at any price and as to the price that is to be paid for it (that is, for the chance of it) in time and money,—where law reckons by months, equity reckons by years where law reckons by crowns, equity reckons by pounds.

So delectable is this institution (the wager of law) in the eyes of Lord Coke, that he seems to pride himself in his country's exclusive possession of it † Its merit consists in what? In this, that it does (he says) no harm Why? Because, for the same demand, though there be one sort of action (an action of debt) which is clogged with this appendage, there is another (an action *on the case)* which stands clear of it Wherever it has no effect at all, there, and there only, it has no bad effect Unhappily, the reason given for the supposed harmlessness of an institution confessedly useless, is not true in fact. For, notwithstanding the silence of this arch-lawyer on the subject, another sort of demand there is, as we have seen, to which that clog does apply, and which being spoilt by it, and having no succedaneum, leaves the subject without a remedy

In regard to this institution, of which the highest supposed merit is that of doing no harm, while its real character is that of operating as a denial of justice, — the matter of triumph to Lord Coke, that no other country has the like, Blackstone‡ shows to be very far from well grounded

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* £10. Call the yearly expense of a family £50, and give five to a family; this gives, for the expenditure of an individual, £10.

† "This, for aught I could ever read, is peculiar to the law of England, and no mischief ensueth hereupon."—2 *Inst.* 45.

‡ Com. III. 341.

An institution that is peculiar to England, or nearly so, is cross-examination in non-penal causes. By neither of these professed panegyrists has this truly honourable peculiarity been noticed: by neither of them has it been observed, that it is by the exclusion this unnatural institution puts upon cross-examination, that the poisonous quality of it operates.

To have been consistent (if consistency had been a quality capable of adhering to English law, especially at the rude period here in question,) the privilege should have been extended, not to the defendant only, but to the plaintiff; and then the effects of the institution, as applied to the two sides of the cause, being equal and contrary, would have destroyed one another. To the plaintiff (I say) as well as to the defendant: or, if to one alone, rather to the former than to the latter. Why? Because, if for a man to swear falsely to save himself from a loss, is wicked, and in proportion to its wickedness improbable;—to swear falsely, for no more excusable purpose than the obtaining an undue profit for himself, at the expense of subjecting another man to an undue loss, is still more wicked, and in that respect still more improbable.

This chapter having been left unfinished by the Author, what follows has been added to it by the Editor. A few paragraphs, which for distinction have been put in inverted commas, consist of fragments, written at different times by Mr. Bentham: for the remainder the Editor is alone responsible.

[This is not the only sort of case in which the sworn, but uncross-examined and self-serving testimony of a party to the suit, is received as conclusive, that is, to the exclusion of counter-evidence. "The practice in chancery," we are informed by Phillipps,* "invariably is, that a party is entitled only to extracts of letters, if the other party will swear that the passages extracted are the only parts relating to the subject-matter."

There is another rule, by which a man's own testimony is rendered conclusive evidence in his favour, and that too on such a subject as that of his own character. The witness indeed in this case is not a party in the suit; but for anything that appears, he may be the vilest of malefactors; and he is, at any rate, under the influence of an interest, which is one of the strongest of all interests in the bulk of mankind, while even in the vilest it cannot be a weak one. A witness, as we have seen,† is not compellable to answer any question, the answer to which, if true, might tend to degrade his character; if, however, he chooses to answer, the party who asks the question is bound by his answer, and is not allowed to falsify it by counter-evidence.‡

The above seem to be the only instances worth mentioning, in which an article of orally delivered testimonial evidence has in English law been made conclusive. The instances in which similar effect has been given to an article of circumstantial evidence are innumerable; and many of them have been already brought to view.

1. As often as a decision has been given against either of the parties in a suit, on no other ground than that of his having failed, at a particular stage of the suit, to perform any operation which has been rendered necessary at that stage by technical rules, to the obtainment of justice; so often has the non-performance of that operation been taken as evidence, and conclusive evidence, of what is called in the language of lawyers, *want of merits*, that is, of the badness of his cause.

"Of the justice of the demand, whatsoever it be that happens to be made upon the defendant, provided the suit does not happen to be called a criminal one, non-resistance on his part is regarded and acted upon as sufficient evidence; and to the plaintiff possession is given of the object of his demand, just as if the justness of it had been proved. Even a lawyer will not pretend that on any ground of reason the inference is a conclusive one. Pecuniary inability, especially under the load of factitious expense imposed everywhere by the technical system, is another cause equally adequate to the production of the effect. In every part of the empire of the technical system, and more particularly in England, this inability will have place in the case of a vast majority of the body of the people.

"If a presumption thus slight were not received in proof of the justice of the plaintiff's claim, and in the character of conclusive evidence—if such direct proof of it as were to be had, were in every instance to be required,

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* Vol. I. (6th edit.) p. 421.

† Book III. *Extraction;* Chap. IV. *Discreditive Interrogation.*

‡ In the disapprobation bestowed upon this rule, it is of course implied, that the case is one of those in which the production of evidence to discredit the character of the witness, is in itself proper; for which cases, see Book V. *Circumstantial;* Chap. XIII. *Of Motives, Means, &c.;* §§ 3 & 4. *Character Evidence.* If not, it is proper to exclude any such evidence, after he has answered, only because it is proper to exclude it, whether he answers or no. But if the case be one in which it would have been proper to adduce evidence against his character without putting any questions to himself, it is difficult to see what impropriety there can be in doing exactly the same thing after you have interrogated him and got his answer, if you do not believe his answer to be true.

a number of *mala fide* suits, with the produce of which the coffers of the man of law are at present swelled, would have no existence.

"Thus it is, that under the technical system, every court calling itself a court of justice is in effect an open shop, in which, for the benefit of the shopkeeper and his associates, licences are sold at a fixed, or at least at a limited, price,—empowering the purchaser to oppress and ruin at his choice any and every individual, obnoxious to him or not, on whom indigence or terror impose the inability of opposing effectual resistance

"The real condition in which the great majority of the people, in the capacity of suitors, have been placed by the factitious expenses manufactured by the man of law, is an object too reproachful to him to be suffered to remain undisguised. In this, as in every other part of the system, extortion and oppression find in mendacity an ever-ready instrument The real condition in which the suitor has been involved, the misfortune of defencelessness through indigence, is put out of sight. a crime is imputed to him in its stead: and for that crime, not only without proof, but under the universally notorious consciousness of his innocence, he is punished *Contempt* is the word constantly employed to designate this imaginary crime. The real, the universally notorious, causes of his inaction, are fear and impotence But a man cannot be punished avowedly for fear he cannot be punished for impotence mankind would not submit themselves to tyranny so completely without a mask. Adding calumny to mendacity, they pretend to regard his inaction as originating in *contempt*, and it is on this mendacious accusation of their own forging, that they ground the ruin they inflict on him under the name of punishment."

In equity, the defendant, who, from his own poverty or ignorance, or the carelessness of his lawyer, is so unfortunate as not to put in an answer to the plaintiff's bill, stands a great chance (if a poor man) of being a prisoner for life. He is committed to gaol for the *contempt*. and as he is not released without payment of fees,—unless he has money to pay these fees, or can find some one else who will pay them for him, he must remain there all his life. Instances of this sort have not unfrequently, through the medium of the newspapers, been presented to the public eye.

2. As often as a contract, or any other legally operative instrument, is pronounced *null and void*, on account of the non-observance of any *formality*,—so often, the sort of exclusion of which we are here treating, has place A man claims a landed estate, under the will of the last proprietor. The will is produced in court: it is found to have the signatures of two witnesses only, instead of three;* or one of the three is proved to have put his name to the will in the absence of the testator. the will is rejected, and the party loses his estate. The rejection of the will may, perhaps, be considered as a *penalty*, for non-compliance with that injunction of the law which requires that certain formalities should be observed Considered in this point of view, it has been shown in a previous Book† to be unnecessary and objectionable. But it may also be regarded as grounded on the presumption that the will was spurious, or unfairly obtained. Here, then, is this one circumstance, viz non-observance of legally prescribed formalities, received as conclusive evidence of spuriousness or unfairness. The fallacy of this supposition has also been made sufficiently manifest in the Book already referred to. This article of circumstantial evidence, which is conclusive in law, is so far from being conclusive in reason, that it scarcely amounts even to the slightest presumption, until two things be ascertained: first, that the party *knew* that these formalities were prescribed, and secondly, that compliance with them was in his *power*. That spurious or unfair instruments have not frequently been *prevented* by the peremptory requisition of these formalities, is more than I would undertake to say: but an assertion which one may venture upon without much danger of mistake, is, that there is scarcely an instance of any instrument's having been actually *set aside* for the want of them, in which there was not a considerable, if not a preponderant probability of its being genuine

3. Almost all *estoppels* are exclusions of the sort now under consideration. You are estopped, say the lawyers, from proving so and so. the meaning of which is, that they will not permit you to prove it. For this they have sometimes one pretext, sometimes another something which you yourself have said or done, or something which has been said or done by somebody else.

There is a great variety of instances in which they tell you that you are estopped by a previous decision, either of the same court, or of some other court of justice. these have been already noticed under the head of adscititious evidence.‡ At other times you are estopped by what they term an *admission*. You are said to make an admission, if you say or do anything, or if any other person says or does anything for you, which a judge construes as an acknowledgment on your part, that a certain event has happened; that is, anything from which he chooses to infer its

* Two attesting witnesses now suffice in all cases, under 7 Will. IV. and 1 Vict. c. 26. See Vol VI. p. 533.—*Ed.*

† See Book IV. *Preappointed.*

‡ See Book VI. *Makeshift.*

happening: after which, though everybody perhaps who knows anything about the matter, knows that it has not happened, and would say so if asked, the judge, to save the trouble of asking, chooses to act exactly as if it had.

Admissions are of two kinds — express or presumed; and the former are either admissions upon record, or admissions not upon record. It is a rule with lawyers, that no evidence can be received to dispute admissions upon record,* that is, admissions in the pleadings. If this rule went no farther than to confine the evidence to such points as are actually in dispute between the parties, it would be a good rule. In a law-book, a man may reckon himself fortunate if he hits upon a rule which has a reason: if he expect, that where the reason stops, the rule will stop too, it is very rarely that he will not be disappointed. One example will serve as well as a thousand. When a man, against whom an action is brought for a sum of money, denies that the plaintiff is entitled to the whole sum which he claims, but admits that he has a just claim upon him for a smaller sum, — the practice is, for the defendant to pay into court the amount of the sum which he acknowledges to be due, that it may remain in deposit until the cause is decided. This payment, lawyers choose to call an "acknowledgment upon record;" and now mark the consequence: "the party cannot recover it back, although he has paid it wrongfully, or by mistake."†

As for extrajudicial admissions, it is not always that they are even receivable; when they are, they are generally taken for conclusive: for it may be observed, in regard to this part of the law of evidence, as in regard to so many other parts of it, that neither the lawyers by whom it was made, nor the lawyers by whom it has been expounded, ever seem to know that there is any middle course between taking an article of evidence for conclusive, and rejecting it altogether. Accordingly, in reading the *dicta* of judges, or the compilations of institutional writers from those *dicta*, one is continually at a loss to know what they mean. In speaking of this or that evidentiary circumstance, what they tell you concerning it is, that it is *evidence:* now and then superadding, as it were for the sake of variety, the epithet *good* to the general appellative evidence. Would you know whether they mean that it is *conclusive*, or only that it is *admissible?* Observe their *actions;* see whether they send it to a jury: for anything that you can collect from their *words*, they are as likely to mean the one as the other.

The following will serve as an example, as well of the ambiguity of which I have been speaking, as of the sort of logic which passes for irrefragable, under the dominion of technical rules. When a party interested in the cause, makes an admission against his interest, — if he has not made it by mistake, it is nearly the best evidence against him that you can have: *ergo*, it ought to be taken for conclusive against him, when he *has* made it by mistake; *ergo*, the admission of a person who is merely a nominal plaintiff, and who is *not interested in the cause*, ought to be conclusive against the person who is. So, at least, it was decided in the case of Bauerman *v.* Radenius,* in which the admission of the plaintiffs on the record, though not the parties really interested, was received as conclusive, and the plaintiffs were nonsuited. I say, received as conclusive; because, when a plaintiff is nonsuited, — that is to say, when his claim is dismissed by the judge without going to a jury, — it is because, if he had gone to a jury, the jury *must have found a verdict against him;* which would have been a bar to any future prosecution of the same claim: whereas a nonsuit leaves it still in his power to bring a fresh action, after remedying the defect which would have compelled the jury to find against him. The Court of King's Bench afterwards *affirmed*, that is, confirmed, the nonsuit: on which occasion Mr. Justice Lawrence said, "The present plaintiffs either have or have not an interest: but it must be considered that they have an interest, in order to support the action; and if they have, an admission made by them that they have no cause of action, is admissible evidence." This judge here, with much *naïveté*, displays the manner in which, under the influence of technical rules, what is known to be false is taken for true, in order that what is evidently unjust may be done. He knew as well as the nominal plaintiffs knew, that they had *not* an interest in the cause: but what of that? The law knew that they had.

There is an overflow of legal learning, on the question, what effect to your prejudice shall be given to the admission of your *agent:* and here again recurs the usual alternative: it is either not received, or it is received as conclusive: it either excludes all other evidence, or it is itself excluded. Thus, in one case,† "a letter from the defendant's clerk, informing the plaintiff that a policy had been effected, was held to be *good evidence* [meaning here *conclusive* evidence] of the existence of the policy; and the defendant *was not allowed to prove* that the letter had been written by mistake, and that the policy had not been made:" while in another case,‡ "where the fact sought to be established, was, that

* Phillipps, i. 159. † Ibid. 175.

* Phillips, i. 84.
† Harding *v.* Carter, *apud* Phillipps, i. 97.
‡ Fairlie *v.* Hastings, ibid. 95.

a bond had been executed by the defendant to the plaintiff, which the defendant had got possession of, the Master of the Rolls *refused to admit*, as evidence of this fact, the declaration of the defendant's agent, who had been employed to keep the bond for the plaintiff's benefit, and who, on its being demanded by the plaintiff, informed him that it had been delivered to the defendant." It might seem to a cursory reader, on comparing these two decisions, either that the predilection of judges for bad evidence was such, that, rejecting an admission in other cases, they were willing to receive it upon the single condition of its being made by *mistake*, or that, in laying down rules of evidence, blind caprice was the only guide. In this apparent inconsistency, however, there is a principle, though no one would have thought it; it is this: that the admissions of an agent are not to be received, unless "made by him, either at the time of his making an agreement about which he is employed, or in acting within the scope of his authority." It is not, that what he says on these occasions is more likely to be true than what he says on other occasions: it is, that "it is impossible to say a man is precluded from questioning or contradicting anything that any person may have asserted, as to his conduct or agreement, merely because that person has been an agent;" and as it would be unjust to preclude him from contradicting it, it is not permitted so much as to be heard.

Besides these express admissions, there is an extensive assortment of presumed ones, when a man "precludes himself from disputing a fact, by the tenor of his conduct and demeanour:"* the meaning of which is, that the court will *presume an admission* from anything that a man does, which they think he would not have done if the fact had not been true. This is the principle: but as to the extent of its application, there is no criterion of it except the Index to the Reports. It has usually been applied only to cases in which the presumption afforded by the act is really strong, and might reasonably be held conclusive in the *absence* of counter-evidence, though certainly not to the *exclusion* of counter-evidence, since there is not so much as one of the cases in which the presumption is not liable to fail. Without touching upon the grounds of failure which are peculiar to this or that case, there is one obvious ground which is common to them all. A man's actions can never prove the truth of a fact, except in so far as his *belief* of it is evidence of its truth: and to hinder a man from proving that a thing did not happen, because at some former period he believed that it did, even if you were sure that he believed it (which in general you are not, it being only inferred from his actions,) would be unjust in any case, but is more especially absurd, when the fact in question is one of those complicated, and frequently recondite, facts, which are constitutive of *title*.

Take a few instances.

"By accounting with a person as farmer of the tolls of a turnpike, a party is estopped from disputing the validity of his title, when sued by account stated for those tolls.

"By paying tithes to the plaintiff on former occasions, a defendant admits the right of the plaintiff to an action for not setting out tithes.

"Where a party rented glebe lands of a rector, and had paid him rent, he was not permitted, in an action for use and occupation, to dispute his lessor's title, by proving that his presentation was simoniacal.

"In actions of use and occupation, when the tenant has occupied by the permission of the plaintiff, he cannot dispute the plaintiff's title, although he may show that it is at an end.

"In an action of ejectment, by a landlord against his tenant, the tenant cannot question the title of his landlord, although he is at liberty to show that it has expired."†

In all these instances, the presumption upon which, if upon anything, the decision must have been grounded, is, that if the plaintiff had not really had a good title, the defendant would not have paid rent, tithe, &c. to him, as the case may be. To justify the rendering this presumption conclusive, it would be necessary, among a crowd of other suppositions, to suppose that a tenant never paid rent to the *de facto* landlord, without first demanding his title-deeds, and going over them with a lawyer, for the purpose of assuring himself that they did not contain any flaw.

4. A whole host of exclusions lurk in the admired rule, that the best evidence which the nature of the case admits of, is to be required: a rule which seems to please everybody, and with the more reason, as, having no distinct meaning of its own, it is capable of receiving any which any one thinks proper to attach to it. There is a charm, too, in the sound of the words *best evidence*, which no lawyer, and scarcely any non-lawyer, is able to resist. The following seems to be nearly the train of thought (in so far as anything like thought can be said to have place) which passes through the mind of the submissive and admiring student, when he hears this maxim delivered *ex cathedrâ*, as something which, like Holy Writ, is to be believed and adored. Good evidence, it naturally occurs to him, is a good thing: *à fortiori*, there-

* See an abstract or disgest of the Law of Evidence, recently published by Mr. Harrison, on the plan of Crofton Uniacke, Esq. (p. 8.)

† Harrison, *ut suprà*, pp. 9, 10.

fore (it is unnecessary to say,) the best evidence cannot but be a good thing what, however, can be more proper, than always to require, and insist upon having, the best of everything? How admirable, therefore, the rule which requires the best evidence (whether it is to be had or no,) and how admirable the system of law, which is in a great measure made up of such rules!

As a preliminary to praising this rule, a desirable thing would be, to understand it: for this, however, you have no chance but by looking at the practice: the attempt to find a meaning for the words would be lost labour. The meaning attached to it by lawyers has been different, according to the different purposes which they have had to serve by it. One use which they have made of it, is, to serve as a reason for excluding an inferior and less trustworthy sort of evidence, when a more trustworthy sort, from the same source, is to be had: as, for example, a transcript, when the original is in existence and forthcoming. Applied to this purpose, the rule, if it were not so vague, would be justly entitled to the appellation of a good rule: the purpose, at any rate (with the limitations which have been seen in the Book on Makeshift Evidence,) must be allowed to be a good purpose. Another use which has been made by lawyers, at times, of this rule, is, to enable a judge, at no greater expense than that of calling a particular sort of evidence the best evidence, to treat it as conclusive in favour of the party who produces it; or the non-production of it as conclusive against the party who, it is supposed, ought to have produced it; in both cases putting an exclusion upon all other evidence: and it is in this application of the rule, that it presents a demand for consideration in this place.

"Take a sample of this best evidence, —of that best evidence which, by such its *bestness*, puts an exclusion upon all other evidence.

"Speculative Position or Antecedent;—Written evidence is better than parol evidence. Practical Inference or Conclusion;—Therefore, in case of a contract, when there exists written evidence of it, with certain formalities for its accompaniments, oral evidence is, or is not, to be admitted, in relation to the purport of such contract. Is, or is not; whichever is most agreeable and convenient to the judge. Such is the plain and true account of the matter: for distinctions are spun out of distinctions; and, the light of reason, by which they would be all consumed, being effectually shut out, on and on the thread might continue to be spun without end.

"Observe the inconsistency.

"In English law, circumstantial evidence of the weakest kind, comparison of hands, by persons acquainted, or not acquainted, with the hand of the person in question,—or of the bare tenor of the instrument, *i. e.* the circumstance of its purporting upon the face of it to have been executed (*i. e.* recognised) by the person or persons therein mentioned, —this circumstance, if coupled with the evidentiary circumstance *ex custodiâ*, is (if the assumed date of the instrument be as much as thirty years anterior to the day of production) held sufficient, and, in default of counter-evidence, conclusive.

"A dozen or a score of alleged percipient witnesses, all ready to concur in deposing that, to the provisions in the instrument mentioned, this or that other had been agreed to be added or substituted,—shall they be received, and heard to say as much? Oh *no*; that must not be; it is against our rule about *best evidence*."

The general rule on this subject is, that oral evidence is not admissible "to contradict, or vary, or add to, the terms of a written agreement."* Cut down as this rule is, by almost innumerable exceptions, there is still enough of it left to do much mischief. The exceptions, if their practical effect be looked to, are reasonable, as narrowing *pro tanto* the extent of a bad rule: in principle, however, there is scarce one of them which is tenable, unless it be first granted that the rule is absurd. It would be difficult, for example, to discover how, in respect of the propriety of admitting oral evidence to show the abandonment of a written agreement, it should make any difference whether the agreement was or was not under seal; or why, in equity, on a bill for the specific performance of a written agreement, evidence to prove that, by reason of accident or mistake, the written instrument does not correctly express the agreement, should, if tendered by the defendant, be in certain cases admitted; if tendered by the plaintiff, refused. The origin of the exceptions to this rule, as well as to so many other technical rules, is visible enough. They were established by the same sort of authority which established the rules, viz. that of judges deciding *pro hâc vice*, under the guidance of no principle, but in accordance with the interest or whim of the moment, or frequently with the laudable view of doing justice, notwithstanding technical rules. A judge sees plainly, that, in this or that particular case, if he adhere to the rule, he will do injustice; and without daring to set it aside, or even allowing himself to suppose that a rule which had descended from wise ancestors could be other than a good one, he has honesty enough to wish to do justice to the cause in hand, and accordingly cuts into the rule with a new exception for every new instance which pre-

* Phillipps, i. 530.

sents itself to him of its mischievous operation, taking care never to carry the exception one jot farther than is strictly necessary for his immediate purpose: another judge follows, and takes another nibble at the rule, always upon the same diminutive scale; and so on. Hence it comes, that, at length, after the lapse of a few centuries, the body of the law, considered as a whole, has become a little more just, and a great deal more unintelligible: while the law books have degenerated from the primitive simplicity of the old text-books, where everything was comprehended under a few simple principles (in which, whatever trespasses you might find against justice or common sense, you will find none against consistency, — and which would be perfect, if conduciveness to human happiness were a quality that could without inconvenience be dispensed with in law,) and have swelled into an incoherent mass of mutually conflicting decisions, none of them covering more than a minute spot in the field of law, and which the most practised memory would vainly strive to retain, or the most consummate logic to reduce to a common principle.

Oral evidence, it seems, is receivable to *explain*, in many cases in which it would not be receivable to *vary*, the terms of an agreement. The general rule is, that, in case of a *latent* ambiguity, — that is to say, an ambiguity which does not appear on the face of the instrument, but is raised by extrinsic evidence, — extrinsic evidence will be received to explain it. thus, if a testator bequeaths to John Stiles his estate of Blackacre, and it appears that he has two estates known by that name, oral evidence will be received to show which of the two he meant. Provided always, that there be no possibility of giving effect to the instrument *in terminis*, without the aid of other evidence,* for if it have a definite meaning, though a different one from that of the testator, it does not signify. When they cannot by any means contrive to give execution to the *ipsissima verba* of the will, then, it seems, they will condescend to inquire what the testator intended.

Not so when the ambiguity is *patent*, that is, apparent on the face of the instrument In this case, the door is inexorably shut upon all extrinsic evidence; and if the intention of the party cannot be inferred from the context, "the clause will be void, on account of its uncertainty." You are unskilled in composition: after making mention in your will of two persons, your brother and your younger son, you bequeath to *him* an estate: in this case it may possibly admit of dispute, to which of the two you meant to bequeath it; what, however, can admit of no dispute, is, that you meant to bequeath it to one or other of them: as, therefore, it is doubtful whether you intended that A should have it, or B, the judge will not give it to either of them, but gives it to C, the heir-at-law, whom it is certain you intended not to have it. Or, if he gives it to either of the two persons who, and who alone, can possibly have been meant, he gives it upon the slightest imaginable presumption from the context. There were twenty persons standing by when you executed the will, all of whom knew perfectly well, from your declarations at the time, which of the two parties in question you meant, but none of whom he will suffer to be heard And this is what lawyers call requiring the best evidence.

For this rule two reasons have been given: one a technical, that is, avowedly an irrational one, the other, one which pretends to be rational The technical reason is the production of Lord Bacon it is this: "the law will not couple and mingle *matter of specialty*, which is *of the higher account*, with *matter of averment*, which is *of inferior account* in law" For those to whose conceptions the incongruity of so irregular a mixture might fail to present itself in colours sufficiently glaring, a subsequent lord chancellor brought forth the following less recondite reason. that the admission of oral evidence in explanation of patent ambiguities, "would tend to put it in the power of witnesses to make wills for testators" an objection which would be very strong against any one mode of proof, if it did not unhappily apply to every other.

All hearing of evidence lets in *some* danger of falsehood What, however, was probably meant, is, that the admissibility of oral evidence to explain a will, would frustrate the intention of the law in requiring preappointed evidence, a better sort of evidence than oral, and less likely to be false If this be the meaning, it is enunciated far too generally. It is true that preappointed evidence, considered as a *genus*, is better than oral. But it is not true that every particular article of the former is better than the best conceivable article of the latter. It is not true that the signature of three witnesses is better, *cæteris paribus*, than the oral depositions of twenty. Yet this rule excludes the latter evidence, on the plea of its inferiority to the former.†

* "The question on the admissibility of parol evidence, in such cases, will depend principally upon this, — namely, whether the evidence is necessary to give an effective operation to the devise, or whether, without that evidence, there appears to be sufficient to satisfy the terms of the devise and the intention of the testator, as expressed on the face of the will."—*Phillipps*, i. 518.

† "The refusal to put upon the words used by a man in penning a deed or a will, the meaning which it is all the while acknowledged he put upon them himself, is an enormity, an act of barefaced injustice, unknown everywhere but in

Another consequence of the technical maxim, that written evidence is better than parol (a maxim which, like almost all other general maxims of technical law, is not true in more than half the cases which it extends to,) is the exclusion, in a great number of cases, of oral evidence to prove that there *exists* a written document evidentiary of a particular fact. The judges, on the occasion of a reference made to them in the course of the late Queen's trial, declared that "the contents of every written paper are, according to the ordinary and well-established rules of evidence, to be proved by the paper itself, and by that alone, if the paper be in existence."* Good: provided always it be a necessary consequence, that a paper is forthcoming, because it is in existence. Upon the strength of this rule, the judges decided, that the supposed writer of a letter could not be questioned concerning the contents of the letter, unless the letter itself were first produced, and the witness asked whether he wrote it. Thus, the only evidence, perhaps, which you have got, and that too of so good a kind as the testimony of a writer concerning what he himself has written, is excluded, because another sort of evidence is not produced, which would be better if you could get it, but which, in all probability, you cannot get. The superior evidence, though not forthcoming to any practical purpose, cannot be shown not to exist; and it is therefore said to be *forthcoming*, to the purpose of excluding all inferior evidence.

A volume might be filled with specimens of the injustice and absurdity which are the fruit of the rule requiring the best evidence. Take this example among others:—A written instrument, with certain formalities, being the best evidence; if, in the written instrument, any one of these formalities be omitted, neither the agreement, nor any other evidence of the transaction, will be received. Thus, "a written instrument which requires a stamp, cannot be admitted in evidence, unless it be duly stamped; and no parole evidence will be received of its contents. If, therefore, the instrument produced is the only legal proof of the transaction, and that cannot be admitted for want of a proper stamp, the transaction cannot be proved at all; as, in an action for use and occupation, if it appear that the defendant held under a written agreement, which for want of a stamp cannot be received, the plaintiff will not be allowed to go into general evidence; for the agreement is the *best evidence* of the nature of the occupation."†

An agreement on *unstamped* paper not being itself receivable, it follows naturally enough, that if it be lost, parol evidence will not be received of its contents; nor even if it be wrongfully destroyed by the other party notwithstanding another technical rule, that no one is allowed to take advantage of his own wrong. But you can never guess, from the terms of a rule, to what cases it will be applied.

Take the following still more barefaced piece of absurdity, as a final specimen of the operation of this vaunted rule:—

"The acts of state of a foreign government can only be proved by copies of such acts, properly authenticated. Thus, in the case of Richardson *v.* Anderson, where the counsel on the part of the defendant proposed to give in evidence a book purporting to be a collection of treaties concluded by America, and to be published by the authority of the American government; and it was proposed, further, to prove, by the American minister resident at this court, that the book produced was the rule of his conduct; this evidence was offered as equivalent to a regular copy of the archives in Washington: but Lord Ellenborough rejected the evidence, and held, that it was necessary to have a copy examined with the archives."‡

We may expect in time to see a judge arise, who, more tenacious of consistency than his predecessors, will refuse to take notice of the existence of the city of London, unless an examined copy of the charter of the corporation be given in evidence to prove it.

English jurisprudence. It is, in fact, making for a man a will that he never made; a practice exactly upon a par (impunity excepted) with forgery.

"Lawyers putting upon it their own sense: Yes, their own sense. But which of all possible senses is their own sense? They are as far from agreeing with one another, or each with himself, as with the body of the people. In evident reason and common justice, no one will ought to be taken as a rule for any other; no more than the evidence in one cause is a rule for the evidence to different facts in another cause. It is not from this or that word, or string of words, in a will, but from all the words taken together,—nor yet only from all the words taken together, but from all the words, compared with every relevant fact that is ascertainable respecting the situation of his property, of his family, of his connexions, that the intention of the testator is to be gathered.

"To these diseases of jurisprudence, attempts have been made to apply a remedy by jurisprudence. But the attempt, if not treacherous, has been shallow. The result never has been, never can be, anything better than a further extent given to the application of the *double fountain* principle.[a] No: it is not a case for Telephus with his spear; it is a case for Hercules with his searing-iron. Jurisprudence pruned by jurisprudence, is the hydra decolated, and left to pullulate: the only searing-iron is the legislative sceptre."

* Phillipps, i. 281.

[a] See the Chapter so intitled, *suprà*, p. 308.

† Phillipps, i. 486.

‡ Ibid. 382, 383.

Can any exposure make this piece of technicality more ridiculous than it is made by merely stating it?

5. I shall notice only one more instance of the species of disguised exclusion which forms the subject of the present chapter. The sort of evidence which, in this instance, is taken for conclusive, is the species of official document called a record "Records," says Phillipps,* "are the memorials of the proceedings of the legislature, and of the king's courts of justice, preserved in rolls of parchment, and they are considered of such authority, that no evidence is allowed to contradict them Thus, if a verdict, finding several issues, were to be produced in evidence, the opposite party would not be allowed to show, that no evidence was offered on one of the issues, and that the finding of the jury was indorsed on the postea by mistake" On this piece of absurdity, after what has already been said, it can scarcely be necessary to enlarge Somehow or other, however, lawyers seem to have found out, that, like everything else which is human, so even a record,—however high its "authority," and however indisputable its title to the appellation bestowed upon it by Lord Chief-Baron Gilbert, "a diagram" (whatever be meant by a diagram) "for the demonstration of right" (whatever be meant by the demonstration of right,)—is still, notwithstanding it be written upon parchment, liable to error for they have found it necessary to determine that a record shall be conclusive proof only "that the decision or judgment of the court was as is there stated," and not "as to the truth of allegations which were not material nor traversable" This is fortunate: the fact of the judgment being one of the very few matters, contained in what is called a record, which, unless by mistake, are generally true. But, however fallible in respect of other facts, in respect of this one fact they hold it to be infallible; and its infallibility, itself needing no proof, supersedes all proof of the contrary; which, therefore, as it cannot prove anything, it would be loss of time to hear: accordingly it is not heard, but inexorably excluded †

* Vol. I. p. 299.

† "We have seen in how many cases the words *conclusive evidence* cover a real exclusion: it remains to bring to notice one case in which they do not. This is when an act, designated by a distinct expression, is termed *evidence* of the same act designated by an indistinct one.

"The clouds in which, partly by imbecility, partly by improbity, the field of legislation has been involved, are, in some places, of so thick a texture, that no small labour is requisite to pierce through them. Even in statute law, the phraseology employed by the professional penman in whom the legislator has reposed his confidence, has, in but too many instances, been so unhappily or so dexterously chosen, as to present no fixed sense, no sense distinct enough for use In this case, what has been the resource? To describe an act in more distinct terms, to consider it as an act different from the act described in the less distinct terms, and to speak of the unauthoritatively, but more distinctly described act, as evidence of the authoritatively, but less distinctly expressed one.

"Thus, in the case of an offence bearing relation to the police, certain acts have been spoken of as being *evidence* of vagrancy. Stript of its disguise, what, in this case, was the plain fact? That vagrancy was one sort of act, the acts in question another sort? and that, these acts being regarded as proved, vagrancy was regarded as a distinct act, the existence of which had been rendered preponderantly probable by the other? No such thing: but the acts in question were determinate, the signification of the word vagrancy, not. What was the consequence? That on the ground of the statute interdicting vagrancy, a rule of jurisprudential law was enacted, interpretative of the statute law: a rule of jurisprudential law, applying to the acts in question the final consequences attached by the statute to the indistinct appellation."

‡ This Chapter has been added by the Editor.

CHAPTER V.

OF THE RULE, THAT EVIDENCE IS TO BE CONFINED TO THE POINTS IN ISSUE.‡

This rule, though good in principle, is frequently, as it is administered, an instrument of mischief; partly from being combined with a bad system of pleading, partly from the perverse application which has been made of it to purposes for which it was never intended. Being an exclusionary rule, it demands consideration in this place. and the occasion seems a suitable one for taking notice, not of the bad effects in the way of exclusion only, but of the bad effects of other descriptions, which are the fruit of it

Nothing can be more proper than to exclude all evidence irrelevant to the points in dispute and if the points in issue on the pleadings were always the points, and all the points, in dispute, nothing could be more proper than to exclude all evidence irrelevant to the points in issue Unhappily, however, to determine what are the points in dispute, though the professed object of all systems of pleading, is very imperfectly attained even under the best, and the points really at issue are often very different from the points *in issue*, as they appear on the pleadings

In so far as the representation given in the pleadings of the state of the question between the parties, fails to accord with the real state,—in so far, at least, as any point (that is, of course, any material point) which is really in dispute, is omitted or misstated in the pleadings, in so far, the rule, which requires that the evidence be confined to the points in issue, those points not being the points in dispute, operates to the exclusion of all evidence

which bears only upon the real points in dispute. This includes all cases of quashing, grounded on what is called a *flaw* in the pleadings: as, for instance, the case of a misnomer. If you indict a man under the name of John Josiah Smith, and it turns out that his real name is John Joseph Smith, though nobody has the least doubt of his being the person meant, and though he himself would not have the effrontery to declare upon oath a belief that he was not, it is no matter—the indictment is quashed:* because, the only question at issue, as indicated by the indictment, relating to the supposed guilt of Josiah, proof, however convincing, of the criminality of Joseph, is *foreign to the issue*. On the same ground, in an action for non-residence, the designation of the parish by the name of St. Ethelburgh, instead of Saint Ethelburgha, was held to be (as lawyers term it) a fatal variance. On another occasion, the ground of the quashing was, that a party to a bill of exchange had been called Couch, instead of Crouch: on another, that the prisoner was charged with having personated M'Cann, while the evidence went to show, that the man whom he had personated was M'Carn. It was not that, in any of these instances, any real doubt existed as to the purport of the charge; nor was it that, in the guilt of defrauding two persons with names so different as *M'Cann* and *M'Carn* are, there was deemed to be any such difference in point of enormity as could justify so great a diversity of treatment: it was, that the unbending spirit of technical rules requires that you should prove, *verbatim et literatim*, the very thing which you have asserted, and, whatever may be the real issue, ties you down to the nominal one. That the substitution of an *r* for an *n* could in any other way be effected than by dropping the proceeding and beginning *de novo*, is what you will never get any Common Lawyer to understand.

It is the same when any other circumstance, legally material, is misdescribed in the pleadings; as when the declaration stated an absolute promise, and a conditional one was proved; and when a declaration for assaulting a constable in the execution of his office, alleged that he was constable of a particular parish, and the proof was that he was sworn in for a liberty, of which the parish was part: a notable reason for depriving the plaintiff of justice, or putting him to the expense of another suit to obtain it!†

The root of the evil here lies in the system of pleading. To eradicate it entirely, that whole system must be abolished: the mode in which what is called pleading is now conducted, namely, by a sort of written correspondence between two attorneys, must give place to oral pleading, by the parties themselves, in the presence of the judge; when either no such mistakes as the above would be made, or, if made, they would be instantly rectified. Even under the present vicious system, however, the quashing of the suit might be avoided much oftener than it is. There are mistakes that are of consequence—there are others which are of none: there are mistakes by which the opposite party may have been misled—there are others by which he cannot. It is just, certainly, that after a party has intimated to his adversary his intention of proving a certain case, he should be allowed to prove that case, and no other; since, if there were no such rule, the other party might be taken by surprise: he might come prepared with evidence to rebut what he imagined was the claim against him, and might find, on going to trial, that the one really brought was quite different. This being the reason, what, then, is the practical rule? Let the remedy be confined to the single case, in which alone there is any evil to be remedied. If the opposite party has really been misled, or put to any inconvenience by the error, he cannot, one would think, have any reasonable objection to saying so: nor to delivering the assertion under all those securities which are taken for the truth of testimony in any other case. Unless, therefore, he is willing, under these securities, to declare that, in consequence of the error, he has been either prevented from bringing the necessary evidence, or induced to bring evidence which was not necessary, let the error be rectified, and the cause go on as it would have done if there had been no error. If he *be* willing to make such a declaration, and if his adversary admit, or fail to disprove its truth, let the necessary delay (when any delay is necessary) be granted: and let the party by whose fault the error was occasioned, be subjected to the obligation of indemnifying the other for all *bonâ fide* expenses which he can prove to have been occasioned him by it.

If the rule, in the cases above examined, is attended with bad effects, it is not that it is a bad rule, but (as has been already intimated) that it is accompanied by a bad system of pleading. There is, however, another set of cases, in which the rule is applied in a sense in which it is altogether absurd: facts being shut out, under pretence of their not being the facts at issue, which, though unquestionably not the facts at issue, are of the highest importance as evidentiary of those which are.

Thus, the custom of one manor is not to

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* The court may order the misnomer to be amended under the 7 Geo. IV. c. 64, § 19, without quashing the indictment.—*Ed.*

† See the title *Variance*, in Starkie's Law of Evidence.

be given in evidence to explain the custom of another manor; unless it be first proved, that both manors were formerly one, or were held under one lord, or unless the custom is laid as a general custom of the country, or of that particular district Why? Because customs are "different in different manors, and in their nature distinct" But although the customs of different manors are *different*, they may nevertheless be *analogous*, and though the custom of one manor cannot of itself *prove* that of another, it may assist in clearing up apparent inconsistencies in it, or in obviating an argument grounded on its supposed improbability There is also another reason, of still greater weight, which we owe to the ingenuity of Lord Chief Justice Raymond. "for," says he, "if this kind of evidence were to be allowed, the consequence seems to be, that it would let in the custom of one manor into another, and in time bring the customs of all manors to be the same"* In the contemplation of so overwhelming a calamity, it is no wonder that Lord Raymond should have lost sight of whatever inconvenience might happen to be sustained by the party in the right, from losing his cause for want of such explanations as a reference to the custom of a neighbouring manor might have afforded; especially if advertence be had to the appalling fact, that the customs of all manors would come to be the same, if suffered to be shown for what they are The reader will not, of course, indulge in any such vain fancy, as that the custom which is good for one manor, can be good, or even endurable, for the manor adjoining, or that the inhabitants of one village could even exist, under rules and regulations which bind the inhabitants of another village as well as themselves

Again. "in a question between landlord and tenant, whether rent was payable quarterly or half-yearly, evidence of the mode in which other tenants of the same landlord paid their rent is not admissible"† Yet what can be more strictly relevant? the determining motive in such cases usually being the landlord's convenience, which may reasonably be presumed to be the same in the case of one farmer as of another.

Mr. Harrison gives an abstract of eight cases decided under the rule that evidence is to be confined to the points in issue, seven of which include this same sort of absurdity

It cannot be pretended, that the evidence thus shut out is irrelevant and to maintain, as a general maxim, that evidence of relevant facts is to be excluded, because those facts are not expressly averred in the pleadings, would be too great a stretch of technicality, even for a lawyer. For the above decisions, however, no better reason can be given,—unless that of Lord Chief Justice Raymond, which Mr Phillipps styles an "argument of inconvenience," be so considered

With as good reason might any other article of circumstantial evidence be excluded. A murder, suppose, has been committed the prisoner was near the spot, he was known to be a personal enemy of the deceased, and at a former interview he had threatened to kill him stains of blood were found upon his linen when he was apprehended, and he had a bloody knife in his pocket What then? None of these facts are in issue it is not said in the indictment, that he was an enemy of the deceased, nor yet that he had used threatening language towards him, he is not charged with soiling his linen, and though, indeed, it is alleged in the indictment, that he killed and slew the deceased with a knife, value sixpence, it is nowhere imputed to him that he stained the knife At this rate, the plaintiff would need to include in the declaration every fact which, in the character of an evidentiary fact, he might have occasion to bring to the notice of the judge

We have now considered the rule in both its applications its abusive application, which can never be other than mischievous, and its legitimate application, which, to be purely beneficial, wants only to be combined with a rational mode of pleading Suppose the system of pleading reformed, this rule, to be a good one, would only need to be always employed in its legitimate, and never in its abusive, sense When thus restricted, however, what does it really mean? Only, that evidence is not to be admitted of any facts, except either those on which the decision immediately turns, or other facts which are evidentiary of them

General as this rule is, greater particularity will not, in this instance, be found to be attainable, since the question, on what facts the decision turns, is a question, not of evidence, but of the substantive branch of the law it respects the *probandum*, not the *probans* it does not belong to the inquiry, by what sort of evidence the facts of the case may be proved, it belongs to the inquiry, what are the facts of which the law has determined that proof shall be required, in order to establish the plaintiff's claim.

This circumstance, obvious as it is, might easily be overlooked by one who had studied the subject only in the compilations of the English institutional writers, who, not content with directing that the evidence be confined to the points in issue, have farther proceeded, under the guise of laying down rules of evidence, to declare, on each occasion, what the points in issue are.

One whole volume out of two which com-

* Phillipps, i. 162.
† Harrison, *ut suprà*, p. 132.

pose Mr. Phillipps's treatise on the Law of Evidence, — with a corresponding portion of the other treatises extant concerning that branch of the law, — is occupied in laying down rules concerning the *sort of evidence* which should be required in different sorts of actions or suits at law. But why should different forms of action require different sorts of evidence? The *securities* by which the trustworthiness of evidence is provided for, and the *rules* by which its probative force is estimated, if for every sort of cause they are what they ought to be, must be the same for one sort of cause as for another. The difference is not in the nature of the proof; it is in the nature of the facts required to be proved. There is no difference as between different forms of action, in reason, or even in English law, in respect of the rules relating to the competency of witnesses; nor, in general, to the admissibility or the proof of written documents; nor in respect of any other of the general rules of evidence. What Mr. Phillipps (I mention him only as a representative of the rest) professes, under each of the different forms of action, to tell you, is, what facts, in order to support an action in that form, it is necessary that you should prove.

Now, what are these facts? In every cause, either some *right* is claimed, or redress demanded for some *wrong*. By a wrong, is of course meant a violation of a right. Some one or more of those facts, therefore, by which rights are conferred, or taken away, or violated, must at any rate be proved: and if proof of any other fact be necessary, it can only be as evidentiary of these. If, therefore, a man professes to tell you all the facts, some one or more or all of which you must prove, in order to get a decision in your favour, — he must furnish you, among other things, with a complete list of all the facts which confer or take away — and all the acts which violate, all the rights, which have been constituted and sanctioned by law. This, accordingly, is what Mr. Phillipps and others of his brethren attempt to do. But, to enumerate the facts which confer or take away rights, is the main business of what is called the civil branch of the law: to enumerate the acts by which rights are violated — in other words, to define *offences* — is the main business of the penal branch. What, therefore, the lawyers give us, under the appellation *law of evidence*, is really, in a great part of it, civil and penal law.

Another part of it consists of rules, which are called rules of evidence, but which are really rules of pleading. These are laid down under the guise of instructions for adapting the evidence to the pleadings. It is not often, however, that a man has it in his power to mould the evidence as he pleases: but he always has the power, — that is to say, his lawyers have it for him, — of moulding the pleadings (those on his own side at least) as he pleases. These rules, therefore, for adapting the evidence to the pleadings, are, in fact, rules for adapting the pleadings to the evidence.

Two examples will illustrate the intermixture of the substantive law with the law of evidence; and one of them will also afford a specimen of the intermixture of rules of evidence with rules of pleading.

Under the title Burglary, Mr. Starkie begins by saying, that on an indictment for burglary, it is essential to prove — 1*st*, A felonious breaking and entering; 2*dly*, of the dwelling-house; 3*dly*, in the night time; 4*thly*, with intent to commit a felony. He then proceeds to inform us, that there must be evidence of an actual or constructive breaking: for if the entry was obtained through an open door or window, it is no burglary. That the lifting up a latch, taking out a pane of glass, lifting up folding-doors, breaking a wall or gates which protect the house, the descent down a chimney, the turning a key where the door is locked on the inside, — constitute a sufficient breaking. That where the glass of the window was broken, but the shutter within was not broken, it was doubted whether the breaking was sufficient, and no judgment was given; and so on in the same strain. Who does not see that all this is an attempt — a lame one, it must be confessed (which is not the fault of the compiler,) but still an attempt — to supply that *definition* of the offence of burglary, which the substantive law has failed to afford?

The title "burglary" consists of twelve octavo pages, not one line of which is law of evidence. It is all, like the part above extracted, penal law; except three pages, which are occupied in stating how the ownership of the dwelling-house, in which the offence was committed, must be laid in the indictment; and which therefore belong to pleading.

To take our next example from the non-penal branch of the law: when Mr. Phillipps, in treating of the sort of evidence required to support an action of *trover*, informs us, that the plaintiff in this action must prove that he had either the absolute property in the goods, or at least a special property, such as a carrier has, or a consignee or factor, who are responsible over to their principal; and further, that he must show either his actual possession of the goods, or his right to immediate possession; and that he must prove a wrongful conversion of the goods by the defendant, and that the denial of goods to him who has a right to demand them, is a wrongful conversion; and that the defendant may show that the property belonged to him, or to another person under whom he claims, or that the plaintiff had before recovered damages against a third person for a conversion of the

same goods, or that he was joint tenant of the property with the plaintiff, or tenant in common, or parcener, or had a *lien* on the goods, or a hundred other things which it would be of no use to enumerate;—what can be more plain, than that he is here telling us, not by what evidence an action of trover is to be sustained, but in what cases such an action will lie: that he is telling us, in fact, what we are to prove, not by what evidence we are to prove it; that he is enumerating the *investitive* facts, which will give to the plaintiff a right to the service which he claims to be rendered to him at the charge of the defendant; and the *divestitive* facts, by which that right will be taken away from him.

Yet, of this sort of matter the whole of the chapter, a few sentences excepted, is composed; and this it is that composes the greatest part of almost all the other chapters in the volume; which yet does not include any sorts of causes except those which, in form at least, are non-penal

I do not mention this as matter of blame to the institutional writers from whose compilations the above examples are drawn.—There are some things really belonging to the subject of evidence, which it is necessary to state in treating separately of each particular kind of action; viz the nature of the corresponding *preappointed* evidence (if the law has rendered any such evidence necessary to support the claim that is the subject of the action,) and also the nature and amount of the evidence which the law renders sufficient to establish a *primâ facie* case, and throw the *onus probandi* upon the other side With this matter really belonging to Evidence, it may be convenient to mix up such matters belonging to civil and penal law, as ought to be adverted to by the professional agent of the party who brings the action. The arrangement which is best for the practitioner, or the student of the law, differs as much from that which is best for the philosopher, as the alphabetical arrangement of words in a dictionary differs from the methodical classification of them in a philosophical grammar.

CHAPTER VI.

OF NEGATIVE EXCLUSIONS.

WHATEVER be the matter of fact in dispute, or (considering rights and obligations antecedently to all dispute) whatever be the matter of fact on which the existence of the right or obligation in question depends; taking things as they exist at any given point of time, let us conceive, as existing at that point of time, a certain quantity of evidence, operating in affirmance or disaffirmance, or part in affirmance, part in disaffirmance, of such right or obligation.

Setting aside the case or preponderant inconvenience in the shape of vexation, expense, and delay,—the established system of procedure, if perfect in this respect, but no more perfect than it might be and ought to be, must have secured the existence of two results:—1. That the whole stock of evidence so existing, shall, in case of the existence of a demand for it for a judicial purpose, be actually presented to the cognizance of the judge, 2 That the evidence so presented, be presented in the most trustworthy shape of which (regard being had to the particular nature of it, whether testimonial, real, or written) it is susceptible.

Arrangements directed to the former of these ends have for their object the *forthcomingness*,—those directed to the latter end, the *trustworthiness*,—of the stock of evidence.

Regard being had to collateral inconvenience, as above mentioned,—to make the most effectual provision which the nature of things admits of, for securing the forthcomingness of the existing stock of evidence as above described, is among the incontestable duties of the legislator. This being admitted,—if, in this or that particular, a provision directed to that object has altogether been omitted to be made,—or, having been made, has failed of being effectual in the degree in which it might and ought to be effectual,—the consequence is, that, to the extent of such deficiency, an exclusion may be said to have been put in a sort of negative way—a negative sort of exclusion may be said to have been put, upon the correspondent lot or article of evidence

If, in any instance, in consequence of any such exclusion, a particle of any such obtainable evidence fail of being presented to the cognizance of the judge—and the consequence of such failure be misdecision or failure of justice, whereby the benefit of the right in question is lost,—injustice, proportioned to the value of such benefit, is the result.

Non-compulsion is negative exclusion. To refuse to take, at the instance of the party having need of the evidence, the steps necessary to cause its being forthcoming, is to exclude it. Various are the shapes in which denial of justice manifests itself. various are the shapes, and this is one of them.

If, in this point of view, we cast an eye over the collection of established systems, we shall find the deficiencies under this head deplorably abundant—the mass of these exclusions and these injustices proportionably ample

It is only however *pro memoriâ*, that the subject is in this place brought to view. To give a view of the system of arrangements by which, on the head of forthcomingness, the demands of justice promise to be satisfied,

and the existing deficiencies (as above) supplied, belongs to the subject of *procedure* at large.

To the head of negative exclusion belongs (as we have seen) a large division of the cases of direct exclusion which have formed the subject-matter of this Book. But in those cases the exclusion was in every instance the result of express determination, called forth by actual views taken of the subject by the ruling powers: in the present case, it may, in many instances, have been the result of mere oversight, and want of reflection; and in every instance, this purely negative cause would have been adequate to the production of it.

BOOK X.

INSTRUCTIONS TO BE DELIVERED FROM THE LEGISLATOR TO THE JUDGE, FOR THE ESTIMATION OF THE PROBATIVE FORCE OF EVIDENCE.

CHAPTER I.

PRELIMINARY OBSERVATIONS.

§ 1. *Use of instructions from the legislator to the judge, relative to the probative force of evidence.*

We have seen the causes — the psychological causes — by the operation of which on the mind of the witness, deception is liable to be produced in the mind of the judge: sinister interest, improbity, and imbecility, — to one or other of these we have seen all those causes to be referable. Had the *immediate* causes alone been to be taken into the account, the catalogue might have been still shorter: *improbity* might have been omitted; since it is only in as far as it is coupled with sinister interest — it is only through the intervention of sinister interest, that, to this purpose or any other, improbity is capable of operating in the character of an active principle.

We have seen that in no instance can any one of these circumstances be employed with propriety as a ground for the *exclusion* of any article of evidence. But what we have also seen, is, that there is not one of them by which a just cause is not presented for regarding the evidence with a *suspicious* eye; for regarding the *trustworthiness* of it as diminished by the influence of the circumstance. Hence the propriety of delivering a set of instructions to the judge, pointing out to his observation the source and degree of its inferiority in point of trustworthiness — of its tendency to produce deception; and thus putting him upon his guard.

For exclusion, substitute the rival remedy, instruction: nothing, it will be seen, can be more innocent; nothing, in every point of view, more unexceptionable.

In so far as the instruction is *operative*, all the good that could have been done by the rough remedy of exclusion, is done by this gentle and rational substitute.

If *inoperative*, inasmuch as the same line of conduct as that which is indicated and recommended by the instruction, would have been practised without it, — even then, and at any rate, it does no harm.

But, under the system of instruction, and in spite of the instruction — in this and that instance (it may be said) it may happen to the judge to give credence, or appear to give credence, to this inferior evidence; and thus being, in reality, or perhaps in appearance only, deceived and misguided by it, misdecide in consequence: an injustice which, if the deceptitious article of evidence had, by an obligatory rule of law, stood excluded, would not have taken place.

True: after hearing, under the system of instruction, an article of evidence that under the exclusionary system would have stood excluded, it may happen to the judge to misdecide. But so it may, and ever and anon does, happen to the judge to misdecide, after hearing evidence of a sort to which no exclusion has, under any system, been applied. Under the system of instruction, the judge has before him the instruction, which, in its nature, cannot be so much as intended to serve as a guide to the *understanding* of a judge, without also serving as a check upon his *will*: serving on each occasion to point the attention of the public to the course taken on that occasion by the judge.

Of the exclusionary system, in so far as it extends, the effect is to tie up the hands of the judge. It is the application of will to will — of arrogance to subjection — of a man without understanding, to another labouring

(as he presumes) under the like misfortune It is the policy of one to whose perverted optics all men are liars, and all judges fools So many exclusionary rules, so many insults offered by the author of each rule to the understanding of those whose hands are expected to be tied by it Coming from the legitimate legislator, addressed by him to his subordinate, the judge,—whatsoever self-conceit and rash presumption there might be in it, there would be, at least, no usurpation, no pretergression of the bounds of official authority the hands he ties up are the hands of his constitutional subordinate—hands to which, be the occasion what it may, in some way or other he applies additional bands by every word he utters But, in fact, so it is that (in England at least) the exclusionary rules have not, in any instance, had the will of the legitimate legislator for their source in every instance they have had for their author some lawyer, in the character of a judge, who, tying or pretending to tie his own hands, has provided a set of manacles—ready made manacles, into which his successors, to save the trouble of thinking, have spontaneously introduced their hands

But though in this, or in any other system of incongruous arrangements, the influence of folly ought never to be left out of the account, there seems reason enough to suspect, on the grounds so often already referred to, that, in the composition of this system, improbity, lawyercraft, acting under the spur and the direction of sinister interest, had an important share

Hitherto, whether in the character of legislator or pseudo-legislator, man has manifested (and certainly not altogether without reason) less confidence in the ascendency of his understanding than in the efficiency of his will had it been otherwise, laws would have been somewhat less numerous, instructions (I mean from the legislator to the judge) would not have been, as they are to this day, almost without example

One consolation is, that, in the way of instruction, it is not altogether out of the sphere of industry and intelligence, though unclothed with power, to be of use When the individual is out of the way, jealousy dies with him, and then comes the time for his words to pass for whatever may be their value Among the living, wisdom is nowhere to be found but in the seat of power she lodges under the privileged robes, and is passed from hand to hand, in company with seals and purses.

In the ensuing pages, a sample may be seen of the instructions, which, on the subject of evidence, it might be of use for the legislator to furnish, to serve as a light to guide the footsteps of the judge

The more plainly true it may happen to them to be, the less extraordinary they will appear, and the less free from all pretension to be taken for anything beyond the obvious dictates of simple common sense.

In the case of a body of instructions,—supposing a code of that description to be inserted in the aggregate body of the laws,—one comfortable reflection presents itself, viz. that by this part no addition need, nor therefore ought, to be made, to that part which, in the shape of an inevitable load, is imposed upon the memory of individuals The subject, the private citizen, as such, has no need to load himself with it, it belongs not either to the catalogue of his duties, or to the catalogue of his rights The person whose judgment it is calculated to assist, is the judge, and no one but the judge the person for whose assistance, in the way of instruction, it is designed, is the judge To the individual it is of no use, but in the event of his having the misfortune to become a suitor nor then, but in the event of his observing, on the other side, some witness or witnesses whose testimony he observes or suspects to be exposed to the action of some interest—some sinister interest, against the seductive influence of which it concerns him that the judge should be sufficiently upon his guard

§ 2. *Instructions to the judge not given under existing systems, and why*

Under existing systems, when a lot of testimony, exposed on any particular score to suspicion, is brought forward, the grand, or rather only, object of consideration is, whether or no it shall be admitted If admitted,—what degree of credit shall be attached to it (*i. e.* what circumstances there are in the situation of the witness, by which the degree of confidence that might otherwise be reposed in his testimony may be diminished,) is a topic scarce ever so much as glanced at It is, accordingly, only for the purpose of serving as a ground of exclusion, that any circumstance, in the character of a cause of comparative untrustworthiness, is ever brought to view If, in the character of a legal ground for exclusion, the circumstance is sustained, it is then pronounced an objection—a good objection—to the *competency* of the testifier: if in that character it be repelled, it is then said to be not good as an objection to the competency of the witness, but as an objection that goes to his *credit*, and in that character, if it be a jury-cause, to be considered by the jury.

Here then, and without any sort of instruction or assistance from the official judge,—the jury, by the light of common sense, are supposed to be natural, competent, and perfect judges of the degree of credence proper to attach to any the most suspicious evidence, against which the door of the witness-box is

not peremptorily shut: — while, as to the question, whether it shall be heard or no, it is at the same time taken for granted, that they are radically incapable of forming any tolerable judgment, even with the help of all that official wisdom to which, where the question is concerning the interpretation to be put upon an article of law (whether jurisprudential, that is imaginary, or statutory, that is real law,) they are expected to pay the most implicit deference.

The question thus referred to the jury, one might here suppose, might be an occasion for the advocates on both sides to display their eloquence: on one side in exaggerating — on the other in depreciating, the force of the mendacity-promoting interest, or other supposed cause of untrustworthiness, whatever it may be.

In fact, an allusion of this sort cannot but now and then be made; but as for any argument at large — any regular debate, it may be questioned whether one instance of any such argument be to be met with anywhere.

The reason (one reason at least) seems not difficult to divine. Besides, the universal absurdity, so inconsistent are the exclusionary rules, that, while interests purely nominal, plainly incapable of exciting in the breast of any human being any the smallest particle of interest — of exercising in it any the smallest particle of influence, are received as grounds for absolute exclusion, — a dose of interest, compounded of the strongest ingredients that human nature furnishes, is not received in that character. The consequence is, that against calculation, comparison, ratiocination, the door is shut by a kind of instinct. Ground thus laid out is as unfit a field for rational argument, as a crowded china or glass shop would be for a fencing or a boxing match.

By the same considerations it is rendered pretty obvious how it has happened, that, for the guidance of the jury, little or nothing in the way of instruction can rationally be expected from a judge. Instruction to a jury from an English judge? Not a proposition — no, not a syllable, could he utter, on any part of the whole subject, without running full butt against some one or other of his rules — without proclaiming the absurdity and mischievousness either of some exclusionary rule, or of some exception taken out of it.

Well, therefore, may he leave this exercise of the judicial faculty to the jury — to anybody who will exercise it, or profess to exercise it: feeling, as he cannot but feel, his utter inability to afford to them any the smallest assistance, without exposing to merited contempt the system of doctrine to which he is tied down, — doctrines for which neither defence nor apology can be found by any human being, and of which, in his situation, it would not be decorous to speak the truth.

On the score of interest (for example,) to what use could it be for a judge to set about weighing grounds of objection, when in so many instances a party is admitted to testify in his own behalf, in his own cause? — on the score of improbity, — when a criminal, confessedly tainted with improbity in the highest degree, is admitted, under the impression of a mass of interest, of which one ingredient is itself the strongest that human nature can be urged by?

Thus it is, that by the learned judges feeling themselves completely unequal and radically incompetent to the task, it is abandoned altogether to that class of men — of ephemeral judges — whom (on pretence of their inability to understand those books, which, made or not made, promulgated or not promulgated, every man is punished for not understanding,) they are so forward on all other occasions to lead like infants in a string, frequently to pull them about and speak for them, as if they were puppets.

From such a source, it may now be imagined whether it be in the nature of things that any discourse capable of bearing the name or calculated to answer the purpose of *instructions*, should ever have come: whether from the bench, in bits and scraps, brought out *pro re natâ*, like the rules of their phantasmagoric system of law, to serve the purpose that happens to be in hand; or from the study, in the form of a treatise, from a learned author of whatsoever class, whether it be a briefless advocate or a superannuated judge.

Incapable of finding a source anywhere in jurisprudential law, — should such a body of instructions be looked for, with any better prospect of success, in statute law? But from what sort of person, then, shall it come? — from the attorney, — who, being paid at so much a sheet, exhausts his powers in the efforts made to find surplusage, screwing up to its maximum the multitude of the sheets? — or from the scantily-pensioned draughtsman, whose occupation it is, while an exhausted treasury is gaping for sustenance, to draw tax-bills against time; and who, never having opened his eyes to anything better, looks up to surplusage, to the works of the attorney, as the only models for his works?

From whom can any such information be looked for, but from one by whom the field has been surveyed, and surveyed in all bearings, with views directed to the ends of justice? But, under the fee-gathering system, in what corner of any inn of court or chancery can any such person be looked for, with any expectation of finding him? To what ends, in any of those receptacles of sham-learning, can men's views have ever been di-

rected, but to the ends of existing judicature, the very opposites of the ends of justice?

§ 3. *Object and character of the following instructions.*

Of the ensuing body of instructions, the object will be, to point out to the notice of the judge the several circumstances which, by the influence they exert on the will of the witness, or the indications they afford of his disposition and character, moral and intellectual, present themselves as having the effect of demonstrating the trustworthiness of his evidence,—the probability of its being at once correct and complete,—of its conforming itself throughout the whole course of it to the line of truth—or else diminishing this probability on the part of the testimony, and thence diminishing the degree of the probative or persuasive force with which it is fit that it should act on the mind of the judge

Antecedently to the present stage of the work, this topic never presented itself for consideration Why? Because, from the first to the last, the proposition maintained has been, that, be the degree of trustworthiness ever so small, ever so low, it can in no case form a rational ground for the exclusion of the evidence But supposing this granted, then, and not till then, comes the question, what degree of persuasive force to attribute to it.

As to a great part (perhaps by much the greatest,) they will be found so obvious to the most uninformed mind, that, in the character of *information*, nothing could be more superfluous, and even impertinent, but in the way of *memento*, the faculty of recurring to them may not be the less useful and commodious. Of a dozen considerations, immediately following one another, it may happen that there is not a single one that would not to the most uncultivated understanding be an obvious one But it may happen, that, for want of a simultaneous view, some one of them may be out of mind and for want of that one, the decision, the judicial operation, may fail of being so correct as it might and ought to have been

If, in the instance of the merely curious reader, there be anything in them capable of affording to his understanding the slightest degree of instruction, or exciting in his mind the smallest spark of interest, it must be the continually repeated contradiction and disproof they give to the rules which govern the existing practice

For in this quarter of the field of law (not to speak of so many others,) the art of the English lawyer (not to speak of other lawyers) has two branches the art of knowing that which has no existence, and the art of not knowing what is known to everybody else.

Throughout the whole course of these instructions, the English reader, and more particularly the English lawyer, would be apt to expect, and thence to be more or less disappointed at not meeting with, a number of technical terms, which, in the part here in question of the field of law, are in present use. Had they been found capable of answering the purpose of correct information, there is not one of them that would not have all along been employed But, in this, as in other branches of science, it is not in the nature of terms of extensive import—of generic terms, where they are the result of erroneous views of the subject, to be capable of serving for the enunciation of truth

Of the classes among which transgressions productive of real mischief have been distributed in another work,* ten or a dozen characteristic properties have been enumerated, as respectively belonging in common to the offences aggregated to each respective class:—such and such properties to all offences against other individuals, such and such to offences, or supposed offences, against a man's self, such and such to offences striking not against any assignable individuals, but undistinguishably against all the individuals of which the public is composed

But, of the classes of offences, and other acts and objects, as made up by the technical denominations employed by the technical system, it is a property (and the only property they have in common) to have no natural property in common,—to have nothing in common but the artificial arrangements made under that system in relation to those objects Take, for example, the words crime, misdemeanor, felony, præmunire, tort, larceny, arson, &c &c

The omission was indispensable Throughout the whole course of the work, the purpose of it being to deliver useful truth, and nothing else,—terms which could not be employed without disseminating error, pernicious error, were incapable of being rendered subservient to the purpose just as a mixture composed of arsenic and sugar would be incapable of being made into syrup, as a vehicle for any useful medicine

But, from this omission, no sort of privation or inconvenience in any shape will accrue to anybody—at any rate, to the non-lawyer.—The words which, in the room of these technical ones, are employed,—these natural expressions, though they belong not to the language coined by lawyers, belong not the less in fact, and by rather a better title, to the English language The words thus carefully, because necessarily, excluded, belong all of them to a sort of cant or slang, the

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* *Introduction to Morals and Legislation.* Dumont, *Traités de Législation.*

opprobrium of the body of the language: a sort of slang never used but to a bad purpose — incapable of being ever applied to any good one. By the omission of this lawyers' jargon, the reader (the non-lawyer at least) is no more left at a loss, than he is by the omission of that other sort of flash language called the thieves' cant or slang, the language in use among unlicensed depredators.

The judge, for whose use these instructions are designed, is a judge whose views (the source of corruption being supposed to have been previously dried up) are directed, not to the established ends of judicature, but to their opposites, the ends of justice: and to such new views the common language of Englishmen will be found as congenial, as the established lawyers' slang will be found inapplicable.

CHAPTER II.

OF INTEREST IN GENERAL, CONSIDERED AS A GROUND OF UNTRUSTWORTHINESS IN TESTIMONY.

WHATSOEVER be the general disposition and character of the proposed witness, the trustworthiness of his testimony is liable to be affected by the interests of all kinds, to the action of which, at the time of delivering such his testimony, he happens to stand exposed.

Between the ideas respectively denoted by the words *interest*, motive, hope, fear, good, evil, pleasure, and pain, the connexion is inseparable.

Without motive there is no interest; without hope or fear there is no motive; without good* or evil, there is no hope or fear;† without pleasure or pain there is no good or evil.

To the several sorts of interest, therefore, correspond so many sorts or modifications of motives, hopes and fears, good and evil, pleasure and pain.

The interests, the influence of which is strongest, and most likely to be exerted upon testimony, are those which arise out of the following classes of pains and pleasures: —

PLEASURES.

1. The pleasures of taste.
2. The pleasures of the sexual appetite.
3. The pleasures of wealth.
4. The pleasures of power.
5. The pleasures of reputation.
6. The pleasures of ease.
7. The pleasures of novelty (or gratified curiosity.)
8. The pleasures of the religious sanction.
9. The pleasures of sympathy.
10. The pleasures of antipathy.

PAINS.

1. The pains of death.
2. Severe bodily torments.
3. The pains of poverty.
4. The pains of disgrace.
5. The pains of labour.
6. The pains of the religious sanction.
7. The pains of sympathy.
8. The pains of antipathy.

In regard to pleasures and pains, besides those which are to be found in the above list, a variety of others are exemplified in experience. But, in whatsoever number and variety those which are not inserted in it may be to be found, they will (it is supposed) be found to come, all of them, under this description, viz. that the pleasures are such as to be at the command of whosoever possesses the taste or relish on which their existence depends, and by that means are incapable of exerting an influence on testimony; the pains such, that the avoidance of them depends not upon testimony.

If, in the case of a pleasure, it be of such a nature as to be on some occasions at a man's command — on other occasions not at a man's command without his being in possession of some object serving as the instrument of that pleasure, and the possession of such instrument is not to be obtained without money, but is to be obtained by money, — the pleasure, in this latter case, comes under the head of the pleasure of *possession*, with relation to the matter of wealth — and becomes pregnant with one of the interests capable of acting upon testimony, viz. pecuniary interest.

Thus (as was the case with the earliest astronomers,) if a man, having a taste for astronomy, can content himself with the pleasure of contemplating the celestial objects on a clear night, so far the pleasure he enjoys belongs to the class of those which are not pregnant with an interest capable of operating upon testimony. But if, to enable him to

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* The word *good*, in as far as any precise signification is annexed to it, denotes indifferently either pleasure, or the negation of pain (present or future,) or whatever is regarded as a cause more or less probable of pleasure, or of the negation of pain, *i. e.* as a security against pain. Take away the ideas of pleasure and pain, you have the word good without a meaning: your good, if so you persist in calling it — your *good*, if such it be, is of no value. By a few obvious changes, this same account will serve as well for *evil* as for *good*.

† Expectation of an event, is the persuasion, more or less strong, of its probability. Hope is expectation of good — fear, expectation of evil: in the import of each of these words, therefore, two distinct ideas — one of the persuasion, the internal judgment or sentiment — the other of the event, the exterior subject or object of the judgment, is included.

reap this pleasure, he requires an instrument, such as a telescope, the property or use of which is not to be obtained by him but for money,—in that case his pleasure is pregnant with a sort of interest which is either the same with pecuniary interest, or equally capable of exerting an influence on his testimony.

So, again, if it requires him, as the study of astronomy by a clear night without an instrument would do, to be at liberty—and for want of money to purchase his liberty, he is confined to a chamber lighted only from within. So, again, if, having a relish for the pleasures derived from the ideas of the sublime and beautiful, as presented by natural objects, such as the sun, the moon, mountains and valleys, seas and rivers, the objects themselves are not sufficient for him, without the assistance of Macpherson's Ossian, or Thomson's Seasons, or Burke on the sublime and Beautiful—and the books are not to be had without money, nor the money without testimony

So, again, in regard to pains for example, the pains attendant on this or that disease or indisposition If, truly or falsely, they are understood to be out of the reach of cure, they too, like the pleasures, are incapable of giving birth to any of those interests by which an influence is occasionally exerted on testimony But if, being understood to be within the reach of cure, the administration of the cure is (as in general it will be) necessarily attended with expense, then they come within the description of those pains which, by the interest with which they are pregnant, are capable of exerting an influence upon testimony

Without wine, for example, or without sea-bathing, relief (it is understood) is not to be had, by means of wine, or of sea-bathing, it is to be had but the wine, or the sea-bathing, is not to be had without money, nor the money without testimony

Thus much for illustration, and for removal of objections But in the cases here exemplified, it is sufficiently evident, that, though at a first view it may appear that by the pleasures or pains in question an influence is exerted upon testimony, and that on that score they ought to have been comprehended in the list, yet, upon a closer examination, it appears that the interest by which the testimony is acted upon in those cases, is neither more nor less than pecuniary interest, and that the force of it is proportioned to the pecuniary value of the several instruments in question—the instruments by which the pleasure is expected to be procured, or the pain removed.

The degrees of which the scale of testimonial trustworthiness is susceptible, can rarely be anything better—anything more precise, than merely *relative: absolute*, the nature of the subject does not, in general, allow them to be. In some instances (as will be seen presently,) and only in some instances, you can say that, whatever be the trustworthiness of the testimony in this first case, it is less in that other case—still less in that third case, but how much less, is what you cannot say in either case language furnishes you not with the means.

It is not with trustworthiness in psychology, as with temperature in physics, in which you can say not only, it was cooler yesterday at noon than to-day at the same hour, but, by observation taken each day on the thermometer, you can express the difference, by numbering in each case the degrees

The only state of things in which the force of an interest (whether in the character of a mendacity-promoting or in that of a mendacity-restraining interest) is susceptible of measurement, is that in which the correspondent pleasures or pains have for their efficient cause an object susceptible of mensuration

Out of all the species of interest, it is only in two that this case is verified, viz pecuniary interest, and the aversion to labour.

In the case of pecuniary interest, for example, everybody sees, that upon a given person (proximity and probability being in both cases the same,) the operative force of a sum of £20 will be, practically speaking (though not in mathematical strictness,) double that of £10

So, in the case of aversion to labour, the operative force of a course of labour for two hours, will be, practically speaking, double that of a course of labour of the same sort for one hour, and, mathematically speaking, something more

The irksomeness of labour depending so much more upon the species than upon the quantity as measured by time, and of labour, the same in species as well as quantity, the degree of irksomeness being so widely different to different individuals, in such sort, that a quantity of labour which to one man is highly irksome, shall to another be not merely indifferent, but highly agreeable,—quantity of labour forms but an imperfect and incompetent subject of mensuration

There remains, therefore, *money*, as the only efficient cause of interest, and pecuniary interest as the only interest, the force of which, in the character of a mendacity-restraining or mendacity-promoting interest or motive, is commodiously measurable.

Yet, this measuring rule once obtained,—by reference to this (by means of the principle of commercial or commutative exchange) cases will happen in which the force of any other species of interest may by accident become susceptible of mensuration.

Thus, suppose two political situations affording honour or power (both or either,) without profit:—considering each by itself, it may be difficult to form any sort of estimation of the degree of force with which, in the character of mendacity-restraining or promoting interests, they may respectively operate upon the mind of a given person. But suppose them to have been, each of them, the objects of purchase and sale—the one having been bought and sold for £2000, the other for £4000:—in this case, the force of the interest constituted by them respectively is as susceptible of mensuration as that of an interest constituted by money.

For an injury done, or supposed to be done, the party injured prosecutes the supposed injurer. He knows beforehand, that (such is the course of practice) he will not, even in the event of his succeeding in the prosecution, receive satisfaction in any pecuniary shape: he understands, on the other hand, that the amount of the expense on his side is not likely to be less than £50. He prosecutes notwithstanding, and delivers his testimony. The interest by which he has been engaged to embark in this prosecution, is the interest created by that modification of the pleasure of antipathy, called the pleasure of revenge. Here, then, not indeed the exact force of that interest, but the minimum of it, is given, and expressed in money. It is certain that it acts upon him with a force at least equal to £50,—that is, to the apprehension of losing £50; since he pays £50 for the purchase of a chance of it. With how much greater a force, does not appear: since it does not appear how much more he would have spent in prosecuting, rather than not obtain the pleasure of the revenge.

There are five species of interest, to the action of all, or most of which, a witness is generally exposed: all concurring in exercising on his testimony a tutelary—a mendacity-and-falsity-restraining, influence; an influence such, that the stronger it is, the greater is his trustworthiness: acting consequently in the character of so many *sanctions*,* contributing, all of them, to bind him to the observance of the laws of truth. They are:

1. The fear of labour, or love of ease; produced by the difficulty of composing, for the occasion, and on the spot, a statement which, being more or less false, must, to answer any purpose that can be answered by falsehood, wear the appearance of being true. Corresponding sanction, the physical sanction, viz. the self-regarding branch.

2. The fear of shame; viz. of the shame, and consequent contempt or ill-will, which mankind in general are apt to entertain towards one who, on any such important occasion, is supposed to have willingly departed from the line of truth. Corresponding sanction, the moral or popular sanction.

3. The fear of punishment—legal punishment; viz. suffering, under the name of punishment, in general expressly attached, by the power of the law, to every departure, at least when wilfully made, on any such occasion, from the line of truth. Sanction, the political sanction.

4. The fear of supernatural punishment—of the punishment to be expected in case of every such transgression, at the hands of Almighty Power. Sanction, the religious sanction.

5. Regret at the thoughts of the evil, of which, at the charge of this or that individual or assemblage of individuals (the witness himself not included,) the transgression in question may be considered as more or less likely to be productive. Sanction, the sympathetic sanction; another branch of the physical sanction, the social branch.†

In the instance of sympathy, the direction in which it acts is far from being so uniformly and steadily on the tutelary or mendacity-restraining side, as that of any of the four preceding sanctions. In a cause of a purely criminal and penal nature, presenting a defendant thereby exposed to punishment, and no individual specially injured on the other side, and the witness satisfied of his guilt;—in this case, the action of this interest (supposing all the other tutelary and mendacity-restraining interests out of the question) would be solely on the mendacity-promoting side. In a suit between one individual and another (punishment out of the question, and nothing in dispute but money or money's worth, claimed by one, and refused to be given up by the other,) love of justice, as well as all partial regard, out of the question, this interest could have no place on either side. Remains, as the only case in which this interest regularly joins its force to that of the other masses of interest above mentioned as constituting the four regularly acting mendacity-restraining sanctions, the case where, the suit being purely penal, the defendant was not guilty; *i. e.* does not present himself as being so, to the mind of the person whose testimony is considered.

Of the several sorts of interest mentioned in the table, there is not one that is not capable of acting on a man's testimony in a sinister direction, that is, in the character of a mendacity-promoting interest.

Nor is there one to which it may not by accident happen to act in the opposite direction; that is, in the character of a mendacity-

* See the last Chapter but one of Book I.

† These several species of interest are termed different species, not as corresponding to so many different species of pain or pleasure, but to pain or pleasure in general, considered as apt to flow from so many distinguishable sources.

restraining interest, an occasional, casual, mendacity-restraining interest, acting in conjunction with the standing tutelary or mendacity-restraining motives above mentioned.

Nor is there, consequently, a sort of witness to whose testimony, in almost any sort of cause, it may not happen to be exposed to the action of any number of casual interests on either side, or on both sides

All other circumstances being the same, — the greater the affliction of the party suffering by the testimony will be apt to appear in the eyes of the witness — and thence (unless in as far as any difference can be seen to have place) the greater it is in reality, *i. e.* in the eyes of the judge, — the greater the improbability of the testimony being mendacious

1. One reason is, that the greater the suffering of the party against whom the testimony operates, the greater is the force with which, on a person whose individual character is unknown, one of the five mendacity-restraining sanctions — viz. the force of sympathy — may be expected to act.

Thus, in a criminal case, the punishment being capital, or in any other way ultra-pecuniary, — it is less probable, that, by a pecuniary interest of a given magnitude, or by the interest of revenge, a man should be induced to aim at producing the conviction of an innocent defendant by false testimony, than if the affliction to the defendant were confined to a mere pecuniary loss, or any other punishment not beyond pecuniary

2. Another reason is to be found in that love of justice, which, at least in a civilized state of society, may be considered as having more or less hold on every human breast *

The criminal fact being by the supposition false, and, by the witness in question, known to be so, — the punishment (supposing the infliction of it produced by the testimony) will, by the supposition, be unmerited, unjust

Were it not for this love of justice — the punishment about to be produced by the testimony, in case of its being mendacious, being the same — the disinclination to give in to the mendacity would be the same, whether in point of fact the charge were true or false, and the punishment, accordingly, merited or unmerited. But, of a disposition contrary to such indifference, the prevalence seems to be indicated by general experience.

To exert an influence on testimony, — an interest, be it what it may, acting in which of the two opposite directions it may, must exist (the idea of it as existing must at any rate be present to the mind) at the time of delivering the testimony

If, at that time, a man does not stand exposed to the action of any interest urging in a sinister direction, it matters not to what interest acting in that direction he may have stood exposed at any former period His testimony will not be a less correct or complete expression of the recollections presented by his memory at that time

But, should that have happened which is very apt to happen, and which in almost all instances will have happened, — viz that, antecedently to the judicial statement which a man makes on the judicial occasion under the authority of the judge, he has held discourse relative to the fact in question (whether in writing or *viva voce*) in the presence of any other person or persons, — in this case he has an interest in not delivering, on any judicial occasion, any such testimony as shall be irreconcilable with the antecedent discourse This interest is, at any rate, the interest of his reputation the motive for perseverance, the fear of shame and to this must be added, in many cases, the fear of punishment, viz. of punishment which the falsehood may be a means of drawing down upon him, in case of a prosecution as for perjury, supported by the testimony of the persons in whose presence it happened to him to deliver, on that former extra-judicial occasion, a statement with which his present judicial testimony is irreconcilable †

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* This love of justice, commonplace moralists, and even a certain class of philosophers, would be likely to call an original principle of human nature. Experience proves the contrary by any attentive observer of the progress of the human mind in early youth, the gradual growth of it may be traced.

Among the almost innumerable associations by which this love of justice is nourished and fostered, that one to which it probably owes the greatest part of its strength, arises from a conviction which cannot fail to impress itself upon the mind of every human being possessed of an ordinary share of intellect — the conviction, that if other persons in general were habitually and universally to disregard the rules of justice in their conduct towards him, his destruction would be the speedy consequence and that by every single instance of disregard to those rules on the part of any one (himself included,) the probability of future violations of the same nature is more or less increased. — *Editor.*

† Of the influence above spoken of in the text, the case of Elizabeth Canning, anno 1754, reported in the State Trials, affords a memorable example. Out of the knowledge of her friends, she had been absent from home for about a month, upon some love errand. On her return, being pressed by interrogations, she fabricated a story of her having been carried off for the purpose of violation to a house of ill-fame, a few miles from her abode in London; from whence, after being kept without food for weeks, in a manner almost miraculous, she at length made her escape unviolated The story exciting public attention, two women were apprehended, and tried for their lives, as for having robbed her in that house, and one of them convicted. The story being a compound of improbabilities, the convict was respited; and in the interval, counter-evidence of the *alibi* kind presenting itself

To the action of this interest a man stands exposed, whether the antecedent extra-judicial statement was true or false. If false, here, then, are two of the standing tutelary and mendacity-restraining interests — fear of shame and fear of punishment — acting by accident (one or both of them) in the direction and character of mendacity-promoting motives.

Not that in this case they act in general, either of them, with their whole force on the sinister side. For here, the testimony dictated by the fear of shame, with or without the fear of punishment, is, by the supposition, false and mendacious: it being false, the discovery of its falsity will, in a greater or less degree, be probable: and should such discovery eventually take place, then comes the shame and the punishment on that side.

Though it is only where present at the time, that an interest of any kind, acting in a sinister mendacity-promoting direction, can exercise any influence — produce any falsity, in the testimony; yet neither should the influence of any interest by which it may have happened to the testimony to have been acted upon at any antecedent period, be in every case disregarded. Supposing the witness not tied down by any antecedent extra-judicial statement as above, there is no interest prompting him to represent the matter in any other light than that in which it presents itself to his recollection at the time. But the influence of interest is not confined to the operation of delivering the testimony, nor to the point of time at which that operation is performed. At the time when the fact in question took place, it may have influenced, perverted, and parti....., the perceptions presented by it — the sort of cognizance taken of it: at any succeeding point of time, it may have influenced in like manner the recollection of it, the picture retained of it in the mind. For the will is on all occasions liable to be influenced by interest. Attention is in great measure at the command of the will: and by a partial direction given to the faculty of attention, conception and recollection are both capable of being rendered imperfect, and partial to one side.

On looking over the list of interests and motives, this or that one will be apt to present itself as being likely, upon an average, to act with greater force than this or that other. But there is no species of interest, the action of which has not, by the testimony of experience, been proved to be occasionally susceptible of every, or almost every, degree of force, from the lowest to the highest. In particular, there is none the action of which is not susceptible of a degree of force equal at least to that of pecuniary interest created by the greatest sum of money that has ever been depending upon a man's evidence.

A consequence is, that from the mere observation of the *species* of the interest to which the action of a man's testimony is exposed, no just inference can be formed respecting the degree.

Another consequence is, that neither on the *number* of interests and motives acting on the same side, can any such inference be grounded. For suppose half a dozen motives acting on one side, and on the other no more than one: in the instance of each of the half dozen interests, the degree of force may be so low, and at the same time that of the single interest so high, that the single one may preponderate.

This state of things is actually exemplified in the case of perjury for lucre. In the character of a seducing, a mendacity-promoting motive, the force of pecuniary interest preponderates over that of all the standing tutelary and mendacity-restraining motives — love of ease, fear of shame, fear of punishment, fear of God, sympathy for the injured: two, three, four, or all five of them, as the case may be.

If, from the action of five interests of as many different species on one side, while there is but one that acts on the opposite side, the inference of the preponderancy of the five over the one is not conclusive, — much less can the opposite inference be so — the preponderancy of the one over the five. On this subject, though no just inference, fit for the guidance of judicial conduct, can be deduced from numbers, yet if it were necessary to frame such an inference, the one nearest to truth would be that which should pronounce the chance in favour of the preponderancy of the five to be as 5 to 1.

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in abundance, she was prosecuted for perjury: and, after a trial of the unexampled duration of fourteen days, convicted: on evidence which — though at that time it divided the bench at the Old Bailey (composed chiefly of aldermen[a]) into nearly equal parts — leaves, at this time of day, not the smallest doubt. She was in consequence transported to America for seven years.

In this instance, by the force of one of the tutelary interests — fear of shame — the wretched woman was driven (we see) into an enterprise of murder against the lives of two innocent persons: as by the same impulse, so many unhappy women are every day drawn into a transgression, which, by a blind abuse of power, is devoted to the same murderous punishment, because, by an abuse of language, called by the same name.

[a] This absurd custom of putting aldermen in the commission, was continued by the 4 & 5 Will. IV. c. 36. As most of these gentlemen are engaged in trade, they are frequently absent attending to their own affairs, and then the public business is effectually stopped; for unless there are two commissioners present in each of the two courts, all the proceedings would be void. The rule is to have a real judge, who does the business, with an alderman sitting by his side, reading the newspaper.—*Ed.*

As the conformity or disconformity of a man's testimony to the line of truth, will, in relation to each distinguishable fact, depend upon the clear amount of the aggregate force of interest acting upon it in relation to that fact, — and that amount will depend upon the difference between the sums of the forces on both sides, — it is equally the business of the judge (in order to enable himself to form a right judgment concerning the credence due to the testimony,) to bring to light all those interests To confine his consideration to any one of them, would be as effectual a means as he could employ, were it his desire to be deceived

The testimony of every man being at all times exposed to the action of the tutelary, the mendacity-restraining interests, some or all of them, — while his being exposed to the action of any interest acting in a sinister direction — acting in the character of a mendacity-promoting interest, is but matter of accident, — it follows, that in the case of any given witness (antecedently to, or abstraction made of, his particular situation and circumstances,) truth is, in every part of his testimony, more probable than falsehood The only interest he has, acts, on this supposition, on the side of truth

On this supposition, the absence of mendacity, and even of bias, is on his part certain The truth of his testimony would also be equally certain, were it not for the infirmities to which, in the character of a witness, the intellectual part of every man's frame is liable ; — viz 1 Original mis-conception or non-perception , 2 Subsequent oblivion or mis-recollection , 3 Mis-expression

So many different facts as there are, that it falls in a man's way to speak of in the delivery of his testimony, to the action of so many different groups of interests may it happen to his testimony to be exposed

A consequence is, that the testimony of the same man may be true in some parts, false and mendacious in others

Where a man's testimony is not exposed to the action of any interest acting in a sinister direction, he will have either no wish at all in relation to the event of the cause, or if he has any wish, it will be on the side of truth and justice.

If, at the same time that it stands exposed to the mendacity-restraining force of the tutelary interests, it is exposed to the force of any interest or group of interests acting in a sinister direction, his wishes will be on that side: and his testimony, if true, will *pro tanto* have run counter to the current of his wishes If, at the same time, it is exposed to the force of any particular occasional interest acting on the same side with that of the standing tutelary ones, there will then be interest against interest, and his wishes will be on the one side or the other, according to the comparative force of the contending masses of casual interest

When the testimony of a man is delivered, in a cause in which he is a party concerned in interest, — in respect of every fact which, to his eyes, presents itself as of a nature to exercise an influence on the event of the cause, his testimony is exposed to the action of interest in a sinister direction, and by whatever part of his testimony (if any) a fact is asserted, the tendency of which is to contribute anything towards causing the suit to terminate to his disadvantage, that part of his testimony runs counter to the current of his wishes. As often as this is the case (*i e* that a fact possessing such a tendency is disclosed by his testimony,) there is, in regard to every such fact so asserted by him, a certainty that the disclosure of it has not been brought about by the action of any sinister interest, and therefore, that, if not true, it is at any rate not believed by him to be false and that the falsity (if there be any) is the result not of any sinister interest acting on the will, but of some infirmity (as above) the seat of which is in the intellectual branch of his frame In so far, therefore, as the testimony a man gives is of a nature to operate to his disadvantage, it presents a stronger reason for its being regarded as true, than can be presented by testimony to the same effect by any other person As far as a man's testimony makes against himself, it produces naturally on the mind of the judge a stronger persuasion of its truth, than can be produced by the testimony of any extraneous witness

To gain credence for a fact which, true or false, has been believed by the witness to be true, — instances have sometimes happened, where, by his testimony, he has deposed to facts, of the falsity of which he himself was conscious at the time *

Hence another consideration, helping to

* To apply this to religion. In perhaps all religions there have been sham miracles performed, and false accounts of miracles never performed. But, from a man's having joined in the performance of a sham miracle, or fabricated an account of a miracle known by himself never to have been performed, we are not to conclude that in each instance he has disbelieved the existence of miracles of earlier date, said to have been wrought under the same religion. These miracles (says he to himself) are true; but at the present conjuncture they do not produce that general conviction which it were so much to be wished they did Let us aid the efficacy of truth by a pious and useful falsehood.

By whomsoever else such policy may be condemned, it can never with any consistency be condemned by any of those lawyers who, on such an infinite variety of occasions, and without any assignable specific use, have given invention, currency, or support, to so many pernicious falsehoods.

show the weakness of the inference, that, because in one part of his testimony a man has been false, even to mendacity, therefore in all the other parts of his testimony he has also been false: the erroneousness of the rule, False in one thing, therefore in everything; or, Once false, and always false.

Without being mendacious, it may happen to a man's testimony to be false; and that, too, even in consequence of the action of interest: this is the case of *bias*.

By the force of bias, understand the force of any interest acting on his testimony in a sinister direction, and in such manner as to produce, on the part of such his testimony, a departure from the line of truth, but a departure such as he is not conscious of.

Falsehoods produced by bias, are such, and such alone, of the falsity of which, he by whom the false testimony is delivered is not conscious at the time.

It is not every sort of falsehood that a man is capable of uttering, or at least apt to utter, without being conscious of.

The sorts of falsehoods into which a man is most apt to be led, are the following, viz.

1. Negative falsehoods; falsehoods consisting in the denial of some fact or circumstance which in reality took place.

A man's attention is, in a great degree, at his command: which is as much as to say, under the direction of his wishes. What, on any account, he finds a pleasure — an unmixed pleasure, in attending to, he attends to of course: what it gives him pain to attend to (understand, a clear balance on the side of pain,) he withdraws his attention from; unless the pain produced by the perception be so great as to divest him of the command he possesses over his attention in slighter cases.

2. Falsehoods in degree; or, in other words, falsehoods of exaggeration, falsehoods respecting degree, — viz. in number, weight, or measure. Of the exact degree he has no recollection, of the correctness of which he is himself persuaded: if he has, the falsity is mendacity, not the pure result of bias. He is fearful of departing from the truth, to the prejudice of that side to which his wishes are attached: by this fear he is driven into an error on the opposite side — an error to the prejudice of the opposite side. Suppose the falsity consists in representing the degree greater than it is. Under the apprehension of representing it as less than the reality, he has represented it as being greater. The considerations which pleaded in favour of increase being conformable to the bent of his wishes, being agreeable to him, being sources of pleasure, the force of his attention was directed upon them, since it went to increase that pleasure. On the other side, pain being the consequence and accompaniment of the attention, the attention as naturally turned aside from it.

CHAPTER III.

OF PECUNIARY INTEREST, CONSIDERED AS A GROUND OF UNTRUSTWORTHINESS IN TESTIMONY.*

In estimating the force of a pecuniary interest in its action upon the testimony of a man whose character in respect of probity is not taken into consideration, two main points are to be considered: —

1. The value of the respective interests in themselves.

2. The pecuniary circumstances of the person.

In estimating the value of a pecuniary interest, four points are to be considered: —

1. The magnitude of the sum by which it is represented.

2. The value of it in respect of time; *i. e.* according as it is in possession or not in possession.

3. If not in possession, the value of it in respect of certainty, according as the interest is vested, or the possession depending for its commencement upon contingencies.

4. The duration of it: in respect of which (in so far as the interest is represented by a sum of money) perpetuity, unless anything be specified to the contrary, is supposed.

In whatsoever shape the property creative

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* If the slight sketch, in the way of instruction, here given, be of use with reference to the present purposes, so will it for the purpose of divers other operations performable on the field of judicature: as, for example: —

1. Liquidation of the quantum of punishment, when (in part or in whole) pecuniary.

2. Liquidation of the quantum which, in the name of satisfaction for loss, with or without injury, a plaintiff ought to receive.

3. Liquidation of the quantum which, on the same score, a defendant ought to be compelled to pay.

For, on this ground, the views of the judge will be incomplete and partial, if (where the importance of the cause warrants it, and the difference of circumstances is considerable) the circumstances on both sides be not taken into the account.

4. Adjustment of the pecuniary burthen proper to be occasionally imposed on parties, extraneous witnesses, or third persons, in the course of procedure, rather than that failure of justice or misdecision should take place. See Book IX. Part II. *Cases in which Exclusion is proper;* Chaps. II. and III. *Vexation and Expense.*

On all these accounts taken together, a complete and carefully constructed set of instructions on this head would, in every code of procedure, be a fit and useful, not to say a necessary, document.

The present pretends to no other character than that of a sample, and imperfect outline.

of the interest happens to be — where (for the purpose of comparison with another interest) any correct estimate is to be formed of it, — it must, if not already existing in the shape of a sum of money, be reduced to that shape.

The value, and consequently the mendacity-promoting force, of a pecuniary interest, the money not being in hand, is less and less, in proportion as the time at which it is to be in hand is more and more distant

So (the time at which, if at all, it is to come in hand, being given,) in proportion as the event of its coming in hand is more or less uncertain, *i. e.* in the proportion between the number representative of the chances against its coming in hand, and the number representative of the chances in favour of its coming in hand

In regard to uncertainty, a distinction must be noted between the case where the event depends merely upon physical causes, not depending in ordinary cases upon the will of man (such as the death of Titius before that of Sempronius,) and the case where it depends wholly or partly upon moral causes (such as the will of Titius or Sempronius.) In the former case, the interest will in general have a rateable value; and the force of it may be rated at the sum which, if sold, it would (as supposed) produce In the other case, it cannot, generally speaking, have any rateable value, and yet the force of it, when acting upon testimony, may be little different from that which it would act with, were the receipt of the sum regarded as not subject to uncertainty.

Suppose a son, the only child of his father, the father a widower, and beyond the age at which it is usual for men to marry, or, if married, to beget children the estate of the father at his own disposal, not assured to the son by law of the disposition of the father, in respect of amity towards the son, nothing known, therefore amity, to be presumed At market, the interest of the son in the property in possession of the father (he not joining in the sale) would not be saleable Yet, suppose the title of the father to the whole estate to be in dispute, and the son examined as a witness the force with which the mendacity-promoting interest created by the value of the estate, acted upon his bosom, would not be in this case materially less than what it would be had the estate been assured to him by law, — viz to be received by him after and upon his father's decease

In like manner (even setting aside whatever interest might in this case be constituted by the tie of sympathy,) the force with which their respective interests in the estate acted on their respective bosoms, would not, in the bosom of the son, be diminished by a sum so great as the sum representative of the value of the estate for and during the father's life; inasmuch as, during the life of the father, the son is naturally a sharer in the advantages attached to the father's property, notwithstanding the legal dependency of the quantum of that share upon the father's pleasure.

In a rough way, and even in a way sufficiently adapted to divers other purposes, the state of a man's circumstances may be expressed by the difference between the saleable value of his property in hand, and the sum of the debts (including pecuniary obligations of all sorts) to the discharge of which he stands bound

But, for the purpose of estimating the seductive force with which a given mass of pecuniary interest may be considered as acting on a man's testimony, several other circumstances will require to be taken into account, viz.—

1 The state of his pecuniary circumstances in respect of present exigency or the proportion between present need and present means: and this, whether the sum in question be needful for the purpose of procuring greater profit, or of saving him from greater loss Remember, to this purpose, the story of Esau, who, under the pressure of hunger, sold his birthright for a mess of pottage.

2 Proportion between his exigencies, in respect of domestic relations, and his pecuniary means, according as the effect of such relations is to charge him with pecuniary obligations, or to afford him pecuniary support. Whether the proposed witness be of the one sex or the other, be unmarried or married, be childless or have children, and in what number, and whether arrived or not arrived at a state of self-maintenance, whether they be respectively of that sex which has fewest wants and most resources, or of that which has most wants and fewest resources, with what other relations (if any) in any of the lines of natural relationship, descending, ascending, or collateral, the witness has any connexion, contributing, as above, to augment the sum of his resources on one hand, or that of his exigencies on the other.

3 Proportion between his pecuniary means (viz the clear amount of them, after addition of the amount of domestic supplies, and deduction of the amount of domestic charges, as above,) between his pecuniary means thus explained, and his exigencies (if any) in respect of political station in life since, of two persons with the same quantum of clear pecuniary means — one, low in rank, may be in a state of affluence — another, high in rank, in a state of indigence.

4. Habitual rate of expense is not in this respect altogether without its influence. Two men, in pecuniary circumstances in every respect equal — the one habitually spending his whole income, the other but the half of his,

— a sum to a given amount, whether coming in, in the shape of extraordinary gain, or going out, in the shape of extraordinary loss, will be apt to find the testimony of the non-saving man more sensible to its influence than than that of the saving man.

For the guidance of the judge's mind, in the formation of his estimate of the trustworthiness of the deponent's testimony, it will in most cases not be worth while for him to subject either the deponent or himself (not to speak of extraneous witnesses) to the vexation attached to a chain of investigation thus particular and intricate. But there are cases in which it may: and since it will often happen that, of the above particulars, a number more or less considerable will come to light in the course of the cause, as it were of themselves, or without any trouble worth regarding, — on this account it seems desirable that the influence of them should be habitually present to the mind of the judge.

The sum in question — and a man's sensibility to pecuniary influence, in so far as it can be collected from circumstances of an external nature (as above,) — being both given — the influence of the same sum will be greater — much greater, in the case of its going out of hand, in the shape of antecedently unexpected *loss*, than in the case of its coming into hand, in the shape of antecedently unexpected *gain*.

Value of a man's property to-day, say £1000: sum at stake upon his testimony, £500. Let this sum be taken from him to-morrow, — the amount of his property to-day is twice as great as what it will be to-morrow. But let this same sum be given to him to-morrow, — the value of his property to-morrow will not be twice as great as it is to-day.

But suppose that it even were twice as great: the matter of wealth is of no value, but in proportion to its influence in respect of happiness. Multiply the sum of a man's property by 2, by 10, by 100, by 1000, there is not the smallest reason for supposing that the sum of his happiness is increased in any such proportion, or in any one approaching to it: multiply his property by a thousand, it may still be a matter of doubt, whether, by that vast addition, you add as much to his happiness, as you take away from it by dividing his property by 2, by taking from him but the half of it.

In many instances there will be a difficulty in deciding, in the case of receipt of money, whether it be to be placed to the account of gain, or of exemption from loss: and, in like manner, in case of disbursement, whether to the account of loss, or of non-receipt of gain. Of this difficulty, when it occurs, it concerns the judge to be aware: but there are many instances in which it has no place.

CHAPTER IV.

OF INTEREST DERIVED FROM SOCIAL CONNEXIONS IN GENERAL.

GAIN or loss may be expected either from the compulsory operation of law, or from the uncoerced conduct of individuals

The value of the sum at stake being given, and the degrees of proximity and certainty respectively attached to the receipt or loss of it being given, — whether it be from the dispensations of law that the assurance of acquisition or loss is derived, is a question, the answer to which makes (it is evident) no difference in the value of the interest, nor thence in the force with which it is likely to act upon testimony in the character of a mendacity-promoting or mendacity-restraining motive.

If (in respect of the value of the interests created, and the force with which they respectively act upon testimony) acquisition and loss, when considered as resulting from the dispensations of law, are in general superior to acquisition or loss to the same amount when expected from causes with which law does not interfere, — this superiority is far from being constant or universal. Of the operations of law the effect can never be so prompt as the effect of operations in which the law has no concern is in many instances. And, how necessary soever the coercive and protective force of law may in general be, to the giving to men's possessions a degree of certainty not derivable from any other source, — yet, in many instances, acquisition or loss, looked to from this or that source, will appear to a particular individual still more certain, as well as prompt, than any acquisition or loss to the same amount that could have been expected by him from the hand of law.

For years together a journeyman has been employed by the same master at a guinea and a half a-week. from any other master he would not expect to get above one guinea a-week: it is in the power of the master, any Saturday evening in the year, to break off all connexion with him on paying him the guinea and a half for his week's work. Says the master to the journeyman, On Friday next you are to appear in such or such a court: if, on that occasion, you do not give testimony to such or such an effect, the wages you receive the next day will be the last wages you ever receive from me. Who does not see that the force with which a threat to this effect acts on the testimony, will be greater than if, in the event of his giving a testimony opposite to that required of him as above, he were to incur a legal debt to the amount of twenty-six guineas (a year's extra wages,) he not being destitute of the means of paying it?

Vary the case, by substituting for employer and journeyman, cusfomer and dealer: both of these in the condition of masters the result, in respect of the action of the interest on the testimony of the witness, will not be materially different

Let the event, on which the supposed debt of twenty-six guineas attaches upon the journeyman, be this,—viz that of the master's gaining the cause Here, then, is an apparent interest, appearing to act upon the witness in such manner as to incite him to testify *against* his master, though it were at the expense of truth, while yet, in fact, he is incited to testify *in favour* of his master, by an opposite interest, which, though perhaps not apparent, is much stronger than the apparent one

Ties of this sort are alike obvious and numerous In point of force—even supposing the interest created in each instance to be a mere pecuniary interest, unfortified by any mixture of sympathy—it is no more susceptible of any determinate limits than the interest constituted by a liquidated sum payable on the spot. If, then, to the exclusion of these less conspicuous but not less powerful ties, the judge were to keep his eye fixed on the interest constituted by a liquidated pecuniary sum, he would be in a way to be continually deceived *

If, in the cases where it is thus, as it were, latent and unconspicuous, the single force of pecuniary interest is capable of rising to a level with any to which a conspicuous interest of the same kind is usually wont to rise,—much more is it where it happens to it to be corroborated by the force of sympathy

In this situation, in the ordinary state of things, are to be found the several descriptions of persons who stand connected with others by the ties of natural relationship—

1 The child, with reference to the father, or mother, or both.

2. Any person junior in age, by whom expectations are entertained from the bounty of a relation senior in age, whether in the simple ascending line (as grandfather or grandmother,) or in the double or collateral line (as uncle or aunt in any degree, or their descendants in any degrees)

Exclusive of the complex interest composed of a mixture of pecuniary interest and natural sympathy, is the interest which has place where the one of the parties is subject to the direction and government of the other

The case in which this sort of interest is capable of existing in its purest state, unmixed with any of the other interests that are so naturally connected with it, is that which, in the bosom of the ward, is created by his dependence on the guardian Pecuniary interest, howsoever accidentally combinable with it, belongs not to the case and as to sympathy, if it be a natural accompaniment, neither is antipathy an unnatural one: at any rate, if it be supposed that upon an average there is a balance on the side of sympathy, it cannot be supposed that this balance can in its amount approach near to that which has place in the more ordinary case, where the relationships of guardian and parent are combined in the same person

Now the interest created by dependence on natural domestic power,—of what is it composed? Of the fear of pains of many kinds, added to the hope of pleasures of most kinds

The interest capable of being created in the bosom of the domestic subordinate, by his dependence on his correlative superordinate, is so obvious as scarcely to require mention, though it were only in the way of memento

The interest capable of being created by the same relationship in the bosom of the superior,—this interest, howsoever obvious, is somewhat less obvious than the interest created in the correlative and opposite case

In general, and throughout the circle of domestic relationships, the social interest—the interest of sympathy, is apt to exist in greater force in the bosom of the superordinate, than in the bosom of the subordinate—in the bosom of the parent than in the bosom of the child, and so on through the string of more and more distant relationships, which are, as it were, the images, fainter and fainter the oftener they are transmitted or reflected, of the relationship betwixt parent and child. Of this disparity, the cause is to be found in the pleasure of power peculiar to the parent, and in which the child, though the source of it, has no share If in this or that instance the balance be reversed, the cause is to be looked for partly in the superior sensibility of youth, partly in the idiosyncratic temperament of the individual

But besides this social interest, the relationship of the superior to the subordinate is susceptible of giving lodgment to an interest of the self-regarding kind, which must not be overlooked. In the case of parent and child, the superior stands bound by a variety of ties to make provision for the sustenance of the subordinate But, the more of his sustenance the child draws from sources other than the pecuniary funds of the parent, the

* In virtue of the existing exclusionary rules, this state of constant deception has been, time out of mind, the lot of English judges. But, the mischief falling exclusively upon the party in the right, while the advantage of it is shared between the party in the wrong and the firm in which the judges are the acting partners, no deception (it has been seen) was ever submitted to with a more unruffled acquiesence.

less is the quantity by which it is necessary he should diminish the amount of these funds. As often, therefore, as money is at stake in a suit to which the child is party, and the parent a witness, — the interest to the action of which the testimony of the witness is exposed, adds to the universally-operative social interest an interest strictly pecuniary, an interest of the self-regarding kind. And so, in regard to all persons standing in this respect in the place of parents: allowance being made for the comparative faintness of the obligation, legal or moral, in their respective cases.

An interest exerting its influence on testimony, is alike capable of being created by the hope of good, and by the fear of evil. On many occasions, the object being given, hope and fear looking to that object run into one another, and are undistinguishable. for when a good of any kind has been habitual in a degree sufficient to keep up expectation of its continuance, it is difficult to say to which of the two denominations, hope or fear, the expectation entertained in relation to it ought to be referred in preference to the hope of retaining, or to the fear of losing it. In a more particular degree, the observation holds true in regard to that particular species of good, which is composed of, or has for its efficient cause, the matter of wealth. money, money's worth, and whatever may be to be had by means of money.

Here and there, perhaps, a mass of interest may be found, consisting of the fear of evil, without any hope of good — a mass of interest having no connexion in any way with the matter of wealth. Suppose two persons in office, military or unmilitary, the one, to some purposes, under the direction of the other; from the favour of the superior, the inferior is not in the habit of deriving, nor in the way to derive, money or money's worth: on the part of the inferior, therefore, the fear of evil (if it exists) exists in a state of relative purity, unmixed with the hope of good. Suppose, then (what is generally the case,) that without committing himself in any way (*i. e.* without subjecting himself in any degree to legal punishment, or even, to appearance at least, to any certain and decided portion of shame,) it is in the power of the superior to inflict habitual vexation on the other: the force of this vexation, is the force with which the will of the superior is capable, in an influential way, of acting on the conduct of the inferior, on any such occasion as that of delivering testimony, as well as on any other.

Let the degree of vexation thus producible be such, that whereas the official emolument of the inferior is equal to £100 a year, — to rid himself of this vexation, he would be content to render, under another superior, the same official service for £20 a-year less. On this supposition, the non-pecuniary interest by which the testimony of the inferior may be acted upon in any direction, proper or sinister, is equal to a pecuniary interest constituted by the eventual assurance of a loss (he having the means of sustaining it) equal to the present value of an annuity of £20 a year for his life; at twelve years' purchase, say £120.

In the case of these several relationships, comparison being made between sympathy and antipathy, — sympathy will naturally be regarded as the sort of affection predominant, on an average, the balance of such affections as are not of a self-regarding nature, will naturally be looked for on that side, and as adding its force to whatever may happen to be exerted by the pecuniary interest, and the other self-regarding ones.

But it would be a gross oversight, and a copious source of deception to the judge, if (to the purpose of judging of evidence, or to any other purpose) he were to be altogether unaware of the casual predominance of the dissocial affection of antipathy, even between the nearest relations. On a variety of occasions which force themselves upon his view, he beholds the marks and fruits of their antipathy in the suits to which they are the contending parties: and well may he conceive that the cases in which the antipathy thus manifests itself, form but a part, and that a small part, of those in which it exists, and that in a degree capable of exercising on testimony a sinister influence.

The inference, therefore, which is to be grounded on the several relations, domestic and political, is, — a general presumption of mutual sympathy — stronger or weaker according to the nature and degree of the relationship, — but, on every occasion, liable to be rebutted by special evidence.

CHAPTER V.

OF INTEREST DERIVED FROM SEXUAL CONNEXIONS.

I. THE superiority of the interest which the relation of husband and wife is capable of creating, when compared with the interest capable of attaching itself to any of the others, is too obvious, and too clear of dispute, to need bringing to view by any special observations.

The only particulars to which, on the subject of this relation, it can ever happen to need bringing to view, are the cases forming so many exceptions to the general rule: the cases in which the interest commonly attached to this relation, and acting on testimony in a correspondent direction and with a correspondent degree of force, may happen to act with an inferior degree of force, though in

that same direction; or even in a direction plainly opposite

The general rule is too obvious to admit the possibility of the judge's regarding it in any case with a degree of attention inferior to that which is its due. On this occasion, as on others, one great use of a body of instructions from the legislator to the judge, is the preventing him from seeking, in the cover afforded by general rules, a cloak for imbecility, or indolence, or negligence, or indifference, or partiality, or corruption of a still grosser nature — in the present instance, for affecting to see an influencing interest where there is none, or to see such interest where there is an opposite one, for presuming the bias of the witness to be on one side, when the facts in the cause, if he chose to look at them, would show it to be acting on the opposite side.

A suit or cause, criminal or civil, the husband, plaintiff or defendant on his side, or on the opposite side, the testimony of his wife is called in. If nothing else appears in the cause than that she is his wife, — if of the terms on which (in respect of amity or the contrary) they live, no special indications present themselves — nothing but the existence of the matrimonial relation, — the ordinary degree of affection must, and will of course, be understood to subsist.

But this presumption ought to be understood as capable, for this purpose, to be rebutted at any time, by the proof of special facts indicative of the contrary: such as separation, whether by consent, or by authority of law, elopement on the part of the wife, habitual and open adulterous cohabitation, on the part of the wife, in a house separate from that of the husband.

But neither should these indications, howsoever strong the presumption which they afford, be regarded as conclusive evidence of the absence of all interest.

Separation will not take away the pecuniary interest which the wife has in the gain or loss that may happen to her husband, unless her maintenance is fixed, has been so for a length of time, and all intercourse between them has ceased: nor even then altogether, since pecuniary loss on the part of the husband would in some cases disable him, wholly or in part, from affording such maintenance.

Notwithstanding separation, elopement, or adulterous cohabitation still subsisting, the common interest may have regained its original force, if from other incidents there appears reason to believe that a reconciliation has already taken place, or is likely to take place.

The interest, and its influence on the testimony, depending not on the outward and factitious bond or symbol of connexion, a token given at some distant point of time — but upon the affections prevalent in the bosom of the witness at the very time of the utterance of her testimony, — whatever indications of a contrary interest happen at that time to present themselves, present the same demand for the judge's attention as any other evidence by which the trustworthiness of testimony may be affected.

On this occasion, however, it concerns the judge to keep his attention open to two circumstances.

1. One is, that — where the importance of the cause, in its own nature or in the eyes of the party and witness, is such as to create an interest capable of supporting them under the trouble of the imposture — appearances of dissension, and even enmity, between the husband and the wife, may be put on, for the purpose of rebutting the presumption of conjugal partiality, and thence gaining for her testimony a degree of credit beyond what properly belongs to it.

2. Another is, that whatsoever ill-humour or antipathy may be really prevalent at the time, the pecuniary interest (a self-regarding interest, an interest in a considerable degree inseparable from the legal obligations attached to the connexion) remains on the other side to oppose its force to that of the dissocial interest: so that unless the case be such that the disadvantage that would fall on the husband in consequence of the loss of his cause, would have no material effect on his purse, — her testimony will not, by any such disagreement, be divested of all bias in favour of his side of the cause, unless (as is sometimes the case between adversaries, e. g. in all acts of aggression so open as to expose the aggressor to inevitable punishment) her antipathy for her husband has for the moment become stronger than her regard for herself.

The estimation in which a woman is held, is apt to be more or less disadvantageously affected, when, after her having cohabited with a man in the character of his wife, a discovery is made that there was no marriage, or that for some cause or other the marriage was void. In general, therefore, were no other interest at stake than the interest of her reputation, — in a cause in which the fact or validity of the marriage were in question, the testimony of the wife, if examined on that side, would be drawn by a strong bias to the affirmative side.

Yet cases are not wanting in which the bias would be still more incontestably on the other side. For example, where the wife is prosecuted for bigamy. If she can induce a persuasion that the supposed former marriage never took place in fact, or was not legal, she thereby exempts herself from whatever punishment is attached to that offence.

In adultery on the part of the wife, concealment is commonly an object with both

delinquents; and so far as it is preserved, reputation remains unaffected. But open adultery is likewise not without example: nor is the case without example, in which, for the purpose of divorce, proofs of the transgression have been purposely furnished by the wife.

In a cause in which the husband is a party, concealed adultery on the part of the wife cannot with reason be regarded as a circumstance diminishing in any considerable degree (much less destroying) the complex and powerful interest by which the testimony of the wife is drawn towards the husband's side. The unity of pecuniary interest, and of that sort of reputation which is attached to condition in life, remains unimpaired. With ill-will, in any degree, the transgression has on her part, though a most natural, not a necessary connexion, either in the character of cause or in the character of effect. Friendship may remain unchanged. The only thing certain is, the existence of a man in whose society she has reaped a sensual gratification, which (by reason of absence, or debility, or indifference, or estranged appetite, or inferiority in personal accomplishments,) she has failed of experiencing in the arms of the man to whom she is joined by law *

For rebutting the presumption of partiality created by the legal connexion—a partiality in general little inferior in strength to that which either, being alone, would feel for his or her own cause,—the judge will naturally carry to account whatsoever counter-indications happen in any case to present themselves. But it is seldom that the utility of such lights, with reference to truth, and security against deception and consequent misdecision, will be important enough to outweigh the vexation, expense, and delay—more particularly the vexation that would naturally be inseparable from an inquiry carried on for that special purpose.

Cases, however, warranting and prescribing such inquiry, are not altogether out of the natural course of things. Suppose a homicide, and the husband under prosecution for the murder. In the ordinary state of things, and to judge on the ground of general presumptions, the testimony of the wife should be little less partial to the husband's side than his own would be. But cases have happened, in which a wife, by herself, or in conspiracy with others, has been concerned in the murder of her husband; and the case may be, that bearing towards her husband a degree of ill will strong enough to have determined her to the enterprise of ridding herself of him by such flagitious means (her husband being innocent of the crime, and known by her to be so,) her design is to employ her testimony to the purpose of procuring him to be convicted. In this case, the prevention of the tremendous calamity of judicial homicide may depend on a scrutiny into the particulars of the habitual intercourse between the husband and the wife.

II. For the particular purpose here in question,—for the purpose of judging of the influence of social connexion upon testimony,—it will not always be easy to say whether, in the case of the female testifying in a cause in which the male is a party, the action exerted on the testimony by the interest resulting from the connexion, is likely to be most powerful in the case of the wife, or in the case of the concubine.

In the case of the wife, the bond of connexion (excepting in the extraordinary case of divorce) is perpetual: in the case of the concubine, it may be dissolved at any time, at the pleasure of either of the parties.

But, in the case of the concubine, the proof of sympathy borne to her by the male is more conclusive than in the case of the lawful wife; for if no such affection existed, the probability is, that he would not maintain her in that character, whereas in the case of the wife, though aversion had taken the place of amity, she would not be the less his wife.

On the other hand, again, the point in question here is not the affection of the male as towards the female, but the affection of the female as towards the male. But, of the affection on the part of the female towards the male, the existence of the sexual connexion is comparatively but a remote article of evidence. Without affection on the part of the male, the connexion would not continue: but it may continue without any affection on the part of the female; since her means and even prospects of subsistence may depend upon it. It may be, that from the first the sentiment never had existed: perhaps, having originally existed, it has become extinct: perhaps it has not only become extinct, but given place to the opposite sentiment, antipathy.

Let the cause in which the male is a party be of the number of those in which money is at stake. Let it be considered, in this particular case, what differences are presented between the situation of the wife and the situation of the concubine.

In the ordinary state of things, the interest

* Among the Lacedæmonians and Romans, though adultery was no more dispunishable than horse-stealing, a man would lend his wife to a friend as he would his horse. To whatsoever degree illaudable, the custom does not the less prove the rashness of any opinion that should regard adultery on the part of the wife as a proof of the extinction of that partiality, by which, in a cause in which the husband is party, her testimony will naturally be drawn towards the husband's side.

[In France, before the revolution, the effect even of notorious adultery in diminishing that partiality was as nothing.—*Editor.*]

of the wife in this case is identified with the interest of the husband Sharing together, and in the company of one another, the common property (though in proportions in some degree dependent on the pleasure of the stronger party,) the gain of the husband is the gain of the wife, the loss of the husband the loss of the wife In the case of the concubine, the identity wants much of holding good, since the connexion may be dissolved at any time

But whether there be gain or loss, the wife will be still the wife In case of gain, her share in the additional mass will not be apt, in her expectation, to differ from the share she had been accustomed to occupy in the original mass and so (*mutatis mutandis*) in the case of loss, her share will be, in her expectation, naturally in the same proportion

On the other hand, in the case of the concubine, the gain (if to a certain degree considerable) may, in her expectation, be liable to excite his thirst for pleasure, and send him in search of more agreeable connexions, either in the same way, or in the way of marriage but, moreover, in case of loss, the loss (if to a certain degree considerable) may render the pecuniary burthen too heavy to be borne by one who has it in his power to rid himself of it at any time.

One case there is, in which it is but natural that the interest of the concubine should act with much more force on her testimony, than the interest of the wife on her's This is where, though the marriage has not been dissolved to the purpose of giving room for another marriage, the wife lives separately from her husband, and at a fixed allowance In this case, be the gain of the husband what it may, the expectation of sharing in it is not likely to have place in the bosom of the wife whereas, in the bosom of the concubine (unless where the gain appears considerable enough to excite new projects,) an expectation of a share in the concern will come of course As to loss,—in the bosom of the concubine, the prospect of it will excite a double apprehension—the apprehension of seeing her share diminished, and the apprehension of experiencing a total dissolution of the connexion from which it should have flowed But to any such loss the separated wife may be comparatively indifferent, unless among the effects of it be that of trenching upon her separate maintenance

Two obvious circumstances there are, by the force of which the condition of a concubine is gradually led towards a coincidence with the condition of the wife One is, the birth of children especially when, by their continuance in life, their existence adds every day to the force of the bands by which their parents were united in the first instance the other is, the duration of the connexion between the parents themselves *

Where the importance of the cause is such as to warrant the inquiry, the judge will perceive that the force with which an interest of this nature is capable of acting upon testimony, has at least as good a claim to be taken into the account as that of any interest of a nature merely pecuniary, expressible by a definite sum, liable to be gained or lost by the testimony, according as the result of the cause is in favour of the one party or the other

From the addition of any other interest or interests operating in the same direction (be their force what it may,) pecuniary interest cannot but receive additional strength and efficacy And if, in the case of a pecuniary interest derived from this or any other of the social relations, the quantum is not so apt as in the case of a simple pecuniary interest, to be susceptible of liquidation—of being expressed by a determinate sum,—the force with which it is apt to act on testimony is scarcely on that account the less considerable Of a sum not liquidated by any arithmetical process, the dimensions are left to be adjusted by the imagination, and in a case of this sort, the imagination is not less apt to err on the side of increase than on the side of diminution

The relation of concubine to keeper is not recognised by the laws, or it would not be what it is it would be changed into that of wife to husband In some countries it has been—in any country it is capable of being, taken for a ground of punishment That which the legislator is disposed to punish—that which he would wish to prevent—that which he would prevent if it were in his power, and if the mischief of the coercion necessary to prevention would not outweigh

* Of this latter circumstance such is the force, that, under the laws of some countries, cohabitation, without further proof, unless it be the acquiescence of the man in the assumption of his name by the woman, is regarded as possessing, to that purpose, whatsoever force has been given by law to the prescribed solemnities—[This may be said to be the case in Scotland, where parties are held as married, if they have lived "habit and repute as man and wife;" that is, if they have allowed themselves to be treated by society as man and wife, without taking measures to show that they wish their connexion to be held in another light Were it proved, however, that the passing for husband and wife was in pursuance of a design concocted beforehand by the parties, to serve a separate purpose,—say to save the woman's reputation,—marriage would not be held to have taken place. It has to be observed, that the cohabitation does not, of itself, constitute marriage;—it is merely held as a proof of its existence—of the parties having consented to be married.—*Ed.*]

the mischief of the obnoxious practice,—cannot be regarded with satisfaction by the legislator, nor ought in general to be so by the judge. But in his displeasure, how strong soever it be, neither the one nor the other will find any sufficient warrant for withdrawing their attention from the object by which it is called forth: from the object, or from the effects, good or bad, which flow from it on all sides.

Where the existence of such a connexion is taken for a ground of punishment, it might be a severe task upon the sympathy of the judge, were it out of his power to form his opinion relative to the existence of such a connexion for the purpose of judging of its influence upon testimony, without proceeding to apply such his opinion to the same fact considered in the light of an act of delinquency, and thereupon to apply punishment in consequence. Fortunately, no such collateral conclusion need be formed. To warrant the application of pure punishment—of a suffering which produces not, on the part of any other individual, any enjoyment to counterbalance it,—stronger and more cogent proof is requisite, than in the case in which that which passes out of the hand of one man in the shape of loss, passes into the hand of another man in the shape of gain; insomuch that, by the transference, though something in the way of happiness, yet not everything, is lost upon the whole. For the purpose of punishment, neither community of abode, nor domination of the female by the male, nor both together, ought to be accepted as sufficient proof, in the character of circumstantial evidence: but, for the purpose of judging of the influence of domestic relation upon evidence, such intercourse may well serve for sufficient proof, subject to the effect of any counter-evidence deducible from other sources.

In the case of concubinage, the common subsistence is, for a variety of obvious reasons, most apt to have for its source the property of the male. Hence, in the relation between keeper and concubine, the station of keeper is (in the ordinary course of language, as in the ordinary course of practice) referred to the male sex—that of concubine to the female.

Instances, however, in which the parts have been reversed, are not without example; and to the judge, as to the legislator, nothing that can ever happen to call for his attention ought to be strange.

To a case thus deviating out of the ordinary course of things, it seems scarcely necessary that any detailed instruction should be adapted. In what respects this converse case agrees with the ordinary case, will be easily pointed out by *analogy:* in what respects they differ, may, with little more difficulty, be discovered by the light of *contrast.*

III. It remains to consider the simple case of the relation between two lovers.

The passion of love is a passion of the force of which, on other occasions, it cannot well happen to the judge not to be aware: it would be a sad oversight, if, on an occasion of such importance as the one here in question, its influence were to be overlooked.*

Without any aid from pecuniary interest, the interest created by this passion is capable of rising beyond any height to which pecuniary interest (particularly in a state to act on testimony) has ever been known to arise.

But, in the state of things in which love aims at marriage, pecuniary interest is capable of adding its whole force.

In the case of the male, the impression made by the personal charms of the female may have risen to any degree of strength; there are no limits to the quantum of the property in possession or expectancy, in which he may be entertaining expectations of possessing a husband's share, and the right to which may be dependent on his evidence; his own may amount to anything or nothing; nor are there any assignable limits to the load of debt under the pressure of which it may happen to him to labour.

Change the sexes: what difference there may be, will be scarcely worth noting for this purpose. The power which, by marriage, the female acquires over the property of the male, is not in general so great as the power which, by the same contract, the male acquires over the property of the female. In this respect, the force with which the interest created by the relation in question is capable of acting on the testimony of the female, may be considered as suffering some diminution in comparison with the opposite case, though a diminution so precarious, as, on the present occasion, to have scarcely any claim to notice. On the other hand, as property is apt to fall in larger masses into the lap of the female than into that of the male, at the same time that the male is less restrained than the female in his choice, elevation by this ladder has been more apt in the instance of the female sex than in the instance of the male, to have risen to extraordinary heights. From the very lowest origin, females have been raised by marriage even to the throne. Men, though they have been raised to a station equally high, have never, by that same ladder, been raised from a station equally low.

CHAPTER VI.

OF INTEREST DERIVED FROM SITUATION WITH RESPECT TO THE CAUSE OR SUIT.

In every cause, each party (except in so far as it may happen to him to be a mere trustee,

* It is completely so by English law.

and not connected by any tie of sympathy with any party having a self-regarding interest in the cause,) each party has of course, in virtue of his being a party, some sort of interest in the cause and, supposing him heard or examined in the character of a witness, the direction in which this interest acts (in so far as it acts with any sensible degree of force) will be in the mendacity-promoting line

But, independently of legal forms (such as that which requires the concurrence of trustees who have no self-regarding interest, and perhaps no interest of sympathy, in the cause) it will frequently happen, that the interest which a man derives from his situation in the character of party in the cause — be it on the plaintiff's side, be it on the defendant's side, — will be practically imperceptible This casual minuteness is, however, confined in a manner to the class of cases which exhibit a multitude of parties on the same side for if a man stands alone, the fact of his subjecting himself to the vexation and expense incident to litigation, affords effectual proof, that the interest derived from his station in the cause possesses a magnitude sufficient to exert a real influence

In general, the interest which the proposed witness thus possesses in virtue of his station in the cause, will be the only interest, except that of the standing tutelary interests, to the action of which his testimony will, on either side, stand exposed But as it may happen to the testimony of any man in the station of extraneous witness, so may it to that of any man in the station of plaintiff or defendant, to stand exposed to the action of any number of casual interests, on either side, or on both sides, and these, each of them, in any degree of force On any occasion, it may consequently happen, that the force of this standing mendacity-promoting interest shall be counter-balanced and over-balanced by casual interests acting on the other side, — that is, in conjunction with the standing tutelary ones And to any such casually operating interest it may happen to apply to the whole of the party-witness's testimony, or to any part or parts of it less than the whole; that is to say, one or more of the entire assemblage of facts comprised in it

Out of this state of things, several anomalies will be apt now and then to arise, of the possibility of all which, it becomes the judge to be advised

The interest which a party (be he defendant, be he plaintiff) has in the cause, will not, *of itself*, be sufficient to restrain him from giving false testimony to the prejudice of that interest, if there be any interest to a greater amount that acts upon him on the opposite side. There is no defendant, who, *all other interests apart*, would not yield to an unjust demand of £10, and even confess the justice of it, if by so doing he were assured of gaining £20 There is no plaintiff, who, all other interests apart, would not desist from a just claim to the same amount, and even confess the injustice of it, for the same recompense

But, so far from being absolutely certain and uniformly efficient is even the united force of all the tutelary mendacity-restraining interests, that instances might be found in which the slightest casual interest (of the pecuniary kind, for example) acting in a mendacity-promoting direction, has been seen to overcome their united force The proposition, therefore, which was true, reservation made of the influence of those tutelary interests, may still be given for true, even without any such reservation

Of the several species and degrees of interest thus attached to the party's station in the cause, there is scarce any one to which, by accident, it may not happen to find itself opposed by a stronger interest, acting in a mendacity-promoting direction, and overpowering it

Feeble as interests of the social class generally are, in comparison with those of the self-regarding class, there is not of the self-regarding class any interest so high and strong as not to be liable to be opposed by an interest of the social class capable of overpowering it Instances have been known in which delinquents have endured the very extremity of torture, rather than disclose their coadjutors. In England (till comparatively of late years) has existed a practice, in virtue of which, if a defendant in a capital prosecution, on being called upon to say, in general terms, Guilty or Not Guilty, forebore to answer, he was tortured to the very death but, on condition of his submitting to this infliction, his property, which, in the event of his conviction in the ordinary way, would have been taken from his natural representatives by the king to his own use, was suffered to take its ordinary course Instances (it is said) have not been wanting, in which men have thus submitted to death, preceded by the extremity of corporal sufferance, rather than expose the objects of their affection to that loss In this case no falsehood was uttered, nothing at all being uttered, nor was falsehood, in any shape, conducive or necessary to the purpose. But, inasmuch as an interest of any degree of slightness will sometimes be sufficient of itself to overpower the united force of the standing tutelary motives, the supposition has nothing improbable in it, that, for the same purpose, in addition to the corporal agony, falsehood would not have been grudged.

In the case where men have suffered themselves to be tortured to death, rather than give up their companions in delinquency,

falsehood must in general have borne a part. For, in all such cases, the defendant has, in course, been plied with questions; and an answer denying his having had any such companions will have been a much more natural result, than a confession of his having had associates, accompanied with a refusal to disclose them.

Even the tutelary interest created by religion, the religious sanction—notwithstanding the uniformity with which it acts, in opposition to mendacity, on all ordinary occasions—may (such have been its anomalies) be regarded, without any extravagant stretch of supposition, as capable of driving a man into this transgression, instead of saving him from it. In Denmark (it is said,) the country was infested by a set of religionists, in whose conceptions there was no road to everlasting happiness so sure as the scaffold; nor to the scaffold any road, on that occasion, so eligible as that of murder; especially if some child, within the age of innocence, were taken for the subject of that crime. If, in that case, instead of a blood-stained hand, a mendacity-stained tongue had been chosen as the more eligible instrument, the aberration from the line of reason and utility would hardly have been more wide.

The cases above brought to view are all of them out of the ordinary course of things—so much so, that there is none of them of which the existence ought to be presumed, or the supposition of it acted upon, unless the probability of the case be indicated by some special circumstance.

In the ordinary state of things, therefore, the following are the rules that may serve for expressing the comparative trustworthiness of self-regarding evidence:—

1. So far as it makes against himself, a man's own evidence is the best evidence—more so than that of an extraneous witness.

For in this case, such part of his testimony as has this tendency (that is to say, so much of it as is understood by him to have this tendency) cannot, for anything that appears, have found any sinister interest to give birth to it. On the other hand, to prevent the utterance of it, had it been otherwise than true, there was the united force of the several tutelary sanctions, strengthened by the accession of the casual interest in question (whatever it be) that is at stake upon the event of the cause: self-preservation against death, if capital; pecuniary interest, if pecuniary and non-criminal; and so forth.

2. So far as a man's testimony makes in favour of himself, it is inferior in trustworthiness to that of an extraneous witness not known to have an interest depending on the credence given to or withholden from the facts asserted in such his testimony.

The following cases, however, present themselves as so many exceptions to these rules:—

1. If the interest which the extraneous witness has at stake be of more value than that which the party has by whom the self-regarding testimony is delivered.

2. If, the interest being in both cases equal in value, the party by whom the self-serving or self-disserving testimony is delivered be in point of reputation upon a level superior to the ordinary level: the reputation of the self-serving or self-disserving extraneous witness being on the ordinary level, as is the case where it happens to be perfectly unknown to the judge.

3. If, the reputation of the party being at the ordinary level, the appropriate reputation of the extraneous witness is decidedly below it—as where it has already happened to him to be convicted of testimonial mendacity (denominated in most cases *perjury*.)

The sum at stake, and all other circumstances (as above mentioned) being equal in both cases,—the force of the interest will in general be greater upon a *party* testifying in the character of a witness, than upon an extraneous witness: and this on several accounts—

1. In the instance of the party—the suit on which the money depends being actually on foot, and thus far in advance,—the money, if lost, will in general be sooner parted with, if gained, be sooner received,—than in the instance of the extraneous witness. But if, in this respect, it so happens that there is no difference, then this reason has no place in the account: if the difference is on the other side, then of course the reason operates on the other side.

2. Of a state of litigation, a degree of irritation is a natural, and almost a necessary, accompaniment. By the influence of this irritation, the party is already acted upon; the extraneous witness not yet. This is as much as to say, that the testimony of the party stands exposed to the action of two sinister interests, to but one of which that of the extraneous witness is exposed. If, then, so it happens, that the ill-will borne by the extraneous witness towards his antagonist is more intense than that borne by the party to his, this reason fails.

3. To the pecuniary loss necessarily resulting from the loss of the cause,—the loss resulting from the obligation of reimbursing to the winning party his share of the costs of suit, is a natural, though not an inseparable, appendage. In the instance of the party, this ulterior loss is already in immediate contemplation: in the instance of the extraneous witness, not so certainly: because, in the instance of the extraneous witness, it may happen that, no suit being as yet commenced, none will be commenced: for that the demand

will either not be made, or will be acceded to without suit But this reason also is liable to fail viz in the opposite case

On this account (the sum at stake, and in that respect the strength of the temptation, being the same,) the improbability of mendacity will be less on the part of a party on either side of the cause, if there be no extraneous witness on that same side to that same fact, than on the part of an extraneous witness, if it be a fact that is not supposed to have come under the party's cognizance

The reason is, that, in the case of the party deposing in his own favour, there is, in case of mendacity, but one person to be reconciled to the wickedness, and that himself, without need of confession to any one else whereas, in the case of the extraneous witness, there is a probability that the suit would not have been instituted or defended (as the case may be,) without a concert between the party and the extraneous witness supposed to be mendacious; which concert supposes, on the part of each partaker in the conspiracy, a confession made of his wickedness to the other, and besides the comparative improbability of it, such double wickedness affords additional chances of detection

In the situation of party delivering his own testimony on his own behalf, it depends upon any man to originate the opportunity of employing, to a purpose chosen by himself, mendacious evidence, viz by instituting the unjust demand, or hazarding the unjust defence, and then delivering his own testimony in support of it

In the situation of extraneous witness, neither the demand is instituted, nor the defence determined upon, by the individual whose testimony is in question Without the previous act of another person (viz a plaintiff or defendant,) the advantage derivable to the interested testimony cannot be reaped

In the case of a design to raise money by groundless demands, to be supported by mendacious evidence, a demand to be made by a plaintiff in the character of an informer (*i e* to gain a reward offered by the law, payable in the event of a delinquent's being convicted of an offence,) presents a more natural and generally practicable mode of carrying into execution, by abuse of law, a plan of depredation to an unlimited amount, than a demand of money as due on account of any of the ordinary transactions between individual and individual since a transaction of that sort can seldom have taken place without some special relation between the parties, — an incident not necessary in the other case

As between plaintiff and defendant (to judge from the mere consideration of their respective stations in the cause, and nothing else,) in a cause where money is at stake, the probability of mendacity will be greater on the part of the defendant than on the part of the plaintiff

The reason is, that, in the station of the defendant (the sum being in both cases equal,) the mendacity-promoting interest is constituted by the fear of loss in the case of the plaintiff, by hope of gain to the same amount And, sum for sum, as already observed,* the sufferance from loss is greater than the enjoyment from gain

But this proposition does not take place, except upon the supposition that the case is such that the defendant has already been established in the habit of regarding the money as his own, the plaintiff not

Suppose the strength of the persuasion in this respect equal on both sides, the seductive force of the interest will in this respect be equal on both sides suppose the persuasion stronger on the plaintiff's side, the strength of the mendacity-promoting interest will be greater on the plaintiff's side

Without pretence of title, conscious of his having none, Rapax has contrived to get possession of an article of property belonging to Humilis, confiding in his supposed inability to take upon himself, or to sustain throughout, the burthen of litigation Circumstances intervening to disappoint the speculation, Humilis seeks his remedy notwithstanding In this state of things, though, at the commencement of the suit, the subject-matter was in possession of Rapax defendant, yet, though he lose the cause, his condition will be, not that of a man who has sustained a loss, but that of a man who has miscarried in his pursuit of a gain while that of Humilis, in the event of his failing in his demand, will be not merely that of a man who has miscarried in the pursuit of a gain, but that of a man who has been struck by an unexpected loss †

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* *Supra*, p. 575

† In the above case, by the supposition, Rapax is the wrong-doer, Humilis the party injured, and conscious of his being so a particular supposition naturally included in that general one, is, that of his being persuaded of the truth of the facts to which he deposes in which case — though subject to the action of an interest promotive of mendacity, had he been in a condition to stand in need of such criminal assistance, — yet, not (by the supposition) standing in need of it, the epithet *mendacity-promoting* may appear unsuitable to the case.

But this particular case, though naturally, is not necessarily, included in the general case. Though fully, and with perfect reason, persuaded of the general rightfulness of his cause — of his demand, or his defence, whichever it be, — it may happen, that this or that particular fact to which he deposes shall be not only untrue, but fully understood by himself to be so. Consideration had of the weight of the evidence on the other side, it may appear to Humilis that the cause, though altogether just, may stand in need of an apposite falsehood for the support of

CHAPTER VII.

OF IMPROBITY, CONSIDERED AS A CAUSE OF UNTRUSTWORTHINESS IN TESTIMONY.

On the present occasion, the object is, to determine, with what degree of assurance expectations of mendacious testimony in the cause in hand can with propriety be grounded on moral improbity in its several shapes, and in particular in the shape of testimonial mendacity, as manifested on some former occasion or occasions.

Though all men are not liars (at least on occasions so important as those of judicial testification,) yet in that situation all men are almost continually exposed to the temptation of becoming so.

Supposing it certain, that, at the time in which the witness is delivering his testimony, he is not exposed to the action of any mendacity-promoting interest,—it is equally certain, that improbity (in whatsoever shape or degree his disposition be stained by it,) cannot exert any sinister influence on his testimony; that mendacity—wilful and intentional mendacity—is no more to be apprehended from him, than from the most virtuous of mankind; and that, in respect of trustworthiness, between the one and the other the only difference is, that, in consequence of the habitual influence of the tutelary sanctions, the virtuous man will apply himself to the giving to his testimony that completeness as well as correctness of which it is susceptible, with a degree of solicitous attention, which in the case of the profligate man will find a substitute in indifference.

But it is seldom that any such certainty either presents itself, or can by any scrutiny be acquired.

One case there is, in which the opposite certainty presents itself: that is, where the person whose testimony is in question is a party in the cause: which conspicuous interest is, however, by accident, liable (as before observed*) to be counter-balanced and even outweighed by other and stronger latent interests acting on the other side.

Another case is, where, though not a party, he has a known and manifest interest in the event of the cause.

In all cases, whether he have or have not any manifest interest in it, he is liable to be exposed (as well in the mendacity-promoting as in the mendacity-restraining direction) to the action of latent interests, of any nature and in any number.

Suppose the point ascertained, that the individual in question (at present an extraneous witness) cannot be under the action of any sinister interest, unless the impulse has the suborning solicitations of the party for its source,—in such case, if the party be regarded as incapable of seeking to exert any such sinister influence, the probity of the party operates on that supposition as a security, and that an effectual one, against the improbity of the witness.

By this circumstance, in so far as it has place, the probability of mendacity is, it is evident, diminished: but what is equally evident is, that it is not altogether done away.

From past improbity, established by any manifest and notorious inquiry—from past improbity, though, to indicate the disposition, there be no more than a single act,—mankind are apt enough to predict, and infer with sufficient assurance, the manifestation of the like disposition on any individual occasion that presents itself. If on this head instruction be needful to the judge, it is not so much for the purpose of pointing out to him the inference, as for the purpose of putting him upon his guard against the propensity to allow it to take a stronger hold on the mind, than, upon an attentive consideration, it would be found entitled to possess.

Of the testimony of this or that person, on whose part improbity (in the shape of mendacity, or even in other shapes) is supposed to be notorious, it has been a common expression to say, It is entitled to no credit whatsoever,—or, No regard whatsoever ought to be paid to it. Applied to judicial testimony, the impropriety of any such proposition, will, on a more attentive consideration, be found (it should seem) undeniable. And this, not only because falsehood, known falsehood, is frequently a key as well as a guide to truth; but because, everything depending upon interest, a man of the most depraved character, of whom it could be ascertained that he was not under the action of any sinister interest, would with more safety be depended upon, than an average man deposing under the action of any interest, the magnitude of which could, reference being had to his situation, be pronounced considerable.

In a general point of view, and denoted by the concisest expression that can be found for it, the degree of probity habitually manifested in the disposition of a human being, will be *directly* (and that of improbity *inversely*) as the force habitually exercised upon it by the permanent tutelary interests and motives so often spoken of, in comparison with

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it. Whether such support will be given to it or no, depends upon the disposition of Humility: upon the proportion between the force with which the mendacity-restraining interests (the tutelary sanctions,) and the force with which his interest in the cause, is acting on his mind at that same time: and to have been, on a particular occasion, innocent and injured, is an accident which is just as capable of happening to a man of the worst disposition, as to a man of the purest virtue.

* *Suprà*, Chap. VI.

the force habitually exercised upon it by the sedúctive interests and motives *

As it is only through the medium of the habitual frame of mind, that any indication can be drawn from past acts, relative to the present frame of mind or disposition of the witness, and thence relative to the probability of a departure on the part of his testimony from the line of truth,—it concerns the judge to look, in the first instance, to the habitual frame of mind, and in that view alone to have regard to any individual act

One practical use of this caution is, to preserve him from deducing too strong a persuasion from some single act, as established by some conspicuous proof, and not deducing a persuasion sufficiently strong from habit, *i. e.* repeated acts, as established or indicated by proofs or tokens less conspicuous

By a judicial conviction (of theft, for example,) improbity on the part of the convict (viz the degree of improbity necessary to the commission of such a crime) is established by proof of the most conspicuous kind But, however conspicuous the proof, no stronger presumption is afforded of a frame of mind habitually disposed to the commission of that crime, than what is capable of being afforded by one single act

On the other hand, suppose it established in the mind of the judge, to a degree of probability sufficient for this purpose, that to another witness, Furfur, it had twice happened to have been detected in a theft, to about the same amount as that of which the first thief, Fur, was convicted, but that, through the lenity of the party injured, or some other accident, conviction had in both instances been escaped In the case of Furfur, it is evident that, though evidenced by proof less conspicuous, the ground for suspicion is decidedly stronger than in the case of Fur

From proofs of so conspicuous a nature, if exclusively attended to, the conclusion liable to be drawn would be more apt, perhaps, to afford fallacious lights, than true and useful ones

Furfur is a depredator by profession depredation, in one shape or other, has been his habitual source of subsistence he has had no other. Fur has been convicted of a single act of depredation once committed Whatsoever indication of future testimonial mendacity may be to be collected from past delinquency in the line of depredation, is evidently many times as strong in the case of Furfur But, in the judicial memorials of the respective prosecutions—unless (what in England has never yet happened) the difference in this respect have been brought to view—both documents, and assuredly that which exhibits the case of Furfur, will to the purpose have been incomplete, and thence liable to be fallacious

Superior magnitude of the punishment in the one of two cases of depredation, as compared to the other, is another indication, which, by being conspicuous, is but the more liable to be fallacious. Proper or improper upon the whole, it is natural and frequent for depredation, in whatever shape, to be made punishable, upon a scale rising in some proportion with the value of the article which has been the subject-matter of the offence. With a view to one of the ends of punishment (viz prevention,) the difference has this obvious use,—viz its tendency to lead the delinquent to the desire of the less mischievous of two offences, in preference to the more mischievous But, if in this case any such inference be drawn, as that, because the depredation to the greater amount is punished with the greater punishment, therefore, as between Fur Magnus who has been punished with the greater punishment, and Petty Fur who has been punished with the lesser punishment, the probability of testimonial mendacity on the occasion in hand is greater in the instance of Fur Magnus than in the instance of Petty Fur, the conclusion would be more likely to be erroneous than just, for, the greater the sum stolen, the stronger the temptation and because a man's probity has sunk under the stronger temptation, it follows not that it would have sunk under the weaker

With regard to the probability of testimonial mendacity on the given occasion (as indeed with regard to improbity in most other shapes,) indications much more conclusive may in many instances be drawn from factitious consequences foreign to the nature of the transgression, than from the nature of the transgression itself, even if known in all its circumstances Maculatus (at the time of his only offence, not a professional depredator) has, in virtue of his punishment, in the choice of which reformation was not so much as aimed at, been confined for years together in the company of a promiscuous and uninspected herd of professional depredators Furfur, convicted of a theft to the like amount, has, during the same space of time, been confined in a state of constant occupation, either in solitude, or under an unremitted course of inspection in assorted company Whatever be the indication, deducible from depredation, of the probability of improbity in a shape so different as that of testimonial mendacity,—it seems evident that, in the case of the ever solitary or constantly inspected convict, the strength of the indication can never be nearly

* Rules in detail for the estimation of the comparative degrees of probity and improbity in the moral part of the human frame, have been given at large in another work (*Introduction to Morals and Legislation* in Vol I ·) they require too many preliminary observations to be inserted here

equal to what it is in the case of the convict kept for the same length of time in a state of corruptive pupilage.

No anomaly of which moral conduct is susceptible, ought to be altogether strange to the conception of the judge. Presenting itself in a specific shape, temptation has been known to overpower the force of the improbity-restraining motives, in a mind on which, presenting itself in the general shape of money (though to appearance in much greater force,) it would have made no impression. Those who, for any purpose (for a negotiation of any kind, unlawful or lawful,) have to deal with gross and uncultivated minds, have frequent occasion to observe, that by money presented in the specific shape of liquor, a much greater effect may frequently be produced, than by the same quantity of money presented in its own genuine shape. In a higher sphere, many a man, whom a mass of uncounted money to a hundred times the value would have found temptation-proof, has felt his probity sink under the temptation presented in some specific shape peculiarly adapted to his taste and fancy. some choice and not readily obtainable production of art or nature — a gem, a manuscript, a tulip-root, or a cockle-shell. Standing in a witness-box, a much more beautiful and choicer gem, parchment, root, or shell, would have been repulsed with horror, if presenting itself as the price of a deliberate departure from the line of truth. Yet, in a book presenting a general list of convicts, or even in the memorial made of the conviction of this particular individual, it might happen that the case and character of this man should remain undistinguishable from the case and character of the professional malefactor, accustomed from infancy to behold in the habit of depredation the only source of his subsistence.

Whatsoever be the degree of improbity indicated by the past act or habit, — with reference to the testimony in hand, the indication afforded by it of probable testimonial mendacity will naturally act with a particular degree of strength, where, on the past occasion, the shape in which it showed itself was that same shape; viz. that of an act or habit of testimonial mendacity.

The reason is, that in this case it serves as an indication not merely of improbity (a weak and vicious state of the *moral* part of the man's frame,) but such a state of the *intellectual* part as hath disposed him to employ, and (according to his own conception at least) qualified him for employing, this particular sort of instrument (mendacity) for the compassing of his sinister and immoral ends.

To be able to frame a false story, capable not only of passing muster in the first instance, but, upon occasion, standing whatever scrutiny is in a way to be applied to it by means of counter-interrogation and counter-evidence, requires a sort of intellectual firmness and vigour, the degree of which — howsoever it may happen to be employed in the service of the sinister interests — has no connexion with their comparative strength and influence. By setting fire to a crowded fleet of ships, or by drawing up a sluice, and so laying a whole town or province under water, a man may produce an abundantly greater quantity of mischief than has ever been produced by an act of testimonial mendacity: but a man who on a former occasion has thus employed fire or water as an instrument of mischief, will not be so apt on a second occasion to employ a mendacious tongue for a purpose of the like nature, as one who, for the like purpose, has already made choice of the same living instrument.

Where, on the former occasion, testimonial mendacity was the shape in which the improbity manifested itself, — indications respecting the probability of testimonial mendacity in the cause in hand may be deduced from the consideration, to which of the several modifications of which testimonial mendacity is susceptible, the mendacity belonged in that instance.

These modifications, in so far as they belong to the present purpose, will turn upon the degree of improbity manifested by the mendacity in the former instance; and thence either upon the strength or weakness of the influence of the standing tutelary sanctions — the improbity-and-mendacity-restraining interests, or upon the strength of the temptation which that influence had to contend with, and by which it was overcome.

The distinctions of which testimony is susceptible, considered with reference to the person whose interest is affected by it, and the manner in which it is affected, have been already brought to view. Veracious or mendacious, those distinctions are alike applicable to it, testimony self-regarding or extra-regarding, in both cases, servitive or disservitive: if disservitive, criminative or simply onerative; if servitive, exculpative, exonerative, or locupletative.

Here follow certain indications afforded concerning the probability of testimonial mendacity in the case in hand, from the consideration of the nature of the mendacity in the former instance. —

1. Where, in the former instance, the object of the mendacity was to save another person from punishment, no evil being thereby done to any other individual, or none more than equal to the good done to the party favoured by it, — the probability of mendacity in the case in hand, as deducible from such former mendacity, seems scarcely to be so great, as where, in the first instance, the man's object had been to save himself from punishment to the same amount.

The reason is, that in the one case a proof

is given of an extraordinary degree of force on the part of the principle of humanity, the interest of sympathy which proof is not given in the other case.

But this indication is not afforded, except on the supposition of the entire absence of every interest of the self-regarding kind a matter of fact which will not often have place, nor, when it has place, be very easily ascertained

2 Where, in the former instance, the object of the mendacity was to save a man's self from evil of any kind, whether under the name of pure punishment, or satisfaction to another for injury,—the greater the evil, the less the probability it affords of mendacity in the case in hand or, conversely, the less the evil, the greater the probability of mendacity in the case in hand

The reason is, that, because a mendacity-promoting interest of a given magnitude had the effect of overpowering the mendacity-restraining force of the tutelary sanctions, it follows not that a mendacity-promoting interest of less magnitude would have been productive of the same effect

Every one sees, that though, to save his life, or to save himself from a pecuniary punishment, or from a pecuniary obligation on the score of satisfaction, to the amount of £500 (being the whole amount of his property,) he fell into this transgression,—it follows not that he would have fallen into the same transgression, to save himself from the obligation of paying £5, being but one hundredth part of the whole amount of his property

3 Where, in the former instance, the object of the mendacity was to save another person from merited punishment,—the probability of mendacity in the case in hand, as deduced from such former mendacity, seems not so great as where, in the former instance, the object was to consign another person to unmerited punishment

The reason is, that in the one case indication is given of the prevalence of the interest of sympathy or principle of humanity (one of the standing tutelary sanctions,) to an extraordinary degree whereas, in the other case, an indication is given of an extraordinary degree of insensibility to the force of that sanction, as well as of most, or all, of the other tutelary sanctions

4 Where, in the former case, the object of the mendacity was to obtain, for a man's self, an undue gain,—the probability of mendacity, in the case in hand, as deduced from such former mendacity, seems still greater than where in the former case the object was merely to subject another person to unmerited punishment.

The reason is, that the interest of ill-will (the seductive interest by which the mendacity was produced in the one case,) especially where the correspondent passion has risen to so high a pitch in respect of duration as well as intensity,—has but a casual existence, and cannot be produced but by some comparatively rare occurrence or state of things a man's probity may, therefore, on a particular occasion, be overpowered by it, and yet (far from being seduced) it may never happen to him to be so much as solicited, by the same sinister interest, to give in to the like evil course at any other period of his life. Whereas, pecuniary interest, not requiring any such special incident, or special object, for the creation of it, is created and kept alive at all times by the matter of wealth in all its shapes and is, therefore (particular purposes being alike laid out of both cases, and the sum constitutive of the interest being supposed to be the same in both cases,) as likely to have place and be prevalent in the one case as in the other

N B—In this case, much (it is evident) will depend upon the circumstances of the case in hand For if, in the case in hand, all self-regarding as well as social interest on the part of the testifier is clearly out of the question (as may be the case, for example, where the testifier is prosecutor, and the only effect capable of resulting from conviction is punishment,) the prevalence of ill-will in the former case may afford a stronger indication—a greater probability, of the prevalence of the like passion in the case in hand, than would even have been afforded by the prevalence of pecuniary interest in the former case But in the case of pecuniary interest so much depends upon the sum, and its proportion to a man's habitual expense and present exigencies, that every comparison which has this interest for one of its terms, is liable, as every one must perceive, to great uncertainties

5 Where, in the former case, the object of the mendacity was to save or obtain a gain,—the probability of mendacity in the case in hand, as deduced from such former mendacity, seems to be greater than if, in the former case, the testifier's object had been to save himself from a loss to the same amount

The reason is, as already observed,* that the influence of a given sum on the well-being of the individual, when considered as passing out of his hands in the shape of loss, is greater than that of the same sum when coming into his hands in the shape of gain, and therefore, that the force of the interest is, in the same proportion, greater in the one case than in the other and it follows not, that because the force of the mendacity-restraining interests has been overcome by a given force, therefore it will by any less force

But as to the point whether, with reference to a given individual, the sum in question, if coming into his hands, is to be considered as

* *Supra*, Chap. III.

passing into them in the shape of gain, and so gained, or only as passing into them in the shape of security against loss, and so simply not lost; or, on the other hand, if going out of his hands, is to be considered as going out in the shape of loss, or as simply not staying in, in the shape of gain; this point, though in many instances clear and out of doubt, will in many instances be subject to doubt, and to doubts absolutely insoluble. The matter depends upon the strength of his persuasion; and this, too, taken at a point of time not always easy to be settled. If, at any given point of time, with an equal degree of persuasion, two contending parties expect, each of them, concerning the same sum, either that it shall not go out of his hands, or that it shall come into his hands, — the not coming in, in the one case, and the going out in the other, may, in the instance of either of them, be alike productive of the sensation of loss.

On the part of a person in whose breast the existence of improbity in a very high degree is notorious, either from proof made on a past occasion, or from the light in which he appears in the cause in hand, — there are several circumstances, each of which may, in aid of the standing mendacity-restraining sanctions, contribute to lessen the probability of mendacious testimony in that case. — These are —

1. Extraordinary difficulty, real, and thence apparent, of carrying through (in the particular circumstances of the cause in hand, and of the part taken by him in that cause,) — of carrying through a scheme of mendacity with safety and success.*

2. (In a case in which an effect of the mendacity, if successful, will be the bringing down upon the head of any particular individual — naturally the defendant — a burthen of affliction particularly severe, such, for instance, as unmerited capital punishment) — the extraordinary severity and afflictiveness of such burthen.

To the joint influence of these causes, on minds on which the influence of the three other tutelary sanctions (the political, the moral, and the religious,) especially the two latter, cannot but have been at its lowest pitch, may (it should seem) be ascribed, in great measure at least, the comparative unfrequency of criminative perjury; and the innoxiousness (as far as can be judged) and utility of the judicial practice by which, under the highest temptation that can be offered, the testimony of known malefactors of the most profligate description is every day admitted as the principal, and sometimes even as the sole, ground for convicting men of the highest crimes, and thence subjecting them to the most rigorous punishment afforded by the law.

That the social principle of sympathy bears some part in the production of the effect, there seems no reason to doubt. But that the part it bears, is, in comparison with that of the other (the self-regarding principle,) much the least considerable, is rendered but too manifest by very conclusive indications. In some countries, standing funds of reward have been established by law, for the purpose of engaging men to pursue to conviction offences of this or that particularly obnoxious description; such as depredation in the various shapes in which — though the mischief of the first order (the loss actually produced) is confined to assignable individuals — by far the greater part of the mischief — *viz.* the danger and alarm — diffuses itself over an indefinite space in the circle of the community at large. Influenced by these rewards, instances have been known, in which men have formed themselves into confederacies for the purpose of reaping the rewards in question at the expense of the ruin of a set of victims, to whom, in one sense, the word *innocent* would not be misapplied.

To entitle themselves to the receipt of the reward, to the payment of which conviction was the previous condition, it was necessary that evidence of the offence, evidence constituting a sufficient ground for the conviction, should have been delivered. To give birth to this evidence, what did they? They gave birth to the offence itself, an offence — an individual offence — of the description in question, was to be produced, that a body of evidence, effectual to the purpose, might be sure to be delivered. On such occasion, an innocent man — a man till then innocent — was to be seduced into the commission of the offence. The offence being really committed by him, care was at the same time taken, that the circumstances in which it was committed, should be such as to leave no deficiency in the necessary mass of evidence.†

* This difficulty — in so far as concerns mere pain of exertion, mental labour, distinct from sense of danger — coincides with that principle of action which, under the name of the *physical* sanction, constitutes the first article in the list of standing tutelary, and thence mendacity-restraining, sanctions.

† In the year 1754 (confederacies for the purpose of availing themselves of this encouragement having been systematically organized,) mischief (effects at least, good or bad) in a quantity considerable enough to engage no small share of the public attention, had, among the lower orders, been done by them. Several persons had been convicted — one at least had suffered death — for acts of robbery, into which, it came out, that they had been seduced by the confederates. Four men, MacDaniel, Berry, Egan, and Sulivan, after having been (in consequence of a special verdict) acquitted on an indictment charging them as accessaries to the robbery, were tried and convicted on an indictment, in which, for the de-

To what cause is this characteristic part of the contrivance to be referred? Not, in any respect, to sympathy. for the suffering to which the victim was consigned, after having been thus drawn into guilt, was not inferior to the suffering to which he would have been consigned, had he been left in possession of his innocence

There remained, therefore, this one cause: viz a view of the advantage which, in respect of its comparative chance of obtaining credence, under the security afforded against deception by the faculty of *vivâ voce* cross-examination, a true story is so sure to possess over a false one For, by the delivery of a true story, no other faculty is called into exercise but the *memory* — a faculty in respect of which, to any such purpose as that here in question, no deficiency can exist in the mind of any man For the delivery of a false story adequate to the production of the same effect, the exercise, and the successful exercise, of two other faculties, each of which must be possessed in an extraordinary degree of perfection — viz invention and judgment — is indispensable

The grand instrument, the touchstone by which falsehood is detected, is inconsistency In the delivery of a true and correct narrative, inconsistencies are impossible, for, of any two, or any number of real facts, to say that any one can be inconsistent with any other, is a contradiction in terms Falsehoods, to escape detection, must to appearance be equally clear of inconsistency of inconsistency, as well with respect to each other, as with respect to all known and indisputable truths But to invent a number, though it were but a small number, of falsehoods, which shall not only at the moment but on all future occasions stand clear of every such inconsistency, is in general (especially under the check of cross-examination) a task of extreme difficulty and, by the force of that check, the number of such facts which a man shall be called upon to invent — to invent at the moment, on pain of seeing the expected fruit of his labours gone, and punishment ready to fall upon his head instead of it, is without limit and in the exercise thus given to it, the faculty of invention must at every step be accompanied and supported by the faculty of judgment, and that at a pitch of perfection, such as the strongest mind can never feel itself assured of rising to

Where, as in the sort of case in question, the perceptions obtained were at the time associated with such an idea of their importance as was sufficient to command a force of attention sufficient to fix them in the memory, — and the first depth of the impression has not been defaced in any considerable degree by the hand of time, — the images presented by the memory are at all times the same no danger of inconsistency between the account given of a fact at one time, and the account given of the same fact at another time But the images of which the picture given of a false fact is composed, — these images, having no real standard by which they

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signation of the offence, the unmeaning appellation of *conspiracy* was employed [a] One of them, Egan, being, in pursuance of his sentence, put into the pillory, was murdered by the populace upon the spot. Another, Berry, died of his wounds Whether any real mischief, other than the alarm, was done by this confederacy, seems, after all, a matter of doubt In the only case the particulars of which are known, the two victims, though engaged by a sort of treachery in the commission of the individual offence of which in consequence they were convicted, had, in pursuance of their own schemes, been habitual depredators, though, for anything that appears, in a line somewhat inferior in criminality; viz simple theft, instead of robbery accompanied with force. This being the supposed case, the effect of the terror inspired by such practice would be purely salutary rather than otherwise, tending to the destruction of confidence among malefactors. and thereby to the destruction of that small and destructive portion of society, whose destruction is the preservation of the innocent part. The malefactors were, two of them, murdered in the pillory. The murderers, if not thieves themselves, were probably set on by those who were

Correct or incorrect, the following more recent story, copied from the newspapers, will be equally subservient to the purpose of illustration:—

"A curious stratagem in the trade of *thief-catching* was played off on Tuesday, at broad noon, in the sequestered walk which leads from the end of the canal at the top of the Green Park, through the shrubbery, to the gate at Hyde-Park Corner A fellow, who had the appearance of a farmer's or cow-keeper's servant, with a milk-vessel in his hand, and a watch in his fob, stretched himself on his back upon the grass at the rear of the Ranger's Lodge, as if drunk and asleep; while two of his companions took their stations at some distance A sweep, with his boy, passing shortly afterward, the former fell completely into the trap, by embracing what he, no doubt, conceived to be the fortunate opportunity of helping himself to the sleeper's watch; who suffered him, without interruption, to bear off his prize for a dozen yards, and then, jumping up, raised the *hue and cry* of stop thief! which was instantly repeated by his companion, and the sweep seized, with the watch in his possession. They insisted on taking him immediately to Bow Street, and prosecuting him for the robbery: but a reputable and resolute gentleman, who lives at Knightsbridge, and who saw the whole transaction, interfered, and told the captors, that if they took the prisoner before a magistrate, to prosecute him capitally for the offence into which they had entrapped him, he should certainly accompany them, and give evidence of their conspiracy. upon which they very quietly surrendered their prisoner, and marched off."— *Times*, 1st August 1806.

[a] State Trials, x. 418–447. Foster's Reports, p. 121–130.

can be adjusted, no real archetype by which they can be fixed, will be at every moment liable to be changed: and as often as a change (though it be in any the minutest particular) takes place, so often is an imminent danger of inconsistency, and thence of detection, produced along with it.

Let it not here be forgotten, that for these always dangerous, though perhaps necessary, remuneratory arrangements, the demand is produced, in no inconsiderable degree, by the exclusionary system; viz. by that branch of it, which, on the score of vexation (if for any reason at all,) forbids the application of judicial questions to any such purpose as that of extracting evidence of guilt from the lips of malefactors. And moreover, that among the effects of it is that of making it men's interest to nurse less mischievous malefactors, capable of yielding but small rewards, till they have ripened into malefactors of a more mischievous description, yielding larger rewards. By this means, while mischief is weeded out with one hand, it is sown with another. But this part of the mischief seems referable rather to the gradation established between the quantum of reward in one case and that in another, than to the application of remuneratory arrangements in aid of penal ones.

CHAPTER VIII.

OF THE COMPARATIVE MISCHIEF IN THE EVENT OF MISDECISION, TO THE PREJUDICE OF THE PLAINTIFF'S OR OF THE DEFENDANT'S SIDE.

THE above-mentioned particulars, such of them as the nature of each case has happened to present, having been taken into consideration, and the trustworthiness of the witness or witnesses on one or both sides remaining in doubt, and with it the decision proper to be grounded upon the evidence,—a consideration to which it may be of use that the mind of the judge should not be wholly inattentive, is the difference (if any) in point of mischief, that may be incident to the decision; viz. according as it happens to have for its sole or principal ground the testimony of an extraneous witness, or that of a party, and, of the parties, that of a defendant or that of a plaintiff. For if, as between right decision and misdecision, the scales of probability appear to hang upon a level, his choice will naturally fall on that side on which, if to the prejudice of that side misdecision should ensue, the quantity of the mischief resulting from it will be at the lowest pitch.

I. Mischief of plaintiff's mendacious self-serving testimony, compared with that of defendant's *ditto*.

In general, in a case where money is at stake, the quantum of mischief liable to result from an erroneous decision pronounced in favour of the plaintiff's side, and grounded on the mendacious testimony of the plaintiff, is greater than what is apt to result from an erroneous decision pronounced in a case where the same quantity of money is at stake upon the ground of the mendacious testimony of the defendant.

The reason is, that in the station of plaintiff it rests with every man to multiply suits at pleasure; to harass with suits any persons and any number of persons at pleasure. If, then, by his own testimony alone, he has obtained a judgment against this or that one person, that testimony being generally understood to be mendacious,—in such case, this one groundless demand having succeeded with him, there is a danger lest he should extend his enterprises to another, and then to another, and so on without limit.*

This might be the case, for example, if, in the character of an informer, a man were to take upon himself to raise money by his own mendacious testimony instituting, or causing to be instituted, against a person altogether innocent, a charge of having committed some offence, to which a pecuniary penalty, payable in the whole or in part to the informer or witness, stands annexed; and supporting the charge by his own testimony, that testimony (the defendant being innocent) of course mendacious.

But though, on the supposition that any such practice as that of making a trade of giving groundless informations supported by false testimony were habitual, the danger indicated and the alarm produced by a given sum raised in this way by a given number of suits, would be greater than the danger indicated and the alarm produced by the same sum raised by evidence equally false in the same number of suits of all other kinds taken together, yet it follows not that, in any given suit taken by itself (and, independently of any such habitual practice, the existence of which is supposed, for mere illustration, to have been ascertained,) mendacity in this case is at all more probable, than, under the action of a pecuniary interest of equal value, it would be in any other sort of suit, whether on the plaintiff's or on the defendant's side.

An informer is one who, at the invitation of the law, lends his hand to the administration of justice. It follows not, that because a man is ready for a certain price to give true

* In this case, however, the mischief produced in the shape of danger and alarm to the community at large, will be apt to be less where the demand had for its ground a claim of indemnification (viz. on the score of a loss already incurred, and known to be so,) than where such previous loss is out of the question.

The reason is, that, in the case of indemnification, the aggregate quantum of possible demands, true and false, is limited by the aggregate quantum of actual losses.

evidence, he is ready to give false evidence for the same price: it follows not, any more than that because a man is ready, in the capacity of a judge, for a certain salary, to engage to administer justice, and do his part towards the due execution of the laws, he is ready, for the same salary, to engage to practise depredation under the name of justice. It follows not, any more than that because for a given price a man is ready to engage to contribute to the defence of his country against the invasion of a foreign enemy, therefore for the same price he is ready to engage to contribute to the destruction of his country in the service of the enemy. It follows not, that because by swearing truly he expects to gain £10, therefore he will depose falsely for that purpose, nor that, because, at the expense of the same sum expended in costs of prosecution, he seeks the pleasure of revenge at the expense of any person who, no matter on what account, has become the object of his ill will, — therefore, to gain the end of the prosecution, he will, in the character of witness for the prosecutor, deliver mendacious criminative evidence.

In various ages and countries, mischief in vast quantity has been operated by men in the character of informers. But the testimony by which in these instances it has been operated — the testimony which has served as the instrument of the mischief, has been, not mendacious, but veracious testimony, the fault has lain, not in the informers, but in the laws.

England, in the time of Henry VII., afforded a remarkable example — probably the most remarkable that is to be found in the history of any age or nation — of mischief flowing in prodigious masses from this source. But, in so far as it was the cause of terror, and a fit object of blame, the mischief was the sole work of the legislator. Laws were sown, that forfeitures might be reaped.

II. Mischief of party's mendacious testimony, compared with that of extraneous witness's *ditto*.

In general, the quantity of mischief apt to result from misdecision in favour of either side, when grounded on mendacious testimony on the part of an extraneous witness, is not so great as when grounded on the mendacious testimony of either party, testifying in his own favour.

The reason is, that it depends not on an extraneous witness to originate the suit, in the course of which his testimony is delivered: it lies not therefore in his power, as in that of a plaintiff, to multiply suits at pleasure, and (if gain were to be made by unjust demands, supported by mendacious testimony) to multiply at pleasure occasions of employing testimony as an instrument of legal depredation.

To originate causes of suit — and thence in a remote way (though not to a certainty) to originate suits themselves — is competent to any man: and thence to a man who, when the suit takes place, occupies the station of defendant. To originate a suit immediately, and without needing the concurrence or antecedent agency of any other individual, belongs also to any individual which individual, as soon as the suit is instituted, assumes thereby the character, and occupies the station, of plaintiff. But to originate any sort of suit, either remotely, as in the character of future contingent defendant, or immediately, as in the character of actual plaintiff, is the exclusive character of a party, and is incompatible with the station of extraneous witness.

III. Mischief of party's self-disserving, compared with that of his self-serving, mendacious testimony.

In the case where it happens to a man's testimony to be mendacious to his own prejudice, and not to the prejudice of any one else, — in such case, if a decision conformable to it be grounded on it, which decision thereby comes under the description of misdecision, the mischief of such misdecision does not stand upon so high a footing as that of a misdecision to the same effect produced by any of the ordinary causes.

The reason is, that the mischief of the second order — the danger and alarm,* — in comparison with which the mischief of the first order is much inferior in importance, amounts to nothing in this case. A man, as often as, without being guilty, he chooses to confess himself guilty, will suffer accordingly: let this be understood. But what, in this case, is the amount of the danger? — for how few are there who will be disposed to make any such choice! — and if there were ever so many more, where is the great harm done? *Nemo ad latum penæ volens*, says the maxim of Roman-Gallic law. But on the other hand comes the maxim, *Volenti non fit injuria*: why refuse to hear him whose wish it is to "perish," if, in the judgment of the person most competent, he will not be injured by it? So again as to the alarm. For, by the supposition, the choice is the man's own: if force be employed, the case quadrates not with the present case, and who is there, in whose breast any pain of apprehension can be infused by the idea of an evil to which he cannot be exposed but by his own free choice?

But though, in this extraordinary sort of case, the mischief of misdecision is not so great as in ordinary cases, still neither is the case altogether free from mischief. For, by

* Dumont, *Traités de Législation*, — and see *Introduction to Morals and Legislation* (Vol. I. p. 69 *et seq.*)

the manifest opposition of the case to the ordinary course of human conduct,—men at large, observing a man convicted on his own self-criminative testimony—on his own confessorial evidence, which afterwards is by accident discovered or suspected not to have been true, will be led to suppose or suspect it to be the result of secret subornation: subornation acting possibly by holding out hope of reward—more naturally by holding out fear of undue punishment, or of injury in some other shape.

Hence one reason, why confession in general terms should never be received, to the exclusion of complete as well as correct testimony from the same source: to the end that, in case of incorrectness or incompleteness, intentional or not intentional, such self-regarding and self-criminative testimony may, from the approved sources, counter-evidence and counter-interrogation (performed at any rate by the judge,) take its chance of being rendered correct and complete: as if, instead of being self-regarding, it had been so much extraneous testimony.

CHAPTER IX.

ULTERIOR SAFEGUARDS AGAINST THE INCONVENIENCES WHICH MAY PRESENT THEMSELVES AS LIABLE TO ARISE FROM THE ABOLITION OF THE EXCLUSIONARY RULES.

PANIC terrors, genuine and counterfeit, are among the life-guards of abuse. From reform, be it what it may, tears are professed by sharp-sighted hypocrites—tears are felt and entertained by their weak-sighted dupes. Knavery presents the phantasmagoric magnifying glass; and it is through this medium that danger is viewed by the eye of imbecility.

Anything which, in the case of the reforms here proposed, may contribute to allay the accompanying apprehension, is deserving of notice.

The safeguards here in view may be ranked in the first place under two heads:—1. Safeguards against deception and consequent misdecision; 2. Safeguards against vexation, in so far as unnecessary and unprofitable.

Under either head may again be distinguised—1. Such as exist or would take place of themselves, but may notwithstanding be pointed out to good purpose, as being liable to be overlooked; 2. Such as, though not at present in existence, nor of a nature to take place of themselves, might (as it seems) be established to good purpose, and may therefore be considered as eventually waiting to be established.

Under the head of existing safeguards, the following may be worth noticing:—

One ground of alarm may be, the danger of mendacity, and consequent deception and misdecision, from the giving an unlimited admission to the testimony of the plaintiff.

By way of antispasmodic against the terrors from this source, it may be proper on this occasion to bring to mind once more the testimony of experience, certifying that, in so many cases, where, by the reason of the most cogent interests, the mendacity-promoting force has been at its highest pitch, no symptoms of mischief from this source have ever been discernible: habitual and professional depredators, delivering their testimony against accomplices, under the temptation offered by impunity instead of capital punishment, with the addition of pecuniary rewards to an amount far beyond what are usually offered to individuals at large. These are rewards earnible by truth as well as by falsehood. But rewards, equally offered, and not earnible but by mendacity, are the rewards by which servants in trade, who have goods to deliver from traders, their masters, to customers, are invited to steal the goods, and then by their testimony charge the customer with the receipt of them—the customer, whose true testimony cannot be opposed to their mendacious evidence.

Lawyer. The defendant will stand exposed to whatever danger is attached to the admission of the testimony of the plaintiff.

Non-Lawyer. Good. but while, from the admission given to him, the plaintiff derives the faculty of delivering false testimony to the prejudice of the defendant,—so, by the admission given to the testimony of the defendant, does the defendant derive the faculty of defending himself, for which, by the supposition, the simple truth is sufficient. Truth opposing herself to the plaintiff, truth giving her support to the defendant,—plaintiff and defendant being, in other respects on equal terms,—in favour of which side lie the odds?

Lawyer. But a case that in reality will frequently happen, is, that the matter of fact, notwithstanding the consequences of it with relation to the interests of the defendant, has not fallen under his cognizance. If, the defendant having been wounded, it be by your hand that the wound has been inflicted, it can scarcely happen but that the fact must have fallen within your knowledge. But if it has been by the teeth of a dog of yours, or by the horns of a bull of yours, this may as well have happened, you being at a hundred miles distance, as in your presence. The plaintiff being predisposed to lie, and having his choice of lies, his care will be, that in the scene he feigns, you, the defendant, shall not be one of the actors.

Non-Lawyer. Doubtless this will be his best policy; just as, under your own established and therefore faultless system, were the tradesman's servant to steal the goods, and

then swear he had delivered them to the customer, it would be better policy to suppose them delivered at his house out of his presence, than in his presence, although the testimony of the customer, to whose loss the theft and the perjury are committed, would not be admitted to contest it

But, the door being, by the supposition, as completely open to the testimony of the defendant as to that of the plaintiff, and the fact on which the plaintiff grounds his claim being by the supposition a fact altogether false,—the case will be, that the defendant, if he contests the claim, believes the fact to be false Under whatever sanction, therefore (call it oath, call it what else you will,) the plaintiff affirms, contrary to truth, his persuasion of the existence of the fact, the defendant will of course affirm his persuasion of the non-existence of it Here, then, it must be confessed, we have a danger of deception, as we have in all cases in which testimony is admitted But the plaintiff's story, being by the supposition an utter falsehood, has everything to fear from scrutiny, from counter-interrogation, from whatever counter-evidence can be afforded by circumstances, while the assertion of the defendant, being true, can find nothing to oppose it from either of these sources

Now observe how the matter stands under your system. Innumerable are the instances in which the fact constitutive of a right on the part of Titius, being true, would be testified and put beyond doubt by the testimony of Titius, if, Titius being plaintiff, his testimony were admitted In perhaps the greater number of these instances, the fact being as well known to the defendant as to the plaintiff, and the defendant not being disposed to be at the expense of perjury to save paying what in justice he ought to pay, he would do one of two things if the fact had fallen within his cognizance, he would confess it, if the fact had not fallen under his cognizance, yet, hearing it sworn to by the plaintiff, and not looking upon the plaintiff as a man who would perjure himself, he would not, upon his oath, declare his disbelief of the statement sworn to on the other side

Now what does your system in this case? To the evil-doer it insures success and triumph, without peril of perjury, or expense of litigation to the innocent and injured, it ensures loss, without hope of safety—injury, without the possibility of self-defence

Lawyer Well, and what then? He should have been wiser It should have been his care to have provided himself with legal evidence

Non-Lawyer His care! Yes but can it be a secret to you, that in many cases such provision would be impossible? that in others the precaution would be resented as an insult, and the transaction itself (the contract, or whatever it be) out of which the right arises, be by that means rendered impossible? And suppose him (like Duke and no Duke) never to travel without a train of witnesses at his heels have you any secret you could supply him with, to enable him to keep them alive at pleasure?

He should have provided himself with legal evidence! Do you and yours, from the lowest to the highest of you, know what legal evidence is? Would you let him know, if you did? Did you ever, with your own goodwill, do anything towards letting men know what (on this subject or on any other) the law—the law which you every day compose on pretence of declaring it—is? Have you ever ceased to do whatever was in your power to prevent all such knowledge from being attainable—to keep all such knowledge out of their reach?

The system which the suitor supposes to be established—the system on the confidence of which he acts, is the system declared to him by domestic experience, right reason, and common sense This system he sees pursued, even by you and yours, in some cases deceived by your indefatigable self-eulogiums, he concludes it to be pursued in all cases Your exceptions, extensive and numerous as they are, how should he divine them? To give himself the least chance for it, it would be necessary for him, at the outset, to begin with discarding his ordinary guides, common honesty and common sense

Here may be the place to observe once more, that the utmost danger which can be apprehended from the freest admission of self-serving testimony on both sides, is inferior, far inferior, to that which, under the technical system, has place in every day's practice In all cases, from the most lightly to the most heavily penal (personal injuries, acts of depredation, acts of malicious destruction,) where an injury by which an individual is the immediate sufferer is treated on the footing of a crime,—the testimony of the party injured (testifying under the influence of an interest in the strictest sense pecuniary, viz that constituted by *costs*,—and always under the smart of the injury, be it what it may,) is admitted under the name of evidence and under the sort of sanction reserved for those declarations which are received under the name and on the footing of evidence,—the sanction of an *oath*, fortified by the eventual punishment attached to the breach of it while, on the other side (the defendant's,) though, under the name of the defence, the party, if present (which in slightly penal causes it is not necessary that he should be,) cannot be prevented from saying what he thinks fit,—yet, what he does say, not being corroborated by the sanction of an oath,

nor being subjectable to counter-interrogation, is not received under the name nor on the footing of *evidence*.

What is to the present purpose, is this question:—If no mischief is experienced from the *partial* admission of self-serving testimony, the admission of it on the plaintiff's side—on that side on which (as hath been seen) it is most dangerous,—can any greater danger be reasonably apprehended from the *impartial* admission of it, from the unreserved admission of it on both sides?

The above observations on the safeguards which already exist, may suffice to dispel all vague fears that great prejudice to justice would result from the abolition of the exclusionary rule.

An ulterior safeguard, which is not, but which might be, and ought to be established, is the registration of evidence.

By the registration of evidence, I do not mean the committing of the evidence to writing *in terminis*; but merely the making a memorandum of the species and nature of the evidence, under apposite heads.

The immediate use is, to show, on the occasion, the strength of each article of evidence: to indicate the strength of it, as far as the denomination to which it belongs, and under which it is entered, may be conducive to that purpose.

The ulterior use is, to put a mark of distinction upon every cause in which, on the side in favour of which the decision was pronounced, the mass of evidence was, in point of strength, in any respect below the ordinary standard.

The ultimate use is, to indicate, not indeed the exact quantity of the mischief (for when there is none, none can be indicated,) but the *maximum* of the mischief which, in the way of misdecision, under any head of infirmity or suspicion, can have owed its birth to the abolition of the exclusionary rule:—1. Judgment for the plaintiff. Evidence for the plaintiff, none but the plaintiff's testimony. Evidence for the defendant, none but the defendant's testimony. 2. Judgment for the defendant: state of the evidence the same. 3. Judgment again for the plaintiff. Evidence of the plaintiff delivered by him, or not delivered: the fact (the collative, or say investitive, fact, by which the right in question was conferred on him) not having fallen within his cognizance, nor any other fact serving for proof of it in the way of circumstantial evidence. Extraneous witness, Matthew Martyr: his testimony exposed to suspicion by interest derived from relationship,—he being husband, son, father, brother, partner, servant, master, to the plaintiff; or by specific pecuniary interest, in such or such a way; or by improbity, as evidenced by his having been convicted of such or such an offence.

Ulterior details might, in this place, be regarded as superfluous and premature. what is above will serve for an indication of the ends to which the proposed arrangement is directed. To frame an apposite system of book-keeping, whereby, for each cause, the labour of registration could be reduced within the compass of a few words, would be a consequential task, and not a difficult one.

I speak of the system of registration as exhibiting the *maximum* of mischief from deception and consequent misdecision having infirmity of evidence for its cause. I say *the maximum*; it being understood that, supposing in every case the decision given in favour of that side of the cause on which the evidence was thus defective to have been erroneous, the greatest number of causes in which this error (error from this source—*could* have taken place, is thus brought to view. But so it may be, that in no one of all those instances *was* the decision erroneous: still, in this case, the word *maximum* is not less apposite than if the decision was erroneous in all those instances.

On the present occasion, in speaking of infirm and suspectable evidence, those causes alone of inferiority need be thought of, that have been brought directly to view in the course and for the purpose of the present work. In a system of registration, in so far as adapted to the end here in question, the several other causes of infirmity would be equally entitled to a place. The heads being expressed by apposite denominations,—the operation of making, on the occasion of such cause, the several entries under those several heads, would present little difficulty. Mercantile book-keeping, an art which, under the existing system of nomenclature, is clouded and perplexed by obscure and unexplained fictions, presents much more.*

* Thus much being said of one part of the proposed system of judicial book-keeping, a word or two, for the purpose of sketching out a general idea of the remainder, may perhaps not appear misemployed. Suggested by a collective view of all the ends of justice, the system, taken in both its parts, embraces in its design all these several ends.

Of the part here more particularly in question, the object is to prevent misdecision: it accordingly presents continually to the view of the legislator the several quarters in which the seeds of misdecision seem to be most apt to lurk.

Of the remaining part, the object is to prevent needless and avoidable delay, vexation, and expense. Taking, therefore, for the standard quantity of that mass of collateral inconvenience, the quantity which experience has shown to be sufficient in a vast majority of the whole number of causes of all sorts,—it calls upon the judge, in each instance in which that standard quantity has been exceeded, to point out, by apposite entries under apposite heads, in his view of the matter, the cause by which such excess has been necessitated, or at any rate produced. (M

Lawyer. What! more records? and have we not records enough already? and is there not enough in them? and is there to be nothing said about John Doe and Richard Roe? and do you mean to confound the distinction between courts of record and courts not of record?

Non-Lawyer. To make answer to your questions, the matter of your records may be divided into three portions — 1. Sheer lies, 2. Impertinent and useless truths; 3. Instructive truths. The instructive truths — that is, heads for the reception of these — it is our wish to preserve, though it would require a microscopic eye to spy them out and if they were of iron, so much the better, because in that case a magnet would save time and scrutiny.

Of the sheer lies and impertinent truths, I agree with you that there is enough already, and therefore it is we propose that no further additions shall be made to that part of the stock. If your relish for the dish remains after the *odor lucri* has evaporated, you know where there is enough for it.

Courts of record — courts not of record! A precious distinction, truly! A precious end it aims at — and a precious use has been made of it! Know you then of that judge, whose operations will be likely to be better secured against error (designed and undesigned) — against needless delay, expense, and vexation, by the assurance that they will be buried in oblivion? Can there be so much as a pretence for omitting to perpetuate the memory of everything that passes (except the verbiage of advocates and parties,) unless it be the little importance of the cause, compared with the delay, expense, and vexation, attached to the registration of it? And do you not know, that the use aimed at by the distinction, and by the consequences grounded on it, were to secure the judges that invented it against the competition of judges below them, and on one side of them? and that, among the civil courts not of record, the equity courts — the courts which reject, as "beneath their dignity," all causes of less than £10 value — are at the head of the list?

So much as to the safeguards against misdecision. For the avoidance of unnecessary vexation, an important maxim remains to be brought to view.

I suppose the ends of justice substituted to the ends of judicature. I suppose hypocrisy unmasked. I suppose honest eyes opened, imbecility in honest guidance. I suppose the door thrown wide open, not only to all willing testimony, but to all lights that are to be elicited from interrogatories administered to unwilling testimony; to unwilling testimony, whatsoever be the now terrible, the now tremendous, fruits of it; lights collected without reserve, from unwilling witnesses, although the result should be the diminishing the multitude of misdeeds of all kinds, and diminishing (if English lawyers and their dupes endure to see it diminished) the barbarity, as well as imbecility, of their penal code.

In throwing open the door to self-criminative evidence, one exception, though but a temporary, and thence a limited and continually expiring one, would require to be made.

Of the established system of mercantile book-keeping, the object in view is to enable the individual whose transactions it is employed to record, to ascertain at any time the balance as between the amount of assets and debts due, with the amount of profit or loss from each source; for the purpose of raising to its maximum the aggregate of the one, and reducing to its minimum the aggregate of the other: not to speak of other subordinate objects foreign to the present purpose.

Of a rational and honest system of judicial book-keeping (not to speak here of the uses to individuals in the character of suitors, or of the uses to the judge,) the uses to the legislator would be, to enable him to reduce to its minimum the aggregate amount of misdecision and failure of justice on the one hand — of judicial delay, expense, and vexation, on the other: and this by indicating in each instance (in so far as it is susceptible of indication) the maximum, and, if possible, the actual amount, of each individual mischief produced on each occasion; with the cause, so far as it may be discernible.

Of the actually existing system of judicial registration and non-registration (for omissions have their effect, and their use,) as established by and under the technical and fee-gathering system, what true account can a man find to give? That the *effect* of it has been, most certainly, and the *design* of it almost as certainly, to enable the masters and journeymen of the justice-shop to cheat and deceive their customers.

Of the natural and inevitable causes of complication (which is as much as to say, of an extra degree of expense, vexation, and delay,) a collective, and it is supposed pretty complete, view is given in a Table annexed to another work (*Scotch Reform*, in Vol. V. of this collection) and along with them, for illustration, under each cause, a set of examples, exhibiting the suits of different descriptions in which it is most apt to have place. A certain portion of time (and that happily a very short time) pointed out by experience, is taken for the standard: these are called *simple* causes. To this standard all other causes are referred: they are called *complex* causes. Taking any given individual cause, — if the length of time it occupies extend considerably beyond that standard length — if it be of such a length as to require adjournment, the demand for the extra length must have for its cause some one or more of the causes enumerated in the Table. These causes being all foreknown, and previously understood and ranged in the form of a table — the judge, as his warrant for the adjournment he puts upon it, makes a memorandum of the existence of such cause or causes: each party at the same time being called upon to annex to such indication a memorandum of the assent to, or dissent from, the matter of fact asserted by it.

No admission of such evidence against offences anterior to the promulgation of the law: the reform should not be retrospective.

The reason is almost too obvious to bear mentioning. Transgressions already committed are beyond the reach of prevention: punishment would be misery in waste.

Not that, because the case were called a criminal one, there would be anything gained to general utility by extending the provision to the exclusion of satisfaction on the score of injury; viz. where the author of the injury cannot be a loser but the sufferer by it must be (and to the same amount) a gainer. But under the existing technical system, such is the structure of the established forms, that if the examination of the defendant remained forbidden to the one purpose, it would remain alike forbidden to the other.

To the abuse here in question, no correction would, could, or ought to be administered, but in the way of statute law. To render the correction retrospective, would include in it an operation of *ex post facto* law. Legislators shrink with uniform horror from the idea of such injustice. Jurisprudential law, from first to last, was formed by it. Not a step can she take on any fresh ground — not a fresh step can she take in any direction, that is not stained by injustice of this description.

CHAPTER X.

RECAPITULATION.

Against the following errors it concerns the judge to be upon his guard:—

1. The supposing that there is any man, of whose testimony it is certain that it will throughout be true: true to the purpose of warranting the judge to treat it as conclusive, *i. e.* exclusive of all counter-evidence.

2. The supposing that there is any man, of whose testimony it is certain that it will throughout be untrue; viz. to the purpose of warranting the judge in refusing to hear it. Not that the certainty of its being throughout untrue, would induce anything like a certainty of its being throughout uninstructive.

3. The supposing that there exists any *one* sort of interest, which, on the occasion in question, can be sure so to overpower the force of the standing tutelary interests, as to render untruth on the part of the testimony certain in any part, much less in the whole.

4. — or any *number* of interests acting in a mendacity-promoting direction.

5. The supposing that because, as to this or that fact, the testimony in question is incontestably false, and even mendacious, — that therefore there is a certainty of its being false as to this or that *other* fact: much more as to all the other facts.

6. The supposing that, where there are divers interests, to the action of which the testimony is exposed on either side, there is any one of them that ought to be neglected, as if destitute of force.

7. The supposing that, where there are divers interests acting on the same side, the aggregate force with which they act is to be learnt by counting them, without regard to the separate force of each.

The above propositions are the general result of this work.

The anatomical view (shall we say) above given of the human mind, — does it quadrate with the truth? No person by whom this work can ever be taken in hand — no person, male or female, high or low, rich or poor, but is competent to judge.

But if it be, what must we say of the picture given of it in the books of jurisprudence? of the picture of it, as referred to, and wrought from, on every jurisprudential bench?

Judging of it from those books and those benches, is this branch of practical science (if science it is to be called) in any better state than the science of anatomy, when the circulation of the blood was unknown, and nerves and tendons were confounded under one name? or than chemical science, when the great Plowden, no less profound in chemistry than in jurisprudence, gave in the pedigree of the metals, certifying them to be the issue in tail lawfully begotten by Stephen Sulphur upon the body of Mary Mercury?

By way of contrast to the above proposed mementos, and that the reader in whose understanding there is any predilection for reason, or in whose heart there is any concern for the welfare of mankind, might take his choice, — it had been in my intention to subjoin a view of those documents to which English judges are at present in the habit of resorting for their guidance, and which (in addition to, or in explanation of, the particular decision, the supposed purport of which has been preserved by chance,) the advocates on each side are wont to present them with in that view.

These documents would range themselves naturally into two classes: — 1. Considerations purely technical, *i. e.* having no reference to anything that will bear the name of reason. 2. *Fragmenta rationalia;* considerations containing in them more or less of the matter of reason. Fragments they cannot but be called; inasmuch as, containing, almost without exception, no reason but on one side, nor of that anything better than a loose and broken hint, they can never, in any instance, be considered as amounting to an entire reason, but only to a quantity of rough matter, by the help of which, with due management, a reason might be made.

Of this research, what, it may be asked, would be the use?

Illustration — illustration merely Amusement, and nothing more or, if anything beyond amusement, this — that the portentous worthlessness and depravity of the technical system, and of that sort of trash which among lawyers goes by the name of science, may be placed in yet another point of view that, of the mountain of their nonsense, the relative as well as absolute magnitude may be measured by the molehill dimensions of such part of their productions as, without abuse of language, may be capable of passing under the name of sense

To engage in any such research, in the hope of any instruction, which in any other point of view could afford payment for the labour, would be to scrutinize the contents of the first great dunghill that presented itself, for the possible pearls or diamonds that might be to be found in it It would at the best be like the reading over and studying the Bibliotheca of Alchemy, in the expectation of meeting with instruction applicable to the advancement of modern chemistry In the course of a twelvemonth, it is not impossible but here and there a result might be found presenting a fact of which no modern chemist is apprized But, in less than a thousandth part of the time thus spent in the puiheus of folly and imposture, facts of more use and importance might be brought to certainty, and for the first time, by following the track already opened by genuine and unpolluted science

To subjoin a view of these lawyer's reasons, technical and semi-rational, to the present work, had, as already observed, been my intention But, considering the bulk to which the present publication has already swelled, the completion of what may be found to say on this topic must be postponed As for specimens, they have been already seen technical considerations in the chapter on restoratives and elsewhere, *fragmenta rationalia* in some of the reasons for the exclusion of self-disserving evidence, in the reasons for excluding the testimony of a wife against her husband,* in the use made of the words necessity, course of trade,† &c

CONCLUSION

We are now arrived at the conclusion of this work a few leading considerations have been pressing upon our minds throughout the whole course of it At present I speak particularly to Englishmen, the application to other countries will not be difficult

1 So far as evidence is concerned (and the limitation need not be anxiously insisted on,) the existing system of procedure has been framed, not in pursuit of the ends of justice, but in pursuit of private sinister ends — in direct hostility to the public ends It is time that a new system be framed, really directed to the attainment of the ends of justice

2 The models, the standards, the exemplifications of the proposed improved system — nay, of a perfect system, are not objects of a Utopian theory, — they are within every man's observation and experience — within the range of every man's view — within the circle of every private man's family.

3 To find these models of perfection, an Englishman has no need to go out of his own country for invention there is little work — for importation, scarce any English practice needs no improvement but from its own stores consistency — consistency is the one thing needful preserve consistency, and perfection is accomplished

4 No new powers, no tamperings with the constitution, no revolutions in power, no new authorities, much less any foreign aid, are necessary All that is necessary (and this is necessary) is, that the laws made for the purpose should be made by the lawful legislator — not by a power subordinate to that of the legislator, taking advantage of his negligence, usurping his authority, legislating with inadequate means, in pursuit of sinister ends, on false pretences

5 Nothing more is required, than the extending, in all causes and cases, to rich and poor without distinction, that relief which in certain causes and cases, and in certain districts, has been afforded to the poor torn (by the appointed guardians and friends of the people) from the rapacity, or abandoned by the negligence, of their natural enemies

6 It requires, indeed, the establishment of local judicatures but even this is not innovation (not that even innovation, where necessary, should ever be declined) — not innovation, but restoration and extension *Restoration* — of powers once in existence,* before they were swallowed up by the framers of the existing system of abuse, under favour of their own resistless power, working by their own hands, covered by their own disguises, in pursuit of their own sinister ends *Extension* — the restoring, though with some increase of amplitude, to one half of the island, the fountains of justice so happily retained by the other †

An aphorism not unfrequently quoted, and seldom without approbation, is that of Machiavel, in which the taking the constitution of the country to pieces, for the purpose of bringing it back to its first principles, is spoken of as a wise and desirable course In

* *Supra*, pp 480 6 † *Supra*, p 167

* The Saxon County Courts.

† The Sheriffs' Courts and Borough Courts in Scotland.

the character of a general principle extending to all states, and to every branch of the constitution of every state, it is founded on vulgar prejudice, and leads to mischief. It supposes a constitution formed all at once: a supposition scarce anywhere realized. It supposes experience worth nothing; and herein lies the great and mischievous absurdity. It supposes men in the savage state endued with perfect wisdom, but growing less and less wise as experience accumulates, and progress is made in the track of civilization. It supposes that, to make the British constitution better than it is, we ought to bring it back to what it was in the time of William III., or Charles I., or Edward I., or John, or William the Conqueror, or Alfred, or Egbert, or Vortigern, or Cassibelaunus; in whose reign it would still have exhibited a picture of degeneracy, if compared with the primeval golden constitution of New Holland or New Zealand.

In the case at present on the carpet, the supposed wisdom of the maxim may find an apparent confirmation. By doing away the work of five or six hundred years, and throwing back the system of procedure, as to the most fundamental parts, into the state in which it was at the time of Edward I. and much earlier, a mountain of abuse might be removed, and even a near approach to perfection made. Why? Because in principle there is but one mode of searching out the truth: and (bating the corruptions introduced by superstition, or fraud, or folly, under the mask of science) this mode, in so far as truth has been searched out and brought to light, is, and ever has been, and ever will be, the same, in all times, and in all places — in all cottages, and in all palaces — in every family, and in every court of justice. Be the dispute what it may, — see everything that is to be seen; hear everybody who is likely to know anything about the matter: hear everybody, but most attentively of all, and first of all, those who are likely to know most about it — the parties.

Under the first Normans, as under the Saxons, the parties were always present in court, whoever else was present. Each was allowed to appear for his own benefit; each was compelled to appear for the benefit of his adversary.

Under the first Normans, as under the Saxons, justice was within the reach of every man: he might have it, in many cases, without travelling out of his own hundred; — in almost all cases, without travelling out of his own county. With, or even without, the assistance of a horse, most commonly he might betake himself to the seat of judicature, and return, without sleeping out of his own bed: at the worst, he might go one day, and return the next.

With minds of a certain texture, many points might perhaps be gained by quoting, as if it were an authority, this conceit of Machiavel. But to rest the cause of utility and truth upon prejudices and wild conceits, would be to give a foundation of chaff to an edifice of granite. In a work which, if true or useful for a moment, will be so as long as men are men, the humour of the day is not worth catching at any such price.

In point of fact, then, I mention it as mere matter of accident, and in point of argument as no better than an argument *ad hominem*, that the system of procedure here proposed, happens to be, in its fundamental principles, not a novel, but an old one. and I give it for good, not *because* it is old, but *although* it happens to be so. Parties meeting face to face, in courts near to their own homes: in county courts, and, where population is thick enough, in hundred-courts or town-courts.

NOTE ON THE BELGIC CODE.

THE code recently promulgated for the kingdom of the Netherlands, forms in many respects, so far as regards the law of evidence, an advantageous contrast with most European systems of jurisprudence

Its superiority is most decided in the department of *preappointed* evidence, particularly under the head of contracts formalities being, as it is fit they should be, *prescribed*, but not *peremptorily* so A contract, although informally drawn up, may yet, if signed by the parties, be received in evidence There is also a system of registration for written contracts. It is an article of this code, that oral evidence is not admissible to prove the existence, or to disprove or add to or alter the contents, of a written contract in form, but to this exclusionary rule there are two curious exceptions: one in favour of the poor — the other in favour of the mercantile classes If the property dependent on the contract do not exceed the value of one hundred florins, or if the transaction which gave rise to the contract be a commercial transaction, oral evidence may be heard These exceptions render the code more wise and just, but much less consistent

In the department of testimonial evidence, the only absolute exclusions are those of the husband or wife of a party to the cause, and all relatives of a party in the direct line but the relatives and connexions of a party in any collateral line (as well as those of the husband or wife of a party) to the fourth degree, are said to be *reproché* (in the Dutch version of the code, *gewraakt*,) as are also the presumptive heir, or servant of a party, all persons directly or indirectly interested (pecuniarily) in the cause, and all persons who have been convicted of robbery, theft, or swindling, or who have suffered any *afflictive* or *infamizing* punishment

It is probable, though not clearly apparent on the face of the code, that the words *reproché* and *gewraakt* refer to the old rule of the Roman law, by which the evidence of two witnesses is conclusive evidence *(plena probatio)* in certain cases and the meaning of these phrases probably is, that a witness belonging to any of the classes above enumerated, shall not be considered a witness to *that* purpose,—viz the purpose of forming a *plena probatio*, in conjunction with one other witness. If this be the meaning of the apparently exclusionary rule, it tends, *pro tanto*, to diminish the mischievousness of the monstrous principle of law to which it constitutes an exception

It seems that the parties themselves cannot be heard in evidence under this code, with this exception, however, that a party may be required to admit or deny his own signature; and several other exceptions closely resembling the *juramentum expurgatorium* and the *juramentum suppletorium* of the Roman law, which have already been explained

Among the bad rules of Roman law which are adopted in this code, is that which constitutes the evidence of a single witness insufficient to form the ground of a decision. The place of a second witness may, however, in many instances, be supplied by a written document, which is in such cases termed a *commencement de preuve par écrit*

A rule deserving of imitation in this code, is that which permits children under fifteen years of age to give their testimony without oath Their title to credence evidently does not depend upon their capacity to understand the nature of a religious ceremony, but upon their power of giving a clear, consistent, and probable narrative of what they have seen or heard

On the whole, this new code — so far at least as regards the department of evidence — may be pronounced, though still far from perfect, considerably better than either the English system, or the other continental modifications of the Roman law. — *Editor.*

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