

THE SPEECHES

OF

THE RIGHT HONOURABLE

THOMAS PHILPOT CURRAN

EDITED,

MEMOIR AND HISTORICAL NOTICES,

BY

THOMAS DAVIS, ESQ., M.R.I.A.

BARRISTER-AT-LAW.

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SIXTH EDITION.

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DUBLIN:

DUFFY AND CO., LTD.,

15 WELLINGTON QUAY.

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Printed by  
EDMUND BURKE & Co.,  
61 & 62 GREAT STRAND STREET, DUBLIN.

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## PREFACE.

A few of Curran's bar speeches were published. The first, of three thousand copies, was sold rapidly, and a second followed, in which some of his parliamentary speeches were added. In 1811, soon after his judgment in *Merry v. Merritt*, Stockdale published a third edition, containing that judgment; but otherwise unimproved from the second. In 1843, a collection was published with ten speeches, not in the former edition, and a short memoir written by the present author, but the writer of that memoir did not edit the speeches, as they were printed, without correction, or notes, or arrangement, from Stockdale's volume, and the pamphlet reports, and they were struck off without having been ever seen by the writer of the memoir.

The present edition is arranged chronologically, with a single exception. It contains six of Curran's bar speeches, and thirty-three of his parliamentary speeches, not in any former edition, and no pains have been spared to get the best reports.

The illustrative matter may be thought too ample.

With most of the parliamentary speeches, some account is given of the state of politics connected with the question, and of the progress and result of the debate.

Prefixed to, or following, each of the legal speeches will be found, the facts and events of the case, and, in many instances, short biographies of Curran's clients

It was hoped by this to communicate to the minute interest felt by a cotemporary, and illustration of Curran's march through life, than could be in a short memoir.

Great attention has been paid to fixing precise dates. documents, as the briefs in Sheares' case, dictated by Sheares, being inaccessible to the public, have been quoted. To the historian of Curran's time, whenever some of these things may be useful.

There are, doubtless, many errors in the volume, really is the first attempt to illustrate and compile speeches, and as it has been made amid the anxieties and occupations of political life, perhaps they will be corrected and not cavilled at. Any correction however, no matter how offered, will be welcome.

T. D.

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# MEMOIR

OF

THE RIGHT HONORABLE

JOHN PHILPOT CURRAN.

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In the north-west corner of the county of Cork stands the little town of Newmarket. It is in a land of moors and streams. Just-north of it slope the Ure hills, part of the upland which sweeps forty miles across from Lisacroll to Tralee, and far south of it, over the valley of the Blackwater, frown the mountains of Muskerry, changing as they approach Killarney, into precipitous peaks. A brook tumbles on each side of it to the Avondala river and, a few miles off, the Avondala and Allo, and a dozen other tributaries swall the tide of the Blackwater.

In old times the town belonged to the M'Anliffes, a small but ascolute clan. One of their castles was close by. They ranged their coulined pikeman and hardy kerne under the banners of M'Carha or Desmond, and shared the fate of their susceins in the days of Queen Elisabeth.

Then much was changed.

To the M'Anliffes succeeded the Aldworths, an Anglo-Saxon family. A grant and charter from James I., confirmed by Charles II., made them owners of a great estate and lords of a manor of 82,000 acres. Among their privileges was the right to hold a market on every Thursday, and, on this account, the town came to be called Newmarket. The castle of M'Anliffe fell to ruin—it is to this day empty and picturosa. The Aldworths built still nearer the town a great substantial "Newmarket House," and surrounded it with elm, and beech, and sycamore, and made a straight avenue of ash trees, which grew to be giants—for the family, though hospitable and good, were not so extravagant as their neighbours—a bridge succeeded the ford, and the parish church of Clonfert rose over the western brook. Some gentry of both races grew up around the town, and it went on improving, until several snug houses and a lot of cabins were clustered in it. Two roads—one from Mallow to Tralee, and the other from Charleville to Killarney—crossed in the town, and, therefore got a few horsemen and footmen, fish-joulters and tinkers, lords and pedlars, going between Cork and Kerry, passed through Newmarket.

In this town Curran was born and bred.

John Philpot Curran was the son of a judge! It happened in this way. Early in the last century, "One Curran, from the North," settled in the town, and had a son James, who learned reading, writing, and cyphering, certainly, and it is said, some Greek and Latin. The son of a North-Country Protestant, thus instructed, James Curran was patronized by the Aldworth family, and was finally appointed by them Seneschal of their Manor of Newmarket. As Seneschal he had jurisdiction to the value of forty shillings, and thus the father of Curran was a judge.



This James Curran was an ugly man, for he bore a coarse likeness to his son, and his occupation he was an ordinary soul. Nevertheless, a judge and a scholar, he had honour in his native place, and won the hand of Sarah Philpot. She was of gentle blood, and, what is more to our purpose, she had a deep, fresh, womanly-irregular mind; it was like the clear river of her town, that came gushing and flashing and discoursing from the lonely mountains—from the outlaw's and the fairy's home—down to the village. She had, under an exalted piety, a waste of passions and traditions lying grand and gloomy in her soul, and thence, a bright human love of her son came pouring out on him, and making him green at her feet. Well, then, did he place on her tomb in Newmarket this inscription:—

HERE LIES THE BODY OF

SARAH CURRAN;

She was marked by

Many Years, many Talents, many Virtues, few Failings, no Crime.

This frail Memorial was placed here by a Son whom she loved.\*

On the 24th of July, 1750, when people in Newmarket were talking of Lucas's Popish plots, the Dublin Society, the war, and the Cork assizes, the house in which Seneschal Curran lived was agitated by the going in and out of midwife, nurse, and neighbours, and at a prosperous moment, his wife was delivered of her eldest born, who, some days after, was christened John Philpot.

He grew up a light-limbed, short, brown boy, with an eye like a live coal. He had a sensitive heart, loved his little brothers and sister; but he loved his mother best, and well he might. She doted on him, and petted him, and taught him much. She soothed him with soft lullabies that sent the passions of his country into his young heart; she flooded him with the stories and memories of the neighbourhood, she nursed up in him love, and truth, and earnestness, by her precept and her example, and she taught him his Bible.

His father's position threw him into contact with high and low, informed him of the ways of all the people in the country, and must have sharpened his sagacity.

There were in these days, too, more marked customs than there are now. Thrice in the autumn, and once in the summer in came cattle and pigs, horse dealers and frieze-dealers, cheese, and hens, match-makers and pedlars, to the fair of Newmarket, and Curran got his boys and his share of the bustle and life with the rest. He was an early attendant at dances and wakes, and there he might gloat over traditions about the unfinished palace of Kanturk, and the hapless love of Catherine Ny Cormick; he might hear the old strollers and rapparees tell of William's wars, and the piper blow his merry jigs by the wild notes to which Alister M'Donnell marched to battle at Knocknanola, and the wilder ones with which the women mourned over his corpse.

Such was the atmosphere in which he lived—the hills and the streams, his father's court, the fairs and markets, and merry-makings, and his mother's lap. He learned much passion and sharpness, and some vices, too.

He went early to school, and it is said had a Kanturk boy, young Yelverton (afterwards Chief Baron Lord Avonmore) and Day his school-fellows; but he was a vehement boy, fond of fun than books.

One morning he was playing marbles in the bau-alley, and playing tricks too (for he was wild with winning taws) when in strolled a large, white-haired, kind looking old man. Seeing the young marble winner the centre of fun, and as hearty as his own laugh; the old man was attracted by him, began a gossip, and finally, by a few cakes induced him to go home to the Rectory. This man was Mr. Boyse, who used to preach as earnestly as if he were pastor of the thousands of Roman Catholics who surrounded him, instead of ministering to the Aldworths, Allens, Currans, and a few more.

Mr. Boyse taught him reading, grammar, and the rudiments of the classics, "all he could."

\* She died in a year or two after he had become Master of the Rolls.

Curran thrived under his care, and never forgot him. Once returning home to Elm Place, from a day of triumphant toil in court, he found a patriarch seated familiarly at his drawing-room fire. It was his benefactor. Curran grasped him; "You are right, sir," he said, "you are right; the chimney-piece is yours—the pictures are yours—the house is yours; you gave me all I have—my friend, my father!" That night Boyse went with the member for Kilbeggan to "the old house in College Green."

Curran was not "all work and no play" at Boyse's. He dashed out often—God bless him! One of his freaks was this:—A show was in the town, and the string-puller being all young Curran got leave to "manage." He went on properly enough for a while with the courtship and quarrels of Punch and Judy, but gradually made that custom tell her husband all the coherings of Newmarket, and ended by quizzing the priest! Thus a bok rick, for which he and the show-box were tumbled into the gutter. Whether he did this in Irish or English does not appear, for he spoke both languages before he could read either. Still these were bursts; he was a willing pupil at Boyse's, and that kind, modest man, finding he could teach him no more, gave him a good man's advice, and sent him to Middleton school, partly at his own expense. One Carr kept this school. He was a passable man, who knew Greek and Latin well.

In that flat-land town he worked up classics for Trinity College. He was to enter the Church, for his mother hoped "John would be a bishop." There he learned to love the sweet-voiced romances of Virgil, the cold and exquisite lyrics of Horace, and the living deeds and men of Homer. He carried much of them in his head, and generally one of them in his pocket ever after. He used to read Homer once a year, and Phillips says he saw him reading the *Æneid* in a Holyhead packet, when every one else was deadly sick.

How far the galeties of Horace and *Jvial*, or the example of *Æneas*, influenced his naturally fine qualities as a wit and a lover, it is easy to guess; but we see little other effect of these classics in his life. To be sure there are some of his classical puns to be found in O'Regan and Phillips—some quotations in his speech for Judge Johnson—and a poem on a plate warmer, giving a history of "The Decline and Fall" of the Heathen Gods. But except the likeness between the exordium of his *Jofunus* of Rowan and Cicero's of Milo, there is little of classic influence observable in his speeches. Surely, he owes more to the wakes, and his mother's stories about ghosts and heroes, and to the Bible and Sterne, than to all the classics; and he got still more from his loving and ambitious ap'it—from the changeful climate of his country, and from the restless times which troubled him to action. Yet books of all kinds, English, French, and Latin, helped to give articulation to those laughs, and sighs, and curses. For 'tis in these his eloquence consists.

He was sufficiently ground at Middleton, to get a Sizarship in Trinity College. This was on 16th June, 1767, when, therefore, he was not quite 17 years old. His tutor was Doctor Dobbin, who did nothing for him. As a Sizar he had free rooms and commons in College, and, thus rewarded, he read a little (unlike most young men about him)—got a Scholarship in 1770—and began reading for a Fellowship. He was then and ever as earnest, though not a monotonous student of men and books.

Being designed for the Church, he studied divinity, and got a little of the mannerism of his intended profession, as we see in a proxy letter of consolation, written to his dear friend Dick Stack,\* in 1770. In his time he wrote two sermons. One was written for this Dick Stack, to preach before the Judges of Assize, at Cork. The other was preached in College Chapel, as a punishment, and in it he gloriously mimicked the Censor, Doctor Patrick Duiganan!—an eruption worthy of him who satirized Newmarket, when twelve years old. We cannot look at the College pulpit without fancying we see the giggling eye, and hear the solemn voice of that wild boy.

Besides the classics and the Bible, he was fond of Sterne, and of Rousseau's *Eloïse*. He liked metaphysical discussions, too, and they led him to a bargain with a friend, the

\* This gentleman afterwards got a Fellowship and wrote a Treatise on Optics for College Text-Book.

whoever died first should visit the other on the death night. His friend died first, and broke his word. Curran was also a lover, a punster, and a ready hand in the rows which "The Gownsmen" used to have every night with "The Townsmen." The students then were generally older than they are now, and society more dissipated and ferocious. The College gown was not only an uniform;—with a stone or a key slung in it, it became a weapon. Nor were the sticks and fists of "The Townsmen" idle. His son says that one night Curran was left senseless on the flags, and, doubtless, many a sore knock he gave and got. He was continually getting into scrapes with "The Board" by his humour and wildness, and getting out of them by his ready wit. In short, he was the wittiest and dreamiest, the most classical and ambitious, of the scamps of Trinity College.

He gave up all thoughts of the church on coming of age; and, having graduated, he went to London, and entered the Middle Temple, intending, like all law students, to be Lord Chancellor, and something more. His son's book contains a merry narrative—a little spoiled by imitations of Sterne—of his journey to London, in a letter, written from his lodgings, "31, Chandos-street." Part of this letter is important and characteristic:—

"I am determined to apply to reading this vacation with the utmost diligence, in order to attend the Courts next winter with more advantage. If I should happen to visit Ireland next summer, I shall spend a week before I go, in seeing the curiosities here (the King and Queen, and the lions); and if I continue in my present mood, you will see a strange alteration in your poor friend. That cursed fever brought me down so much, and my spirits are so reduced, that, faith, I don't remember to have laughed these six weeks. Indeed, I never thought solitude could bear so heavily on me as I find it does. I rise, most commonly, in the morning between five and six, and read as much as my eyes will permit me till dinner-time; I then go out and dine, and from that till bed-time I mope about between my lodgings and the Park. For heaven's sake send me some news or other (for, surely, Newmarket cannot be barren in such things) that will teach me once more to laugh. I never received a single line from any one since I came here. Tell me if you know anything about Keller; I wrote twice to that gentleman without being favoured with any answer. You will give my best respects to Mrs. Aldworth and her family; to Dr. Cragh; and don't forget my good friends, Peter and Will Connel.

"Yours sincerely,  
"J. P. C.

"P.S.—I will cover this blank edge, with entreating you to write closer than you commonly do, when you sit down to answer this, and don't make me pay tennice for a half-penny-worth of white paper."

What an odd fellow a cockney would think him; he had not seen the wonders of London ("the King, the Queen, and the lions"), and spoke of going to see them "next summer." This was one of those gloomy times, when the soul of Curran, thrown on itself, explored the mysteries of its own constitution—calculated its own magazines—and came out frowning, fresh, and keen for his work. There is a desperate humour in a letter written to Jerry Keller, by him, a little after:—

"If you cast your eyes on the thousand gilded chariots that are dancing the hayes in an eternal round of foppery, you would think the world assembled to play the fool in London, unless you believe the report of the passing bells and hearses, which would seem to intimate that they all made a point of dying here. It is amazing, that even custom should make death a matter of so much unconcern as you will here find it. Even in the house where I lodge, there has been a being dead these two days. I did not hear a word of it till this evening, though he is divided from me only by a partition. They visit him once a day, and so lock him up till the next (for they seldom bury till the seventh day), and there he lies without the smallest attention paid to him, except a dirge each night on the Jew's harp, which I shall not omit, while he continues to be my neighbour."

A grim joke this, and coming from a man with depths, and fuel in his soul.

His "life in London" was a hard one. He spent his mornings in "reading even to exhaustion." He frequently attended the Courts, and though not a constant legal student, "he made vigorous plunges into law," and mastered those elements of constitutional and equity jurisprudence, which were basis enough for his practical studies. The mistake (now so common) was then rare, of men supposing that they can leave their minds generally ignorant and without accomplishments or knowledge of life, provided they have read

through piles of law books; mean hearts, who prefer gold to worthiness—blockheads, without sagacity to see that plenty of skill is of more value than plenty of tools.

It was not so with Curran. Besides his legal studies, he mastered the chief English and French writers, and saw what was going on about him in every court and theatre, club and cellar in London. Inclination, probably, more than design led him to this, and yet he was as much of a self-teacher as ever lived. His health had been bad, and his body weak. By cold baths, violent exercise, and attention to air and diet, he became robust; and this, notwithstanding those excesses in drinking which were universal at the time. His oratorical training was as severe as any Greek ever underwent.

His voice was so bad that he was called at school "stuttering Jack Curran," and his manner was awkward and meaningless. By watching himself—by the daily habit of declaiming Junius, Bolingbroke, and Shakespear, before a looking-glass—and by constant attendance at debating societies, he turned his shrill and stumbling brogue into a flexible, sustained, and divinely modulated voice; his action became free and forcible, and he acquired perfect readiness in thinking and speaking on his legs.

His first essay in a debating society was in *The Devil, of Temple-bar*. It amounted to saying, "Mr. Chairman," when he trembled, forgot, grew pale, grew red, grew hot, and sunk down in a fright. He attended the more regularly for a fortnight, and learned to say "aye" or "no," boldly and distinctly. One night he went there with Apjohn and Duhigg after a dinner of mutton, with extra punch. A ragged, greasy blockhead, at whose anachronisms he smiled, attacked him as "Orator Mum." Curran, excited by wrath and white lay, got up, and "dressed him better than he ever had been in his life." Loud applause, and a cold supper from the President, rewarded his vigour and confirmed it. Thenceforward he was a constant speaker, at *The Devil, The Robin Hood, and The Brown Bear*. At this last he was known as "the little Jesuit of St. Omar," from wearing a brown coat outside a black, and making pro-Catholic speeches.

He used sometimes get into black melancholy about Ireland and Newmarket. Still oftener he suffered for want of money, and even thought of going to America.

During his second year in London, he married Miss Creagh, daughter of Doctor Richard Creagh, of Newmarket, a cousin of his. With her he got a woman he loved, though she seems to have been lazy, and rather concealed. Her little fortune, and some money sent by his family, supported him till 1775, when he was called to the bar.

Curran's life has been made a long joke by the pleasant puerilities of his early biographer. Even his son's excellent book has over-much of this vice. What avails it us to know the capital puns he made in College, or the smart epigrams he said to Macklin; or, at least, they should take a small place in large biographies, instead of the chief place in sketches. These things are the empty shells of his deep-sea mind—like things for triflers to classify. But for men who, though in the ranks of life, are anxious to order their minds by the stand of some commanding spirit—or for governing minds, who want to commune with his spirit in brotherly sympathy and instruction—to such men, the puns are rubbish, and the jokes chaff.

Pause then, oh! reader, while, on the first day of Michaelmas Term, 1775, this John Philipot Curran, the married man, aged twenty-five, is putting on his wig, or bowing to the Benchers, ere he sit down a candidate for briefs. Pause, reader, and recall what this young brown lawyer had in him.

The hills of Duballow had laid lines of beauty and shades of wildness on his eye and soul he had been shaped by the position of his family—ennobled by the furs of his mother's mind—instructed in Irish traditions and music. Knowing these, and such lore as Boyse could teach him, he left Newmarket. This wild, fanciful, earnest boy then picked up classics, experience, and ambition at Middleton, and was ennobled by generous companions, refined by study and society, and made fiery by love and pleasure in College.

In London, amid his melancholy and wildness, he had a strong resolve to be great and good. His melancholy grew glorious then, as sun-lit clouds; and poverty sustained his ambition against depression or dispatience. He was too proud to live, or shine, or love upon the toleration of mankind. He learned to labour because he longed to enjoy. He

"he wished to—and but for the bishop he would remove the censure,"—but he was half a slave; he refused to break the rules to which he had sworn. A shower of blows from his lordship's horsewhip drove the old priest stumbling and bleeding to the ground. And yet every lawyer on the circuit had refused to act as counsel for this priest against that lord, when John Curran volunteered to plead his cause.

Reader! think over all this, and you will get at something of the man and the country then.

He did all that mortal could do, and more than any lawyer now or then would. He grappled with the baseness of Lord Doneralle, and dragged his character out on the world. He left his instructions, and described Captain St. Leger as "a renegade soldier," and "drummed-out dragoon." He heaped every scorn on Lord Doneralle's witnesses from their own story. He seemed to forget that he was speaking to tyrants—he treated the jury as men; he spoke as a man—virtuous, and believing others so. That jury, so adured by genius, forgot penal laws, lordships, and ascendancy, remembered God and their oaths and gave a verdict for Father Neale.

Verily those thirty guineas damages were a conquest from the powers of darkness—the first spoils of emancipation.

On account of this trial, Curran fought a duel with Captain St. Leger, and endured the acerbity of the Doneralle family; but, in exchange, he obtained the admiration and trust of his countrymen, and a glorified conscience. If he wanted more, he received it a few weeks after, in the dying and solemn blessing of Father Neale.

He has<sup>d</sup> been five years at the bar, and now he was famous with the public. But he had been recognised long before. It is proof enough of this, that he was prior of the St. Patrick's Society in 1779. The reader looking at the note below, will see that the wisest, best, and most brilliant spirits of the island were there,\* and that Curran was their honoured friend.

\*LIST OF MEMBERS OF THE ST PATRICK'S SOCIETY.

*Under.*—†Barry Yelverton, M.P., afterwards Lord Viscount Avonmore, Lord Chief Baron.  
*Abbot.*—†William Doyle, Master in Chancery.  
*Prior.*—†John Philpot Curran, afterwards M.P., Privy Councillor, and Master of the Rolls.  
*Præcentor.*—Rev. Wm. Day, S.E.T.C.D.  
*Bursar.*—Edward Hudson, M.D.  
*Sacristan.*—†Robert Johnson, M.P., afterwards a Judge.

Arran, the Earl of	†Duquery, Henry, M.P.	Newenham, Sir Edward, M.P.
*Barry, James, Painter, never joined.	†Emmet, Temple.	Ogle, Rt. Hon. George, M.P.
†Brown, Arthur, M.P., and F.T.C.D.	†Finucane, Matthew, afterwards a Judge.	*O'Leary, Rev. Arthur.
Burgh, Walter Hussey, Right Hon., and M.P.; afterwards Chief Baron.	†Fitton, Richard.	†O'Neill, Charles, K.C., M.P.
Burton, Beresford, K.C.	†Forbes, John, M.P.	Palliser, Rev. Dr. Chaplain.
Carhampton, Earl of	†Frankland, Richard, K.C.	†Pollock, Joseph.
Caldbeck, William, K.C.	†Grattan, Rt. Hon. H., M.P.	†Ponsonby, Rt. Hon. George M.P., afterwards Chancellor of Ireland.
Chamberlayne, W. Tankerville, M.P.; afterwards a Judge.	†Hacket, Thomas.	†Preston, William.
Chalamont, Earl of	†Hardy, Francis, M.P. (Lord Chalmont's biographer.)	Ross, Lieut.-Colonel, M.P.
Corry, Rt. Hon. Isaac, M.P.; afterwards Chancellor of the Exchequer.	Harstonge, Sir Henry, Bart., and M.P.	†Sheridan, Charles Francis M.P. Secretary at War.
Daly, Right-Hon. Denis, M.P.	†Herbert, Richard, M.P.	†Smith, Sir Michael, Bart. M.P., afterwards Master of the Rolls.
†Day, Robert, M.P.; afterwards a Judge.	†Hunt, John.	†Stowell, William.
†Dobbs, Robert.	†Hussey, Dudley, M.P. and Recorder of Dublin.	Stack, Rev. Richard, F.T.C.D.
Doyle, John, M.P., afterwards a General in the Army, and a Baronet.	Jebb, Frederic, M.D.	Townshend, Marquess of (Elected, professed, and joined on his visit to Dublin, after his Vice-royalty.
Dunkin, James.	Kingsborough, Lord Visct., M.P.	†Wolfe, Arthur, M.P., afterwards Lord Viscount Killwarden, Chief Justice of the King's Bench.
	†Mocawan, —	
	†Martin, Richard, M.P.	
	†Metge, Peter, M.P.; afterwards a Judge.	
	Mornington, Earl of.	
	†Muloch, Thomas.	

\* Honorary Members thus marked (†) were Barristers.]

continued to scorn for labour's own great sake—for labour is practical power. His duties were great—his passions intense—his means nothing, save intellect. He knew that his soul was a treasury wherewith to give and to buy; a tongue, wherewith to win or persuade—a light to illumine—an army to conquer—a spirit to woman and be worshipped. Nobly he prepared it in life, and passion, and hard thought, even more than in books; and yet this man is called idle and careless. He worked hard during his Apprenticeship; but now he is a Master.

Thus trained, accomplished, strong, passionate, and surrounded by competitors, he came to the bar. Well may his son say, that "instead of being surprised at his eminent success, the wonder would have been if such a man had failed."

Even when he was called, he was known and prized, not as a fishy and unblushing declaimer, but as an earnest and self-relying man, able to judge character and use knowledge.

His first brief was in a trivial Chancery motion, and the Devils' Club scene occurred over again. His imagination so mastered him, that when Lord Liford bid him speak louder, he became silent, blushed, dropped his brief, and allowed a friend to finish the motion.

Phillips describes him as having attended the Cork assizes, and "walked the hall term after term, without either profit or professional reputation."

At this time Curran lodged in Redmond's-hill, a street between Cuffe-street and Digges-street. The neighbourhood was one frequented by his profession. The Solicitor-General lived in Cuffe-street, the Judge of the Prerogative in Bride-street, and Commissioners of Bankrupts were plenty as paving-stones in Digges-street, as any one taking up that historical novel "an old almanack," can see. Mr. Phillips calls the place Hog-hill (there never was such a place in Dublin) and makes a melo-dramatic picture of dirty lodgings, starving wife, and a dunning landlady; and then brings Curran home to find his first brief, "with twenty gold guineas, and the name of old Bob Lyons on the back of it!"

Perhaps Mr. Lyons did, on Arthur Wolfe's recommendation, send twenty guineas and brief, in "Ormsby v. Wynne, election petition," to Counsellor Curran's lodgings, and finding Curran a pleasant companion, asked him to Sligo,\* for Lyons was in good business, a hospitable sharp fellow, and had his office in York-street, near Curran's lodgings. But Curran made eighty-two guineas his first year, between one and two hundred the second, and increased more rapidly every year after. With this, and what his wife had, he could not have been starving, though certainly he was not rich.

He rose rapidly and surely; and his reputation among his intimates was higher than with the public—a sign of a genuine man.

At last this matured genius found a great public opportunity, and used it. A cruel wrong had been done by one so high as to awe down all advocates, and corrupt the fountains of justice—there was need of an avenger, and he came.

The Cork summer assizes of 1780 are memorable, for there this Protestant lawyer appeared as voluntary counsel for a Roman Catholic priest against a Protestant nobleman: Was there ever such audacity?

To be sure, Lord Doneraile had acted like a ruffian.

He had seduced a country girl. Shortly after, her brother broke some rule of his church, and was censured by his bishop. The paramour sought Lord Doneraile's interference in her brother's favour. It was promptly given. Accompanied by a relative of his, a Mr. St. Leger, ex-captain of dragoons, his lordship rode to the cabin in which Father Neale, the parish priest, lived. Father Neale was an aged man, and a just and holy clergyman, but a very poor one. He was kneeling in prayer, when Doneraile's voice at the door ordered him out. Book in hand, with bare and hoary head and tottering step he obeyed, and heard as his lordship's stirrup a command to remove the censure from the convenient miscreant, whose sister Lord Doneraile favoured. The priest was half a slave; he muttered excuses,

\* Lyons had a jolly house there on the fierce coast, amid a secluded Irish race, whom Curran mixed with and learned from.

JOHN Y. CURRAN.

"he waned to—and but for the bishop he would remove the censure,"—but he was half a slave; he refused to break the rules to which he had sworn. A shower of blows from his lordship's horsewhip drove the old priest stumbling and bleeding into the novel.

And yet every lawyer on the circuit had refused to act as counsel for the priest against that lord, when John Curran volunteered to plead his case. Reader! think over all this, and you will get at something of the mad and the country then.

He did all that mortal could do, and more than any lawyer now or then would. He grappled with the baseness of Lord Donerale, and dragged his character out of the mire. He left his instructions, and described Captain St. Leger as "a renegade soldier," and "drummed-out dragoon." He heaped every scorn on Lord Donerale's witnesses from their own story. He seemed to forget that he was speaking to tyrants—he treated the jury as men; he spoke as a man—virtuous, and believing others so. That jury, so adjured by genius, forgot penal laws, lordships, and ascendancy, remembered God and their oaths and gave a verdict for Father Neale.

Verily those thirty guineas damages were a conquest from the powers of darkness—the first spoils of emancipation.

On account of this trial, Curran fought a duel with Captain St. Leger, and endured the acerbity of the Donerale family; but, in exchange, he obtained the admiration and trust of his countrymen, and a glorified conscience. If he wanted more, he received it a few weeks after, in the dying and solemn blessing of Father Neale.

He had been five years at the bar, and now he was famous with the public. But he had seen recognised long before. It is proof enough of this, that he was prior of the St. Patrick's Society in 1779. The reader looking at the note below, will see that the wisest, best, and most brilliant spirits of the island were there,\* and that Curran was their honoured friend.

\*LIST OF MEMBERS OF THE ST. PATRICK'S SOCIETY.

- Under.*—†Barry Yelverton, M.P., afterwards Lord Viscount Avonmore, Lord Chief Baron.  
*Abbot.*—William Doyle, Master in Chancery.  
*Prior.*—†John Philipot Curran, afterwards M.P., Privy Councillor, and Master of the Rolls.  
*Procurator.*—Rev. Wm. Day, S.F.T.C.D.  
*Bursar.*—Edward Hudson, M.D.  
*Sacristan.*—†Robert Johnson, M.P., afterwards a Judge.

Arran, the Earl of	†Duquery, Henry, M.P.	Newenham, Sir Edward, M.P.
*Barry, James, Painter, never joined.	†Emmet, Temple.	Ogle, Rt. Hon. George, M.P.
†Brown, Arthur, M.P., and F.T.C.D.	†Finncane, Matthew, afterwards a Judge.	*O'Leary, Rev. Arthur.
Burgh, Walter Hussey, Right Hon., and M.P.; afterwards Chief Baron.	†Fitton, Richard.	†O'Neill, Charles, K.C., M.P.
Burton, Beresford, K.G.	†Forbes, John, M.P.	Palliser, Rev. Dr. Chaplain.
Carhampton, Earl of	*Frankland, Richard, K.C.	†Pollock, Joseph.
Caldbeck, William, K.C.	†Grattan, Rt. Hon. H., M.P.	†Ponsonby, Rt. Hon. George, M.P., afterwards Chancellor of Ireland.
Chamberlayne, W. Tankerville, M.P.; afterwards a Judge.	†Hackel, Thomas.	†Preston, William.
Challemont, Earl of	†Hardy, Francis, M.P. (Lord Charlemont's biographer.)	Ross, Lieut-Colonel, M.P.
Corry, Rt. Hon. Isaac, M.P.; afterwards Chancellor of the Exchequer.	Harstonge, Sir Henry, Bart., and M.P.	†Sheridan, Charles Francis, M.P., Secretary at War.
Daly, Right-Hon. Denis, M.P.	†Herbert, Richard, M.P.	†Smith, Sir Michael, Bart. M.P., afterwards Master of the Rolls.
†Day, Robert, M.P.; afterwards a Judge.	†Hunt, John.	†Stawell, William.
†Dobbs, Robert.	†Hussey, Dudley, M.P. and Recorder of Dublin.	Stack, Rev. Richard, F.T.C.D.
Doyle, John, M.P., afterwards a General in the Army, and a Baronet.	Jebb, Frederic, M.D.	Townshend, Marquess of (Elected, professed, and joined on his visit to Dublin, after his Vice-royalty.)
Dunkin, James.	Kingsborough, Lord Visct., M.P.	†Wolfe, Arthur, M.P., afterwards Lord Viscount Kilwarden, Chief Justice of the King's Bench.
	†Mocawen, —	
	†Martin, Richard, M.P.	
	†Metge, Peter, M.P.; afterwards a Judge.	
	Mornington, Earl of.	
	†Muloch, Thomas.	

\* Honorary Members thus marked (†) were Barristers.]

## MEMOIR OF

the title vulgarly given them, "Monks of the Screw,"\* people suppose that this was a drinking club. Perhaps the names are answer enough. It was an union of strong men, brought together, like electric clouds, by affinity, and flashing as they joined. They met, and shone, and warmed. They had great passions, and generous accomplishments, and they, like all that was good in Ireland, were heaving for want of freedom. They were men of wit and pleasure, living in a luxurious state of society, and probably did wild and excessive things. This was reconcilable (*in such a state of society*) with every virtue of head and heart.

This was the sanniest period, though not the grandest, of Curran's life. He was surrounded by wise and loving friends, and he saw his country striding to independence, and growing in wealth, in knowledge, and, better than all, in internal union. He was not an idle, though he was not a distinguished party during these events. He stood in the ranks of the Volunteers, armed as free men should ever be, to gain or guard their rights. His censure was dreaded by every corrupt judge and savage lawyer, and his counsel sought by Avonmore, Flood, and Grattan. At a special election in 1783, he entered the House of Commons. He sat for Kilbeggan, a borough belonging to Mr. Longfield, but he sat uncompromised; he sat as Henry Flood's colleague; he was returned under the guardian guns of the Volunteers, to enforce legislative independence. At the general election, in the spring of 1790, he came in for Rathormac, and sat for it till the mad secession in 1797.

His parliamentary speeches reported are few and short. The first mentioned is on Flood's Reform Bill, in November, 1783. The next is introductory of a resolution, declaring the exclusive right of the Commons to originate Money Bills—an important resolution not likely to be trusted to a bad debater. The report of it seems like a newspaper sketch; still we see in it a sound historical argument. His appeal to the House to guard a right which was the palladium of liberty to a virtuous, and of corruption to a vicious Commons, was bold and original.

His speech in the House, on the 24th February, 1785, on the debate on the Abuse of attachments by the King's Bench, led to a duel with Fitzgibbon, then Attorney-General. Fitzgibbon had once been an intimate of Curran's, whose first brief-bag was a gift from John Fitzgibbon, "for good luck." But they were unlike: as the strong hard granite and the soft flashing wave. Fitzgibbon having, though a plebeian, taken the government side, gave it all the support that masculine talents, clear rhetoric, personal courage, and utter want of conscience enabled. Curran, the enthusiastic, the pure, the Irish, went with the people for liberty. They were not friends in 1785; and Fitzgibbon, it is said, had brought the Duchess of Rutland to hear him chastise the member for Kilbeggan. The fiery Cork man heard this, and would not wait for him. Fitzgibbon had fallen asleep, and Curran, on rising, attacked him as a "guilty spirit." Fitzgibbon answered with "puny babbler," and Curran retorted in an invective feebly resembling part of Grattan's against Flood. They

\* The Monks of the Order of Saint Patrick, commonly called the Monks of the Screw, assembled at their Convent, in Saint Kevin-street, Dublin, on and after September the 3rd, 1779.

Curran wrote the Charter Song, of which Phillips gives a part:—

### THE MONKS OF THE SCREW.

When St. Patrick our order created,  
And called us the Monks of the Screw,  
Good rules he revealed to our Abbot,  
To guide us in what we should do.

But first he replenish'd his fountain  
With liquor the best in the sky;  
And he swore, by the word of his Saintship,  
That fountain should never run dry!

My children, be chaste—till you're tempted,  
While sober, be wise and discreet;  
And humble your bodies with fasting  
Whene'er you have nothing to eat.

Then be not a glass in the Convent,  
Except on a festival found;  
And this rule to enforce, I ordain it,  
A festival all the year round!

The Society dwindled away towards the end of the year 1785, according to Hardy 1795, as printed in "Curran's Memoirs, by his Son," is an error, probably, of the printer



I DEDICATE THIS BOOK,  
TO MY FRIEND,  
CHARLES GAVAN DUFFY,

MEMBER OF PARLIAMENT FOR THE BOROUGH OF NEW BLOSS,

THE BEST MAN AND THE BEST IRISHMAN

I HAVE EVER KNOWN,

IN FAREWELL MEMORIAL

OF HAPPY DAYS THAT ARE NO MORE,

AND OF ALL THAT I OWE TO HIS COUNSEL, EXAMPLE,

AND AFFECTION.

*November, 1855.*

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# MEMOIR.

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THE heralds and annalists tell us that among the Danes of Dublin who mingled with our Norman conquerors and helped them to carry their castles and their marchmen to the very edge of Ulster, within a few years after Strongbow's landing, was an Ostman chief, named Plunkett of Bewley. The name meets us often in the early chronicles of the Pale—now its border battles with the Clan Colla, or the Irians of Dalaradia, now in high administrative and judicial office at the Castle. Three peerages, the baronies of Killeen (merged in the earldom of Fingall), of Dunsany, and of Louth, had ennobled the old Norse blood with honours as ample as their estates, which dotted the whole country from the fair margin of Lough Crew, to the low park lands of the City—when in the reign of King Henry the Eighth, Sir Patrick Plunkett, a knight of the house of Louth, married the grand-daughter of the Lord High Chancellor, Sir William Welles.\* From one scion of their family the martyr primata, Oliver Plunkett of Armagh, derived the innocent blood shed on Tyburn Hill. From a younger son of the same Sir Patrick, the Reverend Patrick Plunket of Glennan, in the county of Monaghan, more than a century ago, claimed descent. The particulars of the pedigree baffle Ulster King-at-Arms, but it rests, to the family satisfaction, at either end on the Chancery woolpack.

A son was born to the Rev. Patrick Plunket in 1725, and entered upon the Presbyterian ministry by license of the presbytery of Monaghan in the year 1747. The following year the young Levite was unanimously called to the congregation of Enniskillen. He was early distinguished among his brethren for the keen, wiry wit, the subtle, hard-headed logic, and the free-thinking turn which are characteristic of the Ulster Presbyterians, and for twenty years he preached the gospel, with occasional Socinian strictures, in the chief kirk of Fermanagh. There he married "Mary, sister of Redmond Conyngham, Esq.," and there, in the year 1750, was born, his son Patrick, afterwards as eminent in physic as William was in politics and law. In July, 1764, while the minister and his wife were on one of those long excursions which the duties of a yet neglected ministry sometimes entailed, late at night Mrs. Plunket was taken ill in a country part of Fermanagh, fortunately within reach of the manse of a brother minister, and there delivered safely of the son, who was afterwards named William Conyngham Plunket.

Next door, under the same roof with the minister's house in Enniskillen, was the house of a Protestant burgess named Magee, to whose wife was born a son at the same time. The two children were often nursed at the same breast, shot

\* Burke's "Peerage."

marbles, pegged tops, learned the rudiments and the humanities, entered college, and proceeded *pari passu*, faithful friends and steadfast allies through life together, to the highest dignities of the Anglo-Irish constitution in Church and State. This young William Magee, with the hot no-Popery blood of the Inniskilling Dragoons in his veins, was afterwards Archbishop of Dublin, and author of the famous Protestant tractate on the Atonement.

In the year 1768, the Rev. Thomas Plunket obeyed a call from Strand-street congregation, the oldest of the Irish Socinian chapels, and shifted his pulpit to Dublin. The memoirs mention his intimacy with the eccentric, benevolent parson, *Premium* Madden, and with that gentle genius, his curate, Philip Skelton; and that he was particularly appreciated and courted by all the wits and politicians of the time of Charles Lucas and Anthony Malone. He died poor in 1778, and his congregation undertook the charge of his family. From the subscription raised, all the minister's little debts were paid off and the cost of his funeral defrayed; and with the balance of the fund his widow and daughters established a quiet tea warehouse, patronised by pious elders and the Strand-street matrons, on the profits of which the family was decently maintained and the sons liberally educated. After they had become wealthy and famous, their sisters still, with true northern independence, kept the little shop, and sold the best Bohes in Dublin.

In 1779, William Magee and William Plunket stood for sizarship together in Trinity College, and were rejected, but entered as non-decremented pensioners, and chummed during their college course. In the same examination Mr. Sealy Townsend, afterwards Master in Chancery, and Dr. Miller, the gifted author of "History Philosophically considered," were candidates.\* Townsend took the first place, Plunket the third or fourth, Miller the fifth—neither was so distinguished during the under-graduate course as Townsend, until the second examination of the fourth year when Plunket stopped his certificate on equal answering. He is said to have been dull in the college course; but it was not in the lecture-hall or the tutor's room that the students of Trinity then received the most valuable elements of that education, which for half a century afterwards supplied Ireland with so distinguished a list of lawyers, politicians, and preachers. It was in the gallery of the House of Commons where Grattan's glorious eloquence was preaching the new born nationality. It was in the Historical Society, where the rights of man and the principles of history were debated with a force and a fire which their practical application to a revolutionary period inspired and made real among a generation of young men, perhaps the most splendid in abilities and acquirements who have ever studied together in Ireland.

A grand group might be selected from any *seance* of the Historical Society in these days of the triumphant Volunteers. A versatile, impetuous revolutionist, intensely insubordinate, always meditating love or murder, with a reputation for military, political, literary, any and every kind of talent, when he pleases to apply it, which is by no means perpetually—him they call Theobald Wolfe Tone. A gentle youth, fresh from the country, with softly winning manners, and a tongue from which language flows with a peculiar happy murmur, is named Charles Kendal Bushe. A calm, self-possessed, young citizen, with a Spartan purity of character, and a serene loftiness of intellect, which exercises a strange sway over all his comrades—this is Addis Emmet, younger brother of the great dead lion of the Historical Society, Temple Emmet. Philosophic Miller, ready of speech, racy of hard study, but never dull with it, for his brain was an alembic able to fuse any sub-

\* Memoir of Dr. Miller in the *Dublin University Magazine*.

ject. Honest Peter Burrowes, who, when his generous human heart was stirred to its tranquil depths (seldom, indeed, it must be allowed) could utter beyond any other man among them what would make you burn or shudder with genuine passion. Whitley Stokes, of a most amiable nature, and a beautifully classic and cultivated mind. Magee, who rushed into a controversy at a charge, trusting to the sheer force of his intellect and character to carry him through. Wild Tom Gould, acting the admirable Crichton, flirting for half a day in Sackville-street with all his heart, and then giving half an hour and half his head to astrology, Roman law, or some equally useless abstruse and absurd study. Saurin, somewhat senior to the rest, with his dry and unrelenting logic, which you saw cut in every line of that hard Huguenot head.\* The heads were all heads of mark indeed, and there were more of as good quality, some of which were lifted dripping on the gibbet twenty years afterwards, some of which wore judges' wigs or bishops' mitres, and one or two in Spanish breaches, waved cocked hats with the tricolour and eagle of Napoleon's Irish Legion on them. But all these young men admitted one master mind in the grand game of debate. None of his cotemporaries has challenged the supremacy of Plunket in the talent of oratory. As it is said now that his reported speeches are nothing to what they were when delivered, so it was long before his youthful comrades could be induced to admit that his finest efforts at the Bar or even in Parliament could be compared to the impromptu sallies of that earlier and more familiar forum. Even then they spoke, not so much of the figurative brilliancy and poetic harmony of his language, which young men most admire in eloquence, and which, in Grattan's dithyrambic days were all the fashion, as of an irresistible roll of argument which swelled like wave after wave, clear, rapid, and overwhelming. It was vain to play rhetorical fireworks against such an element. Then you aroused the keen excoiating irony which flowed like bile off his vigorous intellect.

Plunket entered Lincoln's Inn in 1784, and was called to the Bar in 1787. Old attorneys say, that his circuit practice at first was of a humble class, and of a popular character; and that he began by moving Civil Bills at Trim, where the northern circuit then commenced for half-guinea fees—according to the custom of the junior bar before assistant barristers were known. He was so poor that he had to sell his gold medal, and rode his first circuit on a horse lent for the service by Peter Burrowes. In these early difficult days, he lodged with a young Catholic merchant from Monaghan, in Eccles-street, and in the faithful intimacy which he always maintained with his old friends, in after days of pride and place, often said, half in jest and half in earnest, that the Catholics of Ireland owed much of the service he gave to their cause, to his ancient regard for honest Michael Hughes. The following anecdote tells the accident which is said to have first revealed his particular power as a pleader:—

"While yet unknown, he happened to be acquainted with a gentleman who conducted the business of an eminent solicitor. The proprietor gave his man of business instructions for a bill in a very heavy suit, who, trusting to the abilities of his young friend, gave him the instruction and the fee. The bill, a voluminous one, was quickly despatched; the name of the pleader was inquired and introduced; he became the confidential adviser and constant guest of the solicitor, and a connexion of a closer nature soon followed."†

Hereby we learn how Plunket came to marry into the house of John M'Caus-

\* Journals of the Historical Society.

† A valuable Memoir in the *Metropolitan Magazine*, by John O'Donoghue, Esq., of the Irish Bar.

land, the great northern solicitor, and to devote himself at so early a period to the practice of the Equity Courts.

Magee and Bushe, Tone and Burrowes, all rising young men, were of his more particular friendship in these days; and although he did not join the little Political Club in which Tone brought together the rest of his college mates, with his adjutant Tom Russell, and his reformed aristocrat Sir Lawrence Parsons, and the rising national writers, Drennan and Pollock, yet there seems to have been between the two young men a racy, hearty appreciation and genuine regard for each other. One day in November Term, 1792, Tone, who has been working the Catholic cause with an ardour, activity, and courage, quite new in the councils of the committee, walks down from their office to the hall of the Four Courts to take note of the vane of opinion there. "Wonderful," he writes in that wonderful journal of his, "wonderful to see the rapid change in the minds of the bar on the Catholic question; almost every body favourable. Some for an immediate abolition of all Penal laws; certainly the most magnanimous mode, and the wisest. All sorts of men, and especially lawyer Plunket, take a pleasure in girding at Mr. Hutton (himself), 'who takes at once all their seven points on his buckler, thus!' Exceeding good laughing. Mr. Hutton called Marat. Sundry barristers apply to him for protection in the approaching rebellion. Lawyer Plunket applies for Carton, which Mr. Hutton refuses, inasmuch as the Duke of Leinster is his friend, but offers him Curraghmore, the seat of the Marquis of Waterford. This Mr. Hutton does to have a rise out of Marcus Beresford, who is at his elbow listening. Great laughter thereat." A few years afterwards, it was one of the same Beresfords whose black and brutal heart suggested to the Castle the too atrocious idea, that Tone should be dragged out while life was yet oozing through the unhappy death wound he had inflicted, and hanged in his very agony according to the letter of the law.

Even so soon a vast difference of opinion was beginning to exhibit itself among the generation of young men who had worshipped Grattan and Liberty at college, and who had been proud to couple the names of George Washington and Edmund Burke together. The French Revolution had been for several years in action, and was fast erupting into anarchy and general dissolution of law, order, and religion; spreading, by a kind of volcanic sympathy, into all surrounding nations. Edmund Burke had taken his memorable stand against democracy, far in advance of the general opinions of his party, but was gratified to find that his doctrines had found several zealous disciples among the rising young men of his native country. Bushe, who had lived a little in France, wrote a pamphlet to sustain his side of the controversy; so did Goold. Tone at once took the opposite side, and vowed that Paine was the prophet. Plunket was early in his life and to its last day in all his politics a disciple of Burke, tempered by Blackstone. He hated despotism much, but he hated anarchy more. He had a great and equal antipathy to the constructiveness and to the destructiveness of democracy—the antipathy to ancient establishments, and the rage for system-building which it engendered. He saw in the English constitution reformed and unclogged as it had been by the early American republicans, the ideal of a great system of political dynamics, in whose careful balance of powers, a civilized and Christian community might hope to enjoy all the happiness and liberty which government can confer. He added to these principles the intelligence and the reverence of a constitutional lawyer for a state system, to which so much had been contributed by the sagest authorities of his own profession. And he believed that if the parliamentary patriots of Ireland, undazzled by 're-



cent democratic conquests in America and France, and undismayed by the terrorism and corruption which rendered the king's government scandalous, should take their stand upon the concessions compelled by Grattan, they might in time succeed in widening the basis of the constitution of '82, so as to admit all its subjects to equal rights and franchises, and to perfectly conserve the estates of the realm in just and co-ordinate relations, by gradual internal reform. All his interests and ambition went the same way. His daily business was with rights and properties, which had grown with or under the existing system. His ambition was the same which had raised Pery and Burgh, Wolfe and Yelverton, to fame, office, and fortuna. Tone on the other hand was a thorough revolutionist by nature, station, and ambition. From his boyhood, revolt had been the very breath of his being—now and then against his father whom withal he so tenderly loved, but who would insist upon the boy's wearing a wig or a fellow's gown instead of a shako; against the Provost and Fellows, against the Benchers and Bar; but above all, against the atrocious injustice which was then denominated Government in Ireland. He detested his profession. The existing system afforded him no other fixed arena for his eminent and various abilities—abilities equal to any of the positions which daily fell to men of his *genre* in the democratic countries; compared to which any position he could hope to attain in Ireland was a mere vegetation. But ardent as his ambition was, it is only just to him to say that he never allowed it to have more than a secondary influence in his plans for the subversion of the English government. With all his heart and soul, he abominated the loathsome corruption and the unmerciful tyranny of that system. At the time it presented to the view a suspicious and ferocious executive; a parliament, powerless unless for shame or evil, and as much a byword for corruption as any bagnio in the city; the ascendancy political and religious, therefore social also, and in all the three aspects intolerant and intolerable, of a small privileged sect over two vast segments of the population, the Catholics and the Dissenters, who had no communion in the constitution, and hardly the least influence with the administration. Grattan's constitutional revolution had utterly failed to remedy this system. The government of Ireland had relapsed into a worse state than the state before '82. If it could by possibility be destroyed by an unconstitutional revolution, any result whatever could hardly have failed to be more gratifying to God and man. The people failing, the English minister did, in fact, effect a result as extreme by an unconstitutional counter-revolution, the Union. Such results as America, Holland, and even France, before the bloody era of Robespierre, had attained, by armed revolutions, it was Tone's ambition and mission to produce in Ireland.—Republican Institutions based upon a Declaration of the Rights of Man, guided by the patriotic elements youth and genius, and fortified by a vigorous military spirit.

It is right to remember, in judging Plunket's subsequent conduct, especially at the time of Robert Emmet's trial, that at so early a period and with a man whom he regarded so highly as he did Tone, right or wrong, he had taken decided issue against the Irish republicans.

Long before Tone was obliged to leave Ireland, the political opposition had even bred a personal estrangement between the two friends. One day after a long successful interview with "my friend, citizen Carnot, the organiser of victory," Tone writes in his journal, "Well, my friend, Plunket, (but I sincerely forgive him) and my friend Magee, whom I have not yet forgiven, would not speak to me in Ireland because I was a Republican. Sink or swim, I stand to-day on as high ground as either of them." Indeed Tone always speaks of Plunket with

such a fondness as shows that he believed in the perfect sincerity of his convictions; and on the very eve of Tone's exile, Plunket writes to him thus:—

DEAR TONE:—I embrace with great pleasure the idea and opportunity of renewing our old habits of intimacy and friendship. Long as they have been interrupted, I can assure you that no hostile sentiment towards you ever found admittance into my mind. Regret, allow me the expression, on your account, apprehension for the public, and great pain at being deprived of the social, happy, and unrestrained intercourse which had for so many years subsisted between us, were the sum of my feelings. Some of them, perhaps, were mistaken, but there can be no use now in any retrospect of that kind. It is not without a degree of melancholy I reflect that your present destination makes it probable that we may never meet again, and talk and laugh together, as we used to do, though it is difficult to determine whether these jumbling times might not again bring us together. In all events, I shall be most happy to hear from you, and write to you, often and fully, and to hear of your well-being, wherever you may be. If I had known your departure was to have been so very immediate, I would not have suffered you to slip away without a personal meeting. I shall hope to hear from you as soon as you get to America. I formerly had friends there. The unfortunate death of my brother you have probably heard of; perhaps however, I may still have some there who might be useful to you. Let me know where, and in what line you think of settling, and, if any of my connections can be of use, I will write to them warmly.—I beg you will give my best regards to Mrs. Tone, and believe me, dear Tone, with great truth, your friend,

W. PLUNKET.

May 29th, 1795.

Tone sailed for America, thence to France, and within the next three years, had engaged the French and Dutch governments to direct three expeditions to the shores of Ireland; had served with the French army as adjutant-general; was acting in confidential council with Hoche, Bonaparte, Carnot, and as well known and accredited in the *bureaux* of the Directory and at the Hague, as the official of any regular legation. Three years of miraculous work! While Bushe lamented in the House of Commons that he should be "wasting on the desert air of an American plantation, the brightest talents that I ever knew a man to be gifted with"—doubting withal, perhaps, if in such quick and teeming times, the elements of a revolutionary statesman and soldier, were indeed or would long remain mouldering among Yankee maize and tobacco. Plunket lived in Dominick-street; sat under Chancellor Clare as regularly as his register; got his silk gown, and among the innumerable titles, mortgages, jointures, attainders, remainders, and reversions, with which five or six generations of good old Irish gentlemen, rake-helly, and rapacious, had incumbered their rights of property, made much money and a great name in equity. When the Rebellion of '98 broke out, he subscribed to the Patriotic Fund; and on that famous night, when the rebels were to have taken Dublin, and General Craig packed all the lawyers and attorneys in Smithfield to meet the first rush of the Kildare pikes, Plunket was out in battle array, like the rest of Captain Saurin's Lawyers' corps. Once he emerged from his pleadings, while that other battle, fiercer than any that General Craig commanded was going on between the lawyers and the rebels—venue changed from Smithfield to Kilmainham. He was counsel with Curran for Henry Sheares, and did his

duty well: but when Curran, that same sad winter, made such a gallant effort to save Tone from the hangman, it is gratefully told by the patriot's son, "that Peter Burrowes\* ably exerted himself"—and there is no mention made of Plunket.

He had entered parliament in the spring of that awful year for the borough of Charlemont. At the time there was no more honoured constituency in all Ireland, than the tidy village which rests under Mountjoy's old fort, beside the Northern Blackwater. The good old lord, who took his title thence, throughout his life had exercised his *cong's d'elire* as a trust for the people, and was always proud to award its honours where he saw, or fancied he saw, genius, patriotism, and youth struggling into public life, under the discouraging auspices of a system in which counties were family appanages, and boroughs cost £4000 a seat. Grattan had entered Parliament as member for Charlemont, and represented it when he carried the revolution of '82. Among the names which we find on its list of burgesses, is that of Sheridan, a cousin of Richard Brinsley, to whom the earl, struck on a short acquaintance, by the brilliant wit and high idealty which belong to that old Celtic blood, forthwith offered a seat in Parliament. He died young; and then Lawyer Jephson, full of parliamentary promise, is spoken of with a proper *pater patrie* pride; but ungrateful Lawyer Jephson took a judgeship at Gibraltar. Lord Caulfield and he had occupied the two seats from the general election of 1797, until parliament met in the following February. Then the viscount, elected to sit for the county of Armagh, by which he had also been returned; Jephson took office; the Speaker's writ was moved, and the answer that came to it was—that Francis Dobbs, Esquire, Barrister-at-Law, and William Conyngham Plunket, Esquire, one of his Majesty's counsel, had been duly elected by the Portreeve and burgesses of the Borough of Charlemont to serve in the Commons house of Parliament.†

When Plunket entered parliament, the patriot party had dwindled to a miserable minority of seven or eight steady votes, and about twice as many fluctuating tallies. The great assembly, which as Grattan told the English Commons, had "in fourteen years acquired for Ireland what you did not acquire for England in a century—freedom of trade, independency of the judges, restoration of the final judicature, repeal of a perpetual mutiny bill, *habeas corpus* act, *nullum tempus* act," had, since the secession of the opposition, sunk into a mere divan of the minister. With whatever ambitious anxiety the honourable member for Charlemont may have looked forward to his entrance upon that high arena, he must have felt the position a forlorn hope as he looked round the splendid chamber, from whose gallery he had often longingly gazed upon the assembled magnates of Ireland. The seats of the opposition were almost vacant. Grattan, under his beloved oaks of Tinnehinch, chafed like some war-worn soldier, bound by parole, while the trumpet of his cause called all good men and true to the rescue. Curran stood day after day in the bloody assize of the rebellion, pleading in such tones of courage, pity, and wrath, as never were addressed to any tribunal on the earth before for mercy to the young, the gifted, and the true—as well ask mercy from the famished tiger. The familiar faces that used to cluster round Grattan were gone—some dead and gone, and their ancient places knew them no more. Tone's old friend, Sir Laurence Parsons, still kept his seat, and

\* Burrowes prepared Tone's defences before the court-martial. I owe this interesting fact, never before published, to my friend, Waldron Burrowes.

† Eardly's "Charlemont." Journals of the House of Commons.

occasionally harrassed Mr. Pelham. George Ponsonby frequently attended, and his upright character, high connexion, and trained capacity were always an honour to his party. Bushe had been for some months in the House, and was creating a sensation by his elegant and spirited eloquence. Tighe of Wicklow, Stewart of Killymoon, O'Donnell of Donegal, and a few more of the country gentry remained faithful. But parliament was hardly attended during the session of '98, by the squires. They were busy in their counties; some were dragging the rebels, others had grown indifferent to the character of parliament since Grattan's retirement. A herd of colonels, commissaries, revenue commissioners, members of ballast boards, and barrack boards, castle clerks, and black leg barristers, composed the ministerial majority—suppressed the constitution whenever they were bid, and boasted they had been sent into parliament to put an end to it. The task of the little opposition during this dreary period consisted in an ineffectual effort to thwart and mitigate Pitt's *Thorough*—the policy bayonet in one hand and bribe in the other, by which he was preparing for the Union. After a few months more the Union itself roused all Ireland like the sound of the last trumpet.

On the 16th of November, 1798, Mr. Pitt writes to Lord Cornwallis enclosing a rough draft of the articles of Union, and appointing Viscount Castlereagh Chief Secretary for Ireland.\* On the same day, the late Lord Lieutenant, Earl Camden, congratulates the young minister, his nephew; and begs he will write letters frequently, as Mr. Pitt has confidentially complained that the Lord Lieutenant is rather remiss in correspondence—write long letters often, and make his excellency sign them. Neither Mr. Pitt nor Earl Camden seems to have perfectly discerned the amazing elements of power which lay latent in this extraordinary young man. Who indeed could have believed that under that bland adolescent air, that lithe and dazzling front, and, stranger still, that tongue so awkward and maladroit, were hidden a heart as subtle, a will as truculent, a courage as cold, and a conscience as unscrupulous as Cæsar Borgia's. For a model of Castlereagh's character, we naturally refer not to the generous ambitions, and the gallant rivalries of the British parliament; but to the crafty, impassable, and implacable ideal of Machiavelli's Prince, or the inexorable volition, passionless wisdom, and atrocious cold blood of the Third Napoleon. He was then not quite thirty years of age, and wore them with such a blooming, patrician beauty, that it was the custom of the opposition to speak of the secretary as a smooth-faced minion of Mr. Pitt. He had that order of mind, difficult and ungraceful of display in the liberal air of public assemblies which "men of intellect," *par excellence*, are always so vain to contemn. To the last days of his life, Castlereagh's mixed metaphors and rigmarole reasoning were the sport of the wits of opposition. But sneer, stricture, and invective, alike glanced aside from his imperturbable, polite placidity, and his callous pluck. Few men have ever possessed such extraordinary executive faculties, such reticence, tact, and duplicity, such skill in deceiving, and such address in managing men, and so intense and even an energy in the conduct of great affairs.

In a few months he earned a name the most hateful in Ireland since Cromwell's. During the last months of the rebellion, acting as secretary, *ad interim*, he had served a rapid noviciate in the corrupt system of the castle at one of its worst periods. Bloody Carhampton, domineering Clare, and Toler, a ferocious vampire, composed the real executive of the country at the time. At such

\* The Castlereagh Correspondence.

a council board he learned to "dabble his sleek young hands in Erin's gore"—and learned the lesson with all the rancorous zeal of a renegade; for a very few years before his lordship had been a very ultra-democratic Northern Whig. Already an audacious and unscrupulous ambition possessed him. It was said that he even ventured to emulate the fame, and imitate the methods of Mr. Pitt. But perhaps the brilliant success, which another young Irish noble, Lord Mornington, had rapidly won in the wider field of imperial politics, obtained a more natural incentive for him. Fifteen years afterwards, he and the two brothers Wellesley concluded that awful contest, in which Pitt himself had succumbed. Its secret history is that of an alliance between these three Irish adventurers. It was Castlereagh who appointed and maintained the Duke of Wellington as British generalissimo—Wellesley who suggested and Castlereagh who conducted the diplomatic arrangements which banded all Europe against Napoleon at the congress of Vienna.

Yet had the young Secretary been of a less aspiring and active temper, there sat in his office an old familiar of the Castle, whose mind took a perfectly Satanic pleasure in the arts of intrigue and the darkest passions of power, and whose influence he could hardly have escaped. It is likely that Edward Cooke had quite as much to do with the formation of Lord Castlereagh's character as either nature or accident. In the correspondence of that strange being, we observe an intellect of keen, cold, wily energy; a heart without passion, prejudice, or scruple; a temperament of preternatural activity, but which loved to sit still in the shade and move men about like puppets. To prompt an informer; to instruct a spy; to know the precise price of every member in the House; how to manage the "Popish titulars;" how to infuriate the Orange Lodges; how to master the weak points by which the Lord Lieutenant and the Lord Chancellor, and the Lord Chief Justice, and the Attorney-General and the Secretary could all be moved so as to be of one purpose (*his*, Edward Cooke's purpose)—such were the arts which the loved and in which he was versed beyond any man who has filled his office before or since. Into Castlereagh he infused, with the zeal of a master who has at last found a fit pupil in the rare art he loves, all the tortuous schemes and all the dark experience of his life.

A rival is almost as essential to the passion of ambition, as a mistress is to that of love. Almost from the very hour he entered the house, Plunket pitted himself against the secretary. There was no extremity of insult to which he did not proceed, in speeches, to which every man who listened must have felt that they were destined to live as long as Irish history and the English language. Their honest passion and fertile eloquence, hardly redeem passages of that surpassing invective from the character of unjustifiable vituperation. But the Secretary sat silent—perhaps stunned before it all. There is no doubt whatever that Castlereagh was a man of courage.—

"Fearless, because no feeling dwells in ice,  
His very courage stagnates to a vice."

But he neither ventured to reply to those savage onslaughts, nor to seek the coarser and in those days common satisfaction of the duel. It is perhaps the most extraordinary proof we possess of the Secretary's elaborately stern and thick-skinned nature that then or afterwards he never resented all this deadly animosity. When Plunket entered the English House of Commons, Castlereagh was one of the first to hail his success in terms of unstinted admiration. On the questions of the war and the Peterloo Massacre, he led the Irish lawyer, yet independent

of government, and an important parliamentary personage away from his party. And afterwards when Plunket took office, he speaks of Castlereagh's influence upon him in such terms as these:—"His friendship and confidence were the prime causes which induced his majesty's government to desire my services; and I can truly add that my unreserved reliance on the cordiality of his feelings towards me, joined to my perfect knowledge of the wisdom and liberality of all his public objects and opinions, were the principal causes which induced me to accept the honour which was proposed to me. Nothing can ever occur to me in political life so calamitous as the event, which, in common with all his country and Europe, I so deeply deplore." This was written to the Marquis of Londonderry a few days after the minister's suicide.

Plunket appears to have entered upon the contest of the Union at first with despondency. Cooke writes of the Bar Meeting, that "Plunket was cunning, and changed his ground from the violence he had used in a former debate to a tone of moderation, and by that device had good effect." A very good effect in Mr. Cooke's mind—for he frankly declared his decided belief that the Union would be carried! "Fear, animosity, a want of time to consider coolly the consequences, and 40,000 British bayonets will carry it." He might have added the chronic apathy which had affected the national parliamentarists ever since Grattan had withdrawn from public life; he might have added, but his audience would have laughed the assertion to scorn that grand cause, which Grattan afterwards admitted in the most memorable words he ever spoke to the British Parliament—"When the Irish Parliament rejected the Catholic Petition, on that day she voted the Union; many good and pious reasons she gave, and she lies there with her many good and her pious reasons." As the session of 1799 advanced, the lobbies and galleries of the houses and the closets of the castle became as busy as the Stock Exchange, with peerages and boroughs to be bought and sold, applications for the escheatorships, tenders for the manufacture of situations and sinecures, and applications now seldom neglected for places of every species by persons of all possible denominations. When Mr. Cooke has a little leisure, we find him writing to Doctor Troy to ascertain if any more of his brother Titulars have given in their adhesion; and by return the *comarcs* of Saint Laurence writes back to the castle, to say that all is right in Armagh, that he is almost sure of Tnam, and that his own priests have got the hint. At last the old fire began to kindle into a flame. When the measure of the Union was really revealed, first consternation, then wrath spread from man to man, and shore to shore. Two classes were foremost to combine and resist—the independent country gentlemen; old volunteer colonels, toparchs of their counties, and owners of boroughs, who anticipated not merely the national dishonour, but the injury of their influence and property. It afterwards cost at least two millions of money, not to speak of titles and places, to buy their acquiescence. The second class was the Bar, then the most powerful, influential, and intellectual order in Irish society, and having even stronger obvious motives of interest, honour, and ambition, than the gentry in the maintenance of a national legislature. The most considerable men of the first class in parliament were the Speaker Foster, Sir Laurence Parsons, Sir Henry Parnell, Sir Edward O'Brien, Tighe of Wicklow, and Stewart of Killymoon. To the second class, the Prime Sergeant Fitzgerald, George Ponsoby, Saurin, Bushe, Gould, Barrington, and Plunket belonged.

But in that brief parliament no man, squire, lawyer, or minister made such a figure as Plunket. The debates were generally led by Parsons or Ponsoby; he was always content to follow, but he invariably spoke the speech of the night,

and Grattan significantly recognized the place he had attained, by taking his seat next to him when he re-entered parliament. His later efforts never excelled these grand orations. The *sava indignatio*—the pestering sarcasm that stung like a swarm of hornets, the clear, icy irony that flayed its adversary like a razor, and the fiery factfull invective that riddled a reputation like grape-shot—the classic structure, the stately, luminous, and simple language of these magnificent speeches are unsurpassed in oratory—but these were only the ornaments or variations of argument that has all the accuracy of mathematical proof; in which every word is a link of one perfect chain; in which all the ingenuity of logic cannot suggest one superfluous sentence. And there is great moral grandeur in the attitude which he sustains throughout—that of a jurist pleading before the High Court of Parliament, for the constitution of which it is the depository, and which it is bound to guard against the lawless violence of the minister as well as of the mob. Even in the utmost length to which he carried the doctrine of the incompetency of Parliament to enact the articles of Union, we observe that there is not a syllable of sympathy with the attempts lately made by the people against the constitution. He treats the rebel in the same category with the minister, and when he justifies a resort to the *ultima ratio*, as he very plainly does, it is on the same constitutional principle as applied to an abuse of parliamentary authority, that justified the English Revolution of 1688, in consequence of a *malfeasance* of the sovereign power. How far he urged this doctrine, the following passage, taken from one of the speeches of which only a fragmentary report is extant, will tell:

"I boldly assert, staking whatever professional character I may possess as a constitutional lawyer, that if the parliament of Ireland pass this measure against the consent of the people of Ireland, their act will want all the attributes of a law. This is a plain, simple proposition, which I am ready to maintain; and I call on any learned or honourable gentleman in this house to contradict it. It is said by gentlemen on the other side, that Parliament is omnipotent. Sir, the omnipotence of parliament, if literally understood, is impious blasphemy, and if it be understood with limitations, it proves nothing for the gentlemen of the other side, for it implies a limit to its omnipotence. Sir, there are acts which but to name, proves that no parliament can be authorised to perform them—acts, to which no authority can give the force of laws, and which all mankind are justified in resisting. It is true indeed, that under and within the constitution, there can be no power to control the legislature, because the legislature is the highest power known to the constitution; but who is the driveller will say, that therefore any act of that legislature, however contrary to national justice, or inconsistent with the constitution itself, is rightful, and that they have a legal competency to perform them. If then, there are acts which no power in the state is competent to, it remains only to ask is this not one of them—I contend that it is, because it is an act which goes to alter the constitution."

At the close of the same speech, he says in a spirit only too prophetic:—

"Who will say, that when the imperial parliament shall have got an uncontrolled power over Ireland, that they will not make local laws for the government of this country? Who will answer that when the *Habeas Corpus* shall be suspended in Ireland, it shall also be suspended in Great Britain? Who will say, that the miserable inhabitants of this remote and barbarous province shall not be smarting under the fetter and the whip, while the British Parliament, its imperial dignity, shall sit unconcerned at our sufferings and out of the reach of our cries?"

He lived to see the full extent of all he had foreseen. The last words, spoken against the Union in the Irish Commons, say the reports, were spoken by Plunket and Goold—words of what anguish and indignation we can faintly conceive. With the fall of Ireland's independence, the grand ambition of his life, and of all the great Irishmen of that day, seemed to succumb. To Plunket especially, the shock must have been terrible. Had the minister been defeated, such a career lay before him, as no Irishman had yet attempted. He had acquired in a few months, a rank in parliament equally splendid and solid. It is hardly an exaggeration to say, that he stood in a position to fulfil Grattan's labours, and to anticipate O'Connell's. To resume the old policy of the opposition, to reform the House of Commons, to emancipate the Catholics and the Dissenters, to erect a popular ministry in the Castle, and in the fulness of time, make himself its Chancellor—such might have seemed a not unreasonable ambition, for the man who had so easily attained such an ascendancy in his native legislature. Instead of a destiny so brilliant, only the dull and daily-degenerating routine of an Irish practising barrister's life awaited him. One of the first curses of the Union, was that it subverted the natural order of legal promotion, and for twenty years afterwards filled the Benches of the Four Courts with judges, who had no claim to the ermine, but that of having corruptly opposed the leaders of their profession on the question of national independence. To an Irish barrister without office or private fortune, a seat in the British Commons was the road to ruin, in times when all the expenses and troubles of a parliamentary life may be epitomised in the fact, that the mail took four days to go from London to Dublin. Even in the present age of cheap and easy communication, it is in some cases a rather risky speculation for honourable and learned members who have got a country to sell—the competition is so undue, and the first self-denying pangs of a lessening fee book so sharp. In despair, it is said, Plunket meditated for a time emigration to England or the United States. Finally, he settled down to make the leading and most lucrative practice at the Irish Bar—to make money—to watch opportunities of making power. Already it was said that he was far fonder of money and of power than of mere fame.

The next time he appeared in public life, it was to cloud in an unaccountable hour his character as an Irish patriot and as an advocate, with that merciless speech for the Crown, in the case of Robert Emmet. No palliation can mitigate the simple censure, that his speech to evidence upon that occasion was a cruel and uncalled for assault upon a young heroic martyr, who had already surrendered himself frankly to his doom. But the publicists of the day, who sympathised with Emmet, or who, like Cobbett, hated Plunket's party or person, did not rest there. They declared that Emmet had attacked Plunket from the dock—which was a lie; that Plunket had been under the deepest obligations to Emmet's father and brother—which was also a lie; and that Emmet declared he had imbibed the opinions upon which he had acted from Plunket's teaching—opinions, now abandoned by Plunket for corrupt motives. This also is an assertion equally without foundation; but which has never yet been properly met by the apologists of Plunket's conduct. There is to it one simple and sufficient answer. Ten years before, towards Tone, Plunket had evinced precisely the same sentiments. Violent and unfeeling as he was in their utterance, it is impossible to deny that they were in perfect consistency with the settled opinions which he had for many years held and expressed. In every one of his Union speeches, he speaks of the attempt of the United Irishmen and the attempt of the minister with equal abhorrence. There can hardly be a doubt that he regarded Emmet's



experiment, as one more dangerous in every sense than even that of '98—more likely, but for the merest chance, to have succeeded, and certain to have led to an atrocious anarchy, or a French deputy-despotism, if it had. It was now not merely horror of democracy—horror of Bonaparte too had seized upon men's minds. And those who doubt the extent to which both feelings may have fairly influenced Plunket in warning the country against such designs, will find that Curran, speaking not for the Crown, but for the defence of one of Emmet's partizans, Owen Kirwan, a few months afterwards, used language of the same spirit, and if possible, more vehement. Perhaps, too, the very sense that the rebellion had considerably contributed to aid the minister in carrying the Union,\* added its rankling bitterness to the animosity which he exhibited against all who had hand, act, or part in this last attempt of the United Irishmen.

It is certain, however, that Plunket's speech against Emmet had the effect of establishing good relations between him and the government, and led directly to his acceptance of office under Mr. Addington's ministry. He became Solicitor-General in October, 1803, on the promotion of Standish O'Grady to the Court of Exchequer; Attorney-General under Mr. Pitt, in 1805; and retained office with Bushe as his colleague under the Cabinet of "all the talents," worthily sustaining their intellectual reputation in Ireland. They gave him an English seat, and tempted him, not reluctant, to a British ambition. His brief career in Parliament at this time, bred in him an extraordinary attachment to that high and select party, of which Earl Grenville was the head. He followed the Stowe sect ever afterwards. Nor is it difficult to conceive, what an effect the influence of that family of statesmen, by birth and profession, aristocrats in the noblest sense of the word, and engaged to the public service with a zealous, unselfish, and industrious devotion—must have had upon a man, fresh from the Union's experience of borough-mongering rottenness in the lower House, and miserable self-emasculation in the upper. In their resolute sincerity for the Catholics, and against the French, he founded the basis of his future political career. He left office honestly with them, in 1807, gave up his seat, and came home to make a fortune sufficient to enable him to live independently in Parliament; showing, as Grattan said, "a contempt for salary equal to his regard for law." There is no doubt that at the time he could have continued to hold his office, as Bushe did, and secured to himself the fifteen years of absolute power and unlimited lucre upon which his rival, Saurin, then entered.

This is a view of him, at the height of his fame as a lawyer, in the period which followed, from the vivid pen of William Henry Curran:—

"Of all the eminent lawyers I have heard, he seemed to me to be the most admirably qualified for the department of his profession in which he shines. His mind is at once subtle and comprehensive; his language clear, copious, and condensed; his powers of reasoning are altogether wonderful. Give him the most complicated and doubtful case to support—with an array of apparently hostile decisions to oppose him at every step—the previous discussion of the question has probably satisfied you, that the arguments of his antagonists are neither to be answered or evaded—they have fenced round the rights of their clients with all the great names in equity—Hardwicke, Camden, Thurlow, Eldon;—Mr. Plunket rises:

\* "If Mr. Pitt is firm, he will meet with no difficulty; the misfortunes of the present time are much in favour towards carrying the present point of the same grounds that the rebellion assisted in carrying the Union. Timid men will not venture on any change of system however wise and just, unless their fears are alarmed by pressing dangers."  
—*Lord Cornwallis to Lord Castlereagh*—*CANTON CORRESPONDENCE*, vol. IV., p. 24.

you are deeply attentive, rather from curiosity to witness a display of hopeless dexterity, than from any uncertainty about the event. He commences by some general, undisputed principle of law, that seems, perhaps, at the first view not to bear the remotest relation to the matter in controversy; but to this he appends another and another, until, by a regular series of connected propositions, he brings it down to the very point before the Court, and insists, nay, demonstrates, that the Court cannot decide against him without violating one of its own most venerated maxims.

"In this respect, I look upon Mr. Plunket, going through a long and important argument in the Court of Chancery, to be a most extraordinary exhibition of human intellect. For hours he will go on and on, with unwearied rapidity, arguing, defining, illustrating, separating intricate facts, laying down subtle distinctions, prostrating an objection here, pouncing upon a fallacy there, then retracing his steps and re-stating in some original point of view his general proposition; then flying off again to the outskirts of the question, and dealing his desultory blows with merciless reiteration, wherever an inch of ground remains to be cleared; and during the whole of this, not only does not his vigour flag for a single instant, but his mind does not even pause, for a topic, an idea, or an expression."

In 1812, Plunket re-entered parliament, as member for Trinity College; an honour for which he was almost absolutely indebted to the energetic friendship of Magee, then Senior Fellow, and the most potential partizan in the University. He had waited long, and his patience had its reward. His position was one of perfect independence, and of high prestige. His professional savings had already laid the foundation of an affluent fortune. By his brother, Dr. Patrick Plunket's death, he inherited the ample sum of £60,000. Thus the essential basis was secure, and he could afford to abandon himself to his ambition—for the man was in one sense like Virgil's giant, whose head was in the skies, but whose feet touched the earth; and made very sure indeed that they touched it ere he moved. He goes, said Curran, finely from the Newry hustings, "like Gylippus, whom the Spartans sent alone as a reinforcement to their distressed ally—Gylippus, in whom was concentrated all the energies and all the talents of his country." He was already favourably known to the House of Commons. His single speech in the session of 1807 must have created a considerable sensation, when we find Whitbread next year speaking of it, as "one that would never be forgotten." Thus, in easy circumstances, member for his university, with the fame of his former political career, of his present professional pre-eminence, and of his austere and dignified ambition, preceding him, he took his seat under enviable auspices.

The time too was propitious of opportunity. He came in the interval of two great parliamentary eras—while the cotemporaries of Pitt and Fox were gradually retreating from public life, and before Peel, Canning, or Brougham had yet risen to the full perfection of their powers. The Irish character never stood in higher repute. For fifty years before, almost the greatest names which illuminated the history of the Commons had been Irish. There were dozens of old members, anxious to hear the new orator, who had listened to the inspired, majestic, and opulent wisdom of Burke, to the popular vigour of Barre, to the splendid passion of Sheridan, to the savage satire of Francis. Grattan's lustrous energy, Ponsonby's manly sense, Tierney's trenchant irony, Canning's classic tropes and elegant sarcasm, were, at the time, the greatest intellectual attractions of the House. Plunket spoke to them in a new and unexpected strain. In what he

said, a most elaborate logic, a rare depth of meditation, and an austere gravity of tone, half statesmanlike, half judicial, were splendidly combined with a singular purity and precision of language, and an extraordinary, vehement, and unflagging intensity of expression. It was more like the language of some great noble of the robe, speaking with the sense that the estates of the realm really hung upon his words, than the common partizan declamation of the House of Commons, which has no horizon but the opposite benches and the reporter's gallery. The greatest authorities in and out of the House, declared that he reached the very highest style of parliamentary oratory—a style in comparison with which Canning's was flashy, and Brougham's coarse, and Peel's thin. Old Charles Butler had sat in the gallery of the House from far-back penal days, when there was not a flicker of hope for the Catholics. He had heard Chatham, North, Pitt, Fox, Burke, speak their greatest speeches, with a fastidiously critical ear; and he declared that Plunket's speech of 1821 had never been surpassed in the British Senate. Of his very first appearance, it was unanimously admitted that no such speech had been heard in the House of Commons since Sheridan's Begum oration. Lord Dudley's was an opinion upon political talents and effects equal to Horace Walpole's upon *virtus* and *belles lettres*—he repeatedly declared that for its gravity and sagacity, its energy and intensity, its exactitude, its sober and stately grace, he preferred Plunket's to all other styles that he had known or read of. "I wish you had heard him," he wrote of the Peterloo Speech, "in answer to Mackintosh. He assailed the fabric of his adversary, not by an irregular damaging fire that left parts of it standing, but by a complete rapid process of demolition that did not let one stone continue standing upon another." That single speech admittedly saved the Cabinet. It was Mackintosh's own admission, that if Plunket had been regularly bred to Parliament, he would have made the first public figure of the period. All the great Commoners of his era admitted his supremacy as freely as had his old mates of the Historical Society. Last, and most marvellous tribute of all, hardly credible of the House of Commons! He is said, on several of the Catholic Claims' Debates, to have converted various votes to his side, (so many as six, it is alleged, upon one occasion,) by very dint of conscientious conviction.

At fifty years of age, he was in the full maturity of his powers. The long interruption of his public career, had not in any way dulled or frustrated the fine political faculties he had displayed in the Irish House. The rolling vehemence and impatient fire of his earlier invective had subsided indeed, but so had the passions which prompted them. His satire had become as serious and mordant as Swift's—his reasoning as strict, lucid, and close as Locke's or Suarez'. There was something inspired and august in his tone when he addressed the House; they were flattered to feel that he raised them to the level of his own genius. His person and physiognomy fully sustained his character. He was of more than the middle height, built of big bones and massive muscles, with a deep full chest, from which issued a voice of powerful metallic tones, slightly marked by the extra-emphatic accent of Ulster. His head has been perpetuated by the masterly chisel of Christopher Moore. It is the same head that our ethnologists assign to the old Irish of Armagh. The brow rises like a dome over features of coarse and crooked outline. The sides of the head are like walls—there is a lofty and well-arched span from ear to ear—a heavy arrear of animal energy behind. The jaws were immense. The lips, long and convex, looked as if language would overflow from them. The eyes shone with calm, stern lustre, under a forehead craggy with manifold organs, lined with innumerable, long, parallel wrinkles, and from

which a perpetual pallor overspread the whole visage. While he pleaded before the Bench, there was a natural authority about him, that embarrassed the Chancellor on his wool-sack. He lorded it over Mr. Speaker, too, and chained the Commons when he rose. His manner had the same austere energy and staid simplicity as his language. It was perfectly natural and unaffected; the only peculiarity of his delivery on record is, that as he reached each climax of his statement, point after point, he would raise his two hands gradually above his head, and then suddenly swing them down, as though he would drive the argument home with a sledge-hammer. It was a singular gesture, and almost seemed to say *quod erat demonstrandum*.

Plunket's course in British politics illustrated the principles of Burke, and was identified with the party of Earl Grenville. He was an Anti-Jacobin Whig. In 1813, we find him in savage attack upon the Liverpool Cabinet for compromising the Catholic Question; but in 1815, he sustains the same cabinet against Earl Grey and the Gallican Whigs, upon the question of renewing the war. The following year, we find him again in violent opposition to the financial measures of the ministry. But when the discontents which ensued upon those very measures assumed a revolutionary character, he gave to Lord Castlereagh all the immense aid of his ability, his independent position, and his forensic fame. His speech upon the Peterloo massacre had the same result, in opening direct relations between him and the government, that had followed his speech in Emmet's case. " 'He saved the cabinet by that one speech,' said one of the ablest and most critical of the Whigs."\* The Cabinet were more than willing to acknowledge the obligation—but Plunket was slow to admit an interested adhesion. He would not even accommodate them with a full report of his Peterloo speech. Nevertheless, he was heartily abused as a corrupt deserter by Earl Grey in the House of Lords, and by the advanced Reformers in and out of Parliament. There was now, indeed, an open breach in the ranks of the opposition. The structure of the Cabinet had also considerably changed. It contained at once the most unrelenting enemies and the most eminent advocates of Emancipation in the house. Indeed there never was a cabinet in England, not even Chatham's, which so completely deserved the epithet of a Patch-work Cabinet as that which is called Lord Liverpool's, from the year 1812 to the year 1827, but which in reality consisted of the same integral elements, for five years before, and for three years after that statesman's premiership. It had originally been formed on a pledge to the king, never to propose any redress to the Catholic Claims—and consisted on the one hand of ministers like Perceval and Eldon, who were his majesty's particular advisers in this question, and on the other hand, of Pitt's peculiar disciples, the young Tory tribunes, Canning and Castlereagh, who accepted his design of emancipating the Irish Catholics as a doctrine of imperial policy. One could not by possibility traverse a wider difference of view upon this subject, than existed between the minister who kept the king's conscience, and the minister who stood next to the people, between the liberal zeal of Plunket, and the incurable bigotry of Eldon. By its later Irish appointments, this government had adopted a system, which amounted to a precursorship of emancipation. But whenever the question came into the House of Commons, the opposition could afford to look on, and halloo one set of his majesty's ministers against the other. Imagine such a debate as this! The Irish Attorney-General rises to present the petition of the Catholic Association, and to de-

\* Mr. Owen-Madyn's "Ireland and its Rulers."

clare that the laws affecting Catholics are an unconstitutional, impolitic, and-useless injustice. The Secretary for the Home Department denounces the Catholic Association as the greatest peril of the public peace, and the Catholic Claims as incompatible with the system and institutions of the empire. The Secretary for Foreign Affairs has come down to the house on crutches, to declare his solemn belief, that England will forfeit her position in Europe, if she persists in refusing to do justice to her Irish subjects. The Irish Chief Secretary assures honourable gentlemen, that the Irish people are a rabid and rebellious horde, who will only swamp the State if admitted. Finally, the minister who carried the Union, and who has the most profound experience of the policy of the Castle, takes a last opportunity of assuring the house, before his elevation to the peerage, that this measure must sooner or later be passed, and the sooner the better. What is His Majesty's opposition to do while his Majesty's ministers are at such cross-purposes? The House of Lords with calm contempt listens to this exterior uproar; but Eldon, on his woollack, that had almost become a second throne, now and then shudders with a foreboding terror; hearing afar off "the tramp of seven millions of men."

There is no more signal retribution in all history, than that which has followed the cruel and impious injustice of the Irish Penal Laws. Despised and persecuted, the miserable Celtic Papist pursued the British minister like the monster of Frankenstein, breathing perpetual vengeance, and harassing his policy at every point. A tithe of the armies that met his generals in Flanders or Spain was recruited at the mass houses of Connaught and Munster. It was the arm of the Irish Catholic in the enemy's uniform, which covered the retreat of Ramillies and decided the victory of Fontenoy. The most dangerous antagonist of the English conquest in India was one of the expatriated, Lally Tollandal. It was a Munster Papist who led the Russian arms to the spot where Sebastopol lately stood. In all the armies and courts of Europe, this outlawed and excommunicated Pariah disgraced the policy of England, by his heroic valour, his loyalty in service, and his capacity in command. At home, meantime, he kept the Ascendancy which had been established over him, in constant terror of a war at once servile, civil, religious, of property, and of the succession. He was by turn a Jacobite and a Jacobin. When the Ascendancy took up arms against England, their citizen array rested on the unarmed masses, who hated their Irish masters much, but their English enemy far more. When the Ascendancy refused the Catholic petition, they revenged the wrong by that passive attitude which allowed the Union to be carried. Then they shared the prostration which befel their country; but although apparently insignificant in the policy of the empire, the dead weight of their pressure mysteriously destroyed its equilibrium. In 1801, in 1807, long before O'Connell had elevated them into a political power, Pitt and Grenville, the two ablest ministers of the two greatest parties in England, had to abdicate office, because the conscience of a British statesman could no longer tolerate the indefensible injustice of their position. They cowed Wellington—they checkmated Peel. The Irish Catholics have wrecked more ministries since the Union than all other political questions and parties put together. The old king, George the Third, had, with a dogged and malignant bigotry devoted all his authority to maintain his hostility to their claims; but in the end the task broke his brain. The Duke of York publicly declared that the Catholic Question had driven his father mad. The crown at last had to give way before that monstrous moral force, filled with such spirit and *solidarite*. George the Fourth, with tears, told the Irish Protestant Bishops that "they had done their duty" in assuring

him he was about to break his coronation oath, "but what could he do? He could not command a ministry capable of conducting affairs in the position to which they had come." To this conclusion it had come at last; and largely owing to Plunket's endeavours.

"Lord Plunket was, in my opinion, the most powerful and able advocate the Catholics ever had. I will say, that he, more than any other man, contributed to the success of the Roman Catholic Question." Such is the striking testimony of Sir Robert Peel, expressed when an interval of nearly twenty years had cast the sober hue of history between him and that momentous political crisis. Such too was the emphatic and authoritative testimony of Canning. And it is true testimony. We, Irish Catholics, are wont to regard our extraordinary agitation with its plenary arrogation of the functions of government, its weekly parliament in the Corn Exchange, its exchequer of Catholic rent, its arbitration courts of justice, its omnipotent tribune, and his brilliant staff of orators—his skilful application of the administrative mechanism of the church—his masses of passive-obedient or stormy-passionate peasantry—all culminating to the grand coup which completely clogged the Protestant Constitution at Clare; we are too much accustomed to treat these things as the whole of the history of Catholic liberty. But it had a splendid parliamentary history besides—and to parliament Plunket impersonated the cause as completely as O'Connell did to the people. He did more to reconcile the mind of the House to the policy and justice of the Catholic Claims than any other, than all the other advocates of them. His clear, calm, lofty argument reads strangely beside the passionate appeals, the clamorous complaints, the taunts and threats of the Catholic Association. The grand grounds of that argument were: I. That the Catholics were not slaves at all; that they were already practically admitted to the substantial privileges of the Constitution, and only denied its honours in such a way as to offend their loyalty without lessening their power. II. That the machinery of exclusion by oath under the Test and Corporation Acts was immoral, imperfect, and inconsistent in itself, and with all the internal and external polity of England. III. That the true safety of the Church Establishment consisted in a generous policy, whereas its identification with the existing system of civil disabilities exposed it to the perilous enmity of a whole people. IV. That a system of religious disabilities was alien to the spirit of the British Constitution, and had only been provisionally attached to the legislation of the empire, under circumstances which had gradually expired—sustaining this branch of his argument by a masterly historical study of the progress of penal religious legislation from the Reformation to the Revolution, and the re-actionary tendency towards a total repeal of the peculiarly Protestant laws afterwards. V. That the safety of Church and State against Popery might in the present age be amply provided for by accompanying the grant of civil privileges to the laity with a system of administrative relations with the clergy; a concordat—the Veto, the Pension, what the Catholics called the Wings.

The House had been in the habit of considering Catholic Relief merely as a measure of expediency, and even of an immoral and unconstitutional expediency. Arguments so different from those which it was in the habit of hearing—arguments which rested the case of the Catholics upon an indisputably constitutional basis, created, we may well believe, a profound and original sensation. Plunket has obtained the whole glory of this unrivalled political pleading. But Plunket perhaps unconsciously had drawn its leading principles and method from that grand depository of political wisdom, the writings of Edmund Burke. The

Tracts and Letters of that master of statesmen on the Catholic Disabilities—although loosely and hastily written, and, like his other Irish political studies, almost forgotten in the fame of his labours for the people of India and America, and against the principles of the French Revolution—had long before exhausted the subject, and left only corollaries and deducibles for those who followed in his rear. He “who saw everything and foresaw everything,” had from the first moment that his splendid mind surveyed the condition of “that municipal country in which he was proud to have been born,” urged that the civil emancipation of the Catholics and the freedom of their Church from the influence of the state, were essential principles of imperial policy and Irish government.

On the latter point, the question of the independence of the Catholic Church, Burke stands honourably alone among British statesmen. Upon this point the parliamentary question and the popular agitation moved always aloof, and yet always approaching to each other. British statesmen and the British Parliament would gladly have conceded civil privileges to the laity at any time, provided they obtained an influence over the Church. Pitt’s plan contemplated the reduction of the Irish bishops and clergy to a state of dependence upon the crown as complete as that of the Established Church; and Pitt’s was the project of law which his successors always contemplated. Even the liberal Protestant body, even Plunket and Grattan, were anxious, while they conceded full political rights to the laity to encourage them to what they conceived an independent use of them by weakening the influence of the clergy. It would seem to have been by a special Providence that legislation upon the question was so long delayed; for had it taken place at any earlier date or under any other ministry, the old national Church of Ireland should inevitably have been the subject of a department in the Castle. Pitt had perfected all his arrangements with the principal bishops and the leading aristocrats of the Catholic body. A strong body of the laity, a strong body of the bishops for many years afterwards eagerly supported the Veto. Immortal honour to Daniel O’Connell and to the faithful Catholic instinct of the people, who sustained him in repudiating any concession that would have brought the taint of a state connection upon the free Church of St. Patrick and St. Laurence! For years of patient hope deferred, of glorious indefatigable effort, they laboured not in vain; they had at last so widened the breach and weakened the enemy, that the final effort carried the question by storm, and ministers had to surrender Wings and all. The history of these persistent parliamentary approaches is the history of Plunket’s career in the British House of Commons. He moved with the progress and grew with the growth of the Catholic question. It made his fame as the first parliamentary orator of his period. He went into office, with it and Lord Wellesley. He went on the English Bench as Sir William Plunket, Master of the Rolls, when Canning’s premiership denoted another advance in the ministerial dispositions to concession. Finally, he went to the House of Lords with the certainty that it was safe in the Commons, and sat by the Duke of Wellington’s side, watching every turn of the debate, and not less impressive in that cold and stately atmosphere, than he had been among the knights and burgesses of the three kingdoms.

And with the enactment of Catholic Emancipation, Plunket’s political career may be said to terminate. His arguments in the Upper House are as powerful, as profound, as well adapted to his audience, as those which for years he had addressed to the Commons. But after he came home with that great measure of peace and good-will, he seldom reappeared in the political arena.

He did, indeed, once or twice put forth the old lustre and vigour of his mind in that matchless debate in which, with him, the great law lords, Lyndhurst, and Eldon, and Brougham, closed in the lists of Reform. But his speaking, which was frequent for several years after 1829, was generally upon Irish business, and was only a superior order of common-place.

His career in office was distinguished by a high-minded fearlessness and impartiality. He gave the example of a crown prosecutor, who, in the most violent times, was never known to pack a jury. If he strained the authority of his office in the Bottle Riot prosecution, we are bound to remember the position in which the first officer of the law was then placed in Ireland. He stood between two factions, which equally domineered over the law in their respective spheres; and he had determined to try issue with both. He had to deal with Orange judges, sheriffs, juries, and officials upon the one hand—he had to assail a cause indented with his own personal predilections and antecedents upon the other. He failed in both. What could he hope to do against the Oranges Ascendancy, pleading in a hostile court, before a packed jury, with Mr. Solicitor-General, a well-known partizan of the prisoners at the Bar—and scandalously deserted by ministers when the case afterwards came before the Commons! If ever a man was justified in pushing authority to the extreme, it was in such a position. We may be sure that he secretly rejoiced when the counter-prosecutions which he undertook against Sheil and O'Connell also failed; and may well fancy his feelings realised in Sheil's passionate appeal;—

“When Mr. Plunket read the words attributed to Mr. O'Connell, did he ask himself—What is the provocation given to this man? Who is he, and what am I? Who is His Majesty's Attorney-General, the Right Honourable William Conyngham Plunket? I know not whether he administered that personal interrogatory to himself; but if he did, this should have been the answer. ‘I raised myself from a comparatively humble station by the force of my own talents to the first eminence in the state. In my profession I am without an equal. In parliament I had once no superior. When out of office, I kindled the popular passion—I was fierce, violent, vituperative; at last I have won the object of my life; I am Attorney-General for Ireland; I possess great wealth, great power, great dignity, and great patronage. If I had been a Roman Catholic instead of an enfranchised Presbyterian, what should I have been?’ I can tell him. He would have ‘carried up and down a discontented and repining spirit;’ he would have felt like a man with large limbs who could not stand erect; his vast faculties would have been cribbed and cabined in; and how would he have borne his political humiliation? Would he have been tame and abject, servile and sycophantic? Look at him, and say, how would that lofty forehead have borne the brand of ‘popery?’ How would that high demeanour have worn the stoop of the slave? No, he would have been the chief demagogue, the most angry, tumultuous, and virulent tribune of the people—he would have superadded the honest gall of his own nature to the bitterness of political resentment—he would have given utterance to ardent feelings in burning words; and in all the force of passion, he would have gnawed the chain from which he could not break. And is this the man who prosecutes for words? If the tables were turned; if Mr. O'Connell were Attorney-General, and Mr. Plunket were the great leader of the people; if Antony were Brutus, and Brutus Antony, how would the public mind have been inflamed; what exciting matter would have been flung amongst the people? What lava would have been poured forth? ‘The very stones would rise in mutiny.’ Would to Heaven, that not only Mr.



Plunket, but every other Protestant that deplores our imprudence in the spirit of a fastidious patronage, would adopt the simple test of nature, and make our case his own, and he would confess that, if similarly situated, he would give vent to his emotions in phrases as exasperated, and participate in the feelings which agitate the disfranchised community to which it would be his misfortune to belong.\*

He was not a great judge in the opinion of the Four Courts—rather, he it said, he was not so great a judge as his former fame had led men to expect he would prove. But after a position at the Bar, in which his character had towered by its moral and intellectual elevation, over a bench filled by much inferior men, and after the illustrious and powerful station which he had so long occupied in the senate, it is easy enough to understand that neither the Common Pleas nor the Court of Chancery was likely to excite his faculties, or administer a fresh impulse to his ambition. As he grew old, it began to be observed that he was of an intensely indolent disposition. The three score years and ten allotted to man's life had almost elapsed ere he reached the woolsack—and, spent in such arduous and unremitting exertion, might well have wearied and worn away even that massive intellect and those athletic energies. In his most vigorous days, indeed, it is said that his best work was the fruit of rapid, ready, and intense effort rather than the result of patient and plodding industry. Old attorneys say that he was seldom known to note a brief, and that he digested his business as he drove into town from the beloved shades of Old Connaught. Of the method of his public speaking he told Sheil, who told George Henry Moore (so that the tradition reaches us through a line of orators accomplished in the art) that he always carefully prepared to the very syllable the best passages and the best only of his great speeches, and used these as a kind of rhetorical stepping stones, trusting to his native fluency and force for sustaining the style. Sheil said, what all who ever heard and all who read Plunket will confirm, that so consummate was the art with which this was done, one could never discern where the prepared was welded into the extemporaneous. But certain it is believed to be, that many of his great sentences—that for instance in which he did *not* say that History was no better than an old Almanack—had been carefully constructed and finished *ad unguem* long before the occasions came upon which they were applied. It is easier to believe this of a style with the corruscating brilliancy of Grattan's than of one with such a stately and sustained rhythm, and out of whose own innate and vivid vitality, the grand, simple figures seem to flash. Of his wit, † Parliament seldom saw a specimen; but some of the best anecdotes of the Four Courts are those which record its virile ease and attic finish.

His later life preached two striking political morals. One was reflected from the passionate nationality of his early life. He had submitted to the Union; he had devoted his mighty talents to the service of the empire; he had become a West Briton to all intents and purposes. But the curse of Swift was on him withal. Being an Irishman, he was used while he was useful, and afterwards flung aside with indignity. When he was appointed Master of the Rolls in England by Canning—the first attempt that had been made to place an Irish Barrister on the English Bench—the Bar of England rose in rebellion at the outrage to their nationality, and the minister was obliged to cancel the appointment. So

\* Speech in Catholic Association, 8th January, 1825.

† I may be excused for mentioning here, the last witticism of Plunket's of which there is record. "What is the tone of the *Nation* to-day, my lord?" asked some one in '48. "Oh, Willie Tone, of course," was his answer.

such for the reality of the Union! But when in his old age, the Whigs wanted to get the Irish woolstack for Sir John (afterwards Lord) Campbell, Lord Plunket was disgracefully hustled into a reluctant resignation. He had thus lived to approve in his own person the prophetic spirit of his earlier days. There was another moral too in this later life of his—his price. When he did sell himself, it was on the grand scale of his character. After making, as it was believed, £120,000 at the Bar, he took, one after another, the most honourable and productive offices of his profession, and the British Peerage. He made one son a Bishop, another a Chairman of a County, a third Commissioner of Bankrupts, a fourth Vicar of Pray—and scattered the *spolia opima* of Church and State among a clan of kinsmen to the third and the fourth degree.

In private life, among the few to whom he opened his heart, he was greatly beloved always. The affection which Peter Burrowes had for him was womanly in its fondness, and childish in its simplicity. Between him and Bushe, and Magee, and Millar, and the surviving few of his early circle of college friends, to the last a loyal and generous friendship subsisted. Of them all, he remained alone and the last, and his heart seemed to grow stern and gloomy, and the bright light of his intellect to fade, as one by one they fell around him, and he remained weathering year after year like an old oak, the last of a forest—and going, as the stern cynic, to whom he was much alike in many of his moods, said of himself, going atop.

Decay first crept into his frame through the subtle valves of the intellect. For years before his decease, he had sat in the valley of the shadow of death. Mournfully the once giant intellect dwindled away, and his last days were like those of Swift, Moore, and O'Connell. In one of the wayward moods of these later days he is said to have destroyed all his political papers. He often drove from Old Connaught, along the margin of the bay, towards the city that had once been the arena of his ambition, and that had proudly hailed every phase of his fortunes—and a last trait told of him by one bright-eyed girl, who loved the white-haired "old man eloquent," is, that he was very gentle with children, and stopped to speak with them always—a child himself again of the second childhood; he whose manhood had been of so stately and masculine a mould. At last, on the 5th of January, 1854, came the merciful release of death, startling rather than saddening all who heard the news; for the name of Plunket had long been irrevocably blended with the past. He sleeps in the Cemetery of Mount Jerome, under a massive altar-base of granite, beside a walk that leads from the old lawn of John Keogh, and that was familiar many and many a long year ago to the footsteps of Tone in the gay and brilliant days, when Lawyer Plunket and he began the warfare of the world.

## THE KING AGAINST WALLER O'GRADY.

I HAVE printed the following celebrated speech as the most perfect specimen upon record of Plunket's consummate power of pleading. I have not willingly conigned so much space to a dry legal argument, but I could not help feeling that it was due to his high professional fame.

Old Chief Baron O'Grady, in the year 1817, appointed his son Waller to the situation of Clerk of the Pleas in the Court of Exchequer. Saurin, instigated it was believed by a personal animosity, which was sometimes supposed to stimulate his official conduct, astonished the Four Courts, by instituting proceedings on the part of the crown, against the new officer—on the ground that the king, not the court, had the right of appointment. The Chief Baron resisted with the first abilities and energy to be had at the Irish Bar, and the case became a regular legal tournament—in which Saurin and Busha, on the part of the crown, and Plunket and Burton on that of the court, debated every point of law, vestige of tradition, and atom of precedent, that could by possibility be brought to bear upon the case.

The following is Plunket's speech to the jury.

It is now my duty to lay before you the case of the clerk of the Pleas of the Court of Exchequer: and my lords and gentlemen, I am apprehensive, that in so doing I shall be obliged to claim a larger share of the time, of the attention, and of the indulgence of the court and jury, than I should be disposed to do. But this case is one of very great importance to the parties, and to the public; and I should not satisfactorily discharge my duty to my client, to the learned judge who has appointed him, or to the Court of Exchequer who have justified that appointment, and who are now brought before the bar of this court upon a criminal information to answer the charge of having usurped upon the rights of the crown, which they are by their oaths bound to maintain, were I not to enter with some minuteness into every part of this extraordinary case.

You already know, my lords, from the statement of the counsel for the crown, that this is a claim of right by Mr. Waller O'Grady as the clerk of the Pleas of the Court of Exchequer; a claim put upon an appointment by the chief baron of that court, which has been ratified and acted on, and admitted as an authority, by the whole Court of Exchequer. It is a claim on his part, I allow, against a long usage by the crown, and I do not scruple to admit it to be right and proper that that claim should be carefully examined. It is certainly the right and the duty of the king's law officers to take care that his rights shall not be usurped, or his just prerogative diminished; but it must be equally admitted, that if the claim of the chief baron be a well-founded one, it is fair upon his part to urge it: nay more, that it would be a most gross dereliction of his duty to suffer any of the rights intrusted to him by the law to be diminished or impaired.

I agree with the proposition laid down by the attorney-general, that according to the constitution of these countries, the king is the fountain of all office; and I agree further, that it is the duty of the king's attorney-general to provide that this right of the crown, so far as it remains, shall be guarded from encroachment. But if by this position it is meant to be insisted, that all offices in this country are derived immediately from the crown, I beg leave totally to deprecate such a doctrine. All offices are certainly derived from the crown mediately or immediately; but it is equally, true, that there are many offices vested by the constitution and by the common law in other persons, as incident to offices derived by them from the crown, and over which the king can have no

control. With respect to those offices which are exercised in courts of justice, whether the persons who are to fill them be appointed by the courts or not, in all cases where they are to be admitted by the court, the care of them is intrusted to that court and to that alone. If the crown conceives itself injured by such an admission, the attorney-general has no right to proceed by a prerogative information, but the only legal mode of trying the right, is by the crown's appointing an officer and having his title tried in the first instance in the court to which he is appointed, and if their decision be unsatisfactory, then by appealing to another. This proposition I pledge myself to demonstrate to the court and the jury.

Having premised so much, I shall call the attention of the court to the admitted facts of this case: namely, that the office of clerk of the Pleas is an ancient office in the Court of Pleas of the Exchequer, the duty of which is to enrol pleas and judgments of that court, and which is of high concern to the administration of public justice, that the present defendant has been appointed by the chief judge of that court, and that he has been regularly admitted by the entire court. Having stated so much, I must beg leave to say, that this proceeding is unprecedented, vexatious, unwarrantable, and illegal in every particular. I state once for all, to my learned friend the attorney-general, that I am sure he will not suppose, that in so speaking, I mean any personal disrespect to him. I am sure that in instituting this proceeding, he has been actuated solely by considerations of duty and a laudable desire to maintain what he conceives to be the just rights of the crown. Nor is there any man for whose legal knowledge and information upon general subjects I entertain a higher respect. But I must say, that in the present instance, by some fatality, he has acted in direct violation of the best established principles of the constitution; and that a proceeding of this nature can have no other tendency than to bring humiliation and disgrace on courts of justice, and odium upon the prerogative of the crown. And I say this now, because I conceive this is the place and the time—when the judges of the land are brought to the bar of this court to answer for their conduct, upon a criminal information—when the judges of a superior original court are called as culprits and usurpers before the tribunal of another and a co-ordinate jurisdiction.

Wherever a court of justice is created, of necessity the judging of the admissions of the persons who are to be their clerks is vested in such court. They are the persons intrusted by the law to judge of the sufficiency of the persons to be admitted, and also the legality of their title. Unless they are satisfied of both, they ought not to admit. Upon this, I shall refer your lordships to the treatise on the authority of the Master of the Rolls, a book, your lordships are aware, of very high authority, and which, it is well known, was written by Sir Joseph Jekyll. In the second section, 64, 65, it is laid down, "The admission of officers of courts of justice, by whomsoever nominated, belongs to those courts, who are to judge of their qualifications. And accordingly, though the nominated officer is usually admitted, yet in some instances,

he has been rejected, as in *Dyer*, 150, in the case of the clerk of crown, who is nominated by the king under the great seal. For the nomination, admission, and swearing of officers, is an act of the court." And for these positions he cites the year book 9. Edw. IV., p. 5, which I have examined, and which is direct on the point. The case referred to in *Dyer* is *Hunt v. Allen* (*Dy.*, 149 a. 152 b.), which was an assize by *Hunt* against *Allen*, the question turning on the validity of the nomination of *Hunt*. And the case of *Fogge*, chief clerk or *custos brevium*, in 18 Edw. IV. was cited, "where the justices would not allow the patent of the king to encumber the place, because there cannot be two chiefs in one office." And the court accordingly refused to admit him. There is a further case in *Dy.* 150 b. upon the same subject. The crown appointed *Croxton* and *Vynter* clerks of the crown; *Croxton* died, and *Vynter* came into court and showed the king's patent, and prayed to be admitted, &c., but the court refused to admit him, and appointed another person. I am now showing the authority of courts to refuse admission if they think proper. The admission of the officer is "an act of the court," judging of the fitness of the person, and the legality of the appointment. The latter of the above cases in *Dyer* is an instance of rejection on account of unfitness in the person, and the former for the illegality of the appointment. And in further confirmation of this right I beg leave to cite to the court, *Cavendish's case*, 1 *Anderson*, 152. There the crown appointed a person to execute writs of supersedeas in the Court of Common Pleas. The judge of that court refused to admit him, because in point of law the grant was void, inasmuch as the duty of making such writs belonged to the chief prothonotary. It appears that this case was attended with much difficulty on the part of the court, and much exertion on the part of the crown. But yet no idea was entertained that such a proceeding as a *quo warranto* would lie, notwithstanding that great efforts were made on the part of *Cavendish*. The justices, however, refused to yield to either menaces or importunities, and the crown was at length obliged to acquiesce. This was in the reign of Elizabeth. Now, according to these doctrines and these precedents, I take upon me to say, that the uniform course and practice has been, in every case where it is conceived that the right of the crown or of any other party has been affected by the admission of any officer by a court, to try the right by the nomination of an officer on the part of the party complaining, and to have the title of that officer in the first instance tried by the court which has given such admission. The present proceeding is without even the colour of precedent in the whole history of the law; in England or in Ireland; before the Revolution or since the Revolution; there never before was an example in which the act of a superior court of justice admitting its own officer has been questioned at the bar of another court; much less by such a proceeding as a criminal information; and I must again repeat, that the direct tendency of it is to throw disgrace upon the administration of justice, and odium upon the prerogative of the crown. I thought it my duty to apprise the attorney-general, that we consi-

dered this proceeding so mischievous and unconstitutional, that we should be called upon to arraign it. I do not find that the attorney-general has stated any other reason in its vindication, than an usage on the part of the crown to appoint to this office for 400 years. It is not only the privilege, but the duty of the king's officer to assert his right; I do not mean to say there is anything criminal in it; but why the staleness of this demand should now for the first time justify a proceeding in the teeth of all decency and all precedent, I do not see the semblance of a reason. If it be said, no action has been brought, because if it had, it must have been tried in the first instance in the Court of Exchequer; the answer is, that the law has said so. And it has said so, for the best reason, in order to avoid a clashing of jurisdictions, which must be the consequence of allowing one court to be called before another, as is done here, to answer for the exercise of its discretion in the appointment of its own officer. Nor is it in the power of the crown to defeat this courtesy of the law by resorting to such a proceeding as a criminal information. The privilege of correcting an erroneous decision (if this was so), is as great a privilege as that of affirming it. If the Court of Exchequer had done anything amiss, if on the trial of an action they should decide against the just rights of the crown, they are liable to be corrected by way of appeal, and in no other way. No other court has any original jurisdiction. Suppose an application had been made to this court, not as is now done, by a prerogative information, but for liberty to file such an information, the court must have refused it. They must have refused it, in analogy to every principle of law; for there is no instance to be found of one court of justice questioning the act of another, of co-ordinate jurisdiction, especially in the appointment of its own officers. This court never had, in any shape, an appellate jurisdiction over the Court of Exchequer. This doctrine is fully laid down in 4 Inst. 71, 105, 106, where it is said, that the crown could not grant such a jurisdiction. So that this is an attempt to give originally to this court the right to reverse the decisions of the Court of Exchequer, a right which even the crown could not give by way of appeal.

Suppose judgment of ouster given by this court against the officer of the Exchequer, where is the jurisdiction in this court to arm its officers with the power of enforcing it? Suppose, after such a judgment, the Court of Exchequer were to say that the officer should still act, where is the power, either in this court or in the crown to restrain him? Is a party to be brought into court by criminal information as an usurper, because he acts under the authority of a superior court, a court which has exclusive jurisdiction over his office, and which can commit him to prison if he refuses to perform it? What authority has this court to punish the officer of the Court of Exchequer, any more than the Court of Exchequer has to punish the officer of this court?

I have complained that this proceeding is vexatious: I say again, it is vexatious in every part of it, and that it cannot be attended with any advantage to either the king or the public. It not merely puts the de-

defendant to prove his title, as has been said by Mr. Attorney-General, but it hampers him in point of pleading; so that even if his title were good, he would be liable to be defeated by a trivial irregularity. He is precluded from pleading double matter: so that if he had ten defences, he must yet resort to only one, and if the issue be found against him on that one, it is fatal to his case. If he be successful, he can have no costs, but is compelled to defend himself at his own expense: and if he fails, he has costs to pay. I say, it is a prerogative of so severe a nature, that it ought not to be resorted to, unless where there has been a direct and manifest usurpation of the rights of the crown. Had the attorney-general inquired, he would have been informed of the nature of this appointment. He would have learned, that it was not a claim set up by a stranger, but made by the chief baron, and ratified by the court. Immediately upon the making of this appointment, my lord chief baron waited upon the lord lieutenant, and informed him that he felt himself bound by his oath to maintain the rights of the crown, and proposed that the case should be referred to the principal law officers: offering at the same time to waive any advantage gained by the appointment. That proposal, for what reason I know not, has been declined. I do not mean to say that any blame upon this subject is imputable to the lord lieutenant, of whom I wish to be considered as speaking with every sentiment of personal respect. The first intimation given to the chief baron after this communication of the intention of the crown, was by the filing of this information.

Allow me now to ask, whether, if the Court of Exchequer refused to admit another officer, a mandamus could issue from this court to compel them? To show that it could not, I beg to cite Lee's case, Carth. 169, 170. 3 Mod. 332, 335. S. C. In that case, a mandamus to admit a proctor into the Ecclesiastical Court was refused, and on this ground "that (3. Mod. 335.) officers are incident to all courts, and must partake of the nature of those several and respective courts, in which they attend; and the judges, or those who have the supreme authority in those courts, are the proper persons to censure the behaviour of their own officers, and if they should be mistaken, the King's Bench cannot relieve: for in all cases where such judges keep within their bounds, no other courts can correct their errors in proceedings." And the sole question raised in that case was, whether the court had acted within its jurisdiction. Sir Bartholomew Shower, who was counsel for the mandamus, in his argument endeavours to distinguish the case, as being that of an inferior jurisdiction: admitting that it would be otherwise in the case of the Court of Common Pleas. This case will be material in a subsequent part of my argument, as showing that the course of the court is the law: but at present I use it only to show that one court is not subject to the control of another of co-ordinate jurisdiction.

Again, this proceeding is most vexatious; for even if judgment of ouster should be pronounced against the defendant, there could not be judgment for the king to put him into possession of this franchise, be-

cause he cannot exercise it himself. *Rex v. Stanton*, Cro. Jac. 25f 260. From the entry in 1 Lill. 6. *Woodhouse v. Twyford*, it appears that when a plea of privilege is put in by an officer of the court, he is not obliged to go into the right of appointment, but need merely state his appointment and admission. Thus this proceeding is additionally vexatious. If the crown gets a judgment of ouster, the consequence will be, that it will appoint a person to execute this office, who must go back to the Court of Exchequer, and according to the course of law submit to them the validity of that appointment. Nor is this merely a wanton conjecture; for in the late act of parliament passed in the last session, making provision for the fees of this office, it is recited "And whereas his royal highness the Prince Regent, in the name, &c proposes to make a grant of the said office," which is a direct intimation that the crown is to grant. "And whereas a suit has been instituted, and other suits may hereafter be instituted respecting the right of a grantee of his majesty, &c." So that this proceeding is to end in a grant by the crown to try the right. Should these suits which are spoken of, be instituted, where are they to be tried? Can they be tried any where but in the Court of Exchequer? Unless indeed, in the spirit of these proceedings, an act of parliament is to be passed for transferring the jurisdiction. If these suits are to be conformable to precedents from the earliest times, they can follow no other course than that which I have suggested. And can it be thought a wholesome or a sound exercise of that discretion which is placed in the crown, instead of trying the right in the first instance, to institute a proceeding which is to deprive the party of the benefit of pleading, to subject him to costs, and to call down condemnation upon the Court of Exchequer? And this for the purpose of again submitting the same question to that same court, thus degraded and vilified? It can only bring the law into disgrace: and if my learned friend the attorney-general were now addressing your lordships, he would disclaim such an imputation. I am sure he is incapable of sanctioning so revolutionary and jacobinical a doctrine: and if these shameful consequences had struck his mind, he would never have prosecuted such a suit. So firmly was I impressed with the weight of these consequences, that I advised the chief baron to call on this court to enter a remanet upon this record, till the opinion of the twelve judges could be had upon it, and until (if necessary) the twelve judges of England should be consulted. He has, however, declined to do so, and desires his case to go before a jury - but I should not have conceived I had done my duty, had I not advised him as I did.

There are three material issues before the court and the jury. The first is upon an uniform usage alleged by the attorney-general to have existed in the crown from time immemorial, to appoint to this office. The second is upon a right of the chief baron as chief judge of the court (which he is by this pleading admitted to be,) and by the usage and course of the court, namely, that he should appoint to all such offices as the court were at any time entitled to appoint to: and the third



is simply upon that usage. These issues are all nearly connected with each other. In order to have a determination upon the second, we must previously dispose of the first: and accordingly this course has been taken by the crown. The argument of the attorney-general is this: that if the court has such a right, it must be, either by the original constitution of the court, or by prescription, or by act of parliament: and he says that there is no evidence of this being the original constitution of the court. Again he says, that even if the right ever were in the court, yet, first, it could not be legally transferred, and secondly that in point of fact it was not transferred. This, if I mistake not, comprehends the sum of his argument. The words used by him in stating the right of the court, are somewhat ambiguous: he says that if there be such a right, it must be either "by the constitution of the court, or by prescription, or by act of parliament." What is meant by the original constitution of the court, I do not exactly know. If it means the common law, then I heartily subscribe to the position: but if it means some positive institution of the court, as implying some attributes which the common law does not allow to it, then I must deny it. And here let me remark, that by a singular and unaccountable felicity, the attorney-general has not once in the whole course of his argument mentioned the name of the common law. That this should be the case, I am not surprised: because the attorney-general has found himself under the necessity of falling foul of Lord Coke and Lord Holt.

There is a difference between the two modes of expression, common law and usage. According to the one, it would be necessary to show the right had always existed: but not so in the other. The common law is the protection of the inheritances and the liberties of the subject. It is a body of immemorial usage; not arising from prescription—nor from act of parliament—nor from charter: but growing out of the immemorial usages which have prevailed in these countries. As they existed in England they were imported here, as a grand code of law, by King John, in the 12th year of his reign. The attorney-general has alleged, that although by the common law of England these rights were established in the chief justices there, yet it would not be so here. I deny that; for I say the subjects of this country are purchasers of the common law of England, and of all its properties and all its benefits. It was not arbitrarily imposed upon them by conquest: they were purchasers of the entire benefit of it; and therefore if by the common law of England this right is vested in courts of law, it is necessarily so here also.

In order to learn what is the common law, I know of no other mode, than by inquiring into the reasonableness of the thing, the ancient usage of the country in that and in analogous cases, the declaration of the legislature, the expositions of wise and learned men, and finally the decisions of courts of justice. I shall refer to all these criterions for the purpose of seeing whether there is any common law upon this subject, and if so, what it is. The first circumstance for your lordships' attention is the

declaration in the Stat. of Westm. 2 c. 30, 13 Edward I., anno 1285; the words of which are, "All justices of the benches from henceforth shall have in their circuits clerks to enroll all pleas pleaded before them, *like as they used to have in times past.*" By the common law, wherever a court of common law exists, the judges of that court, or one of them, must have a power of appointing the clerks who are to enroll the pleadings and judgments. My Lord Coke, in his comment on the above passage,\* says, "Hereby it appeareth that the justices of courts did ever appoint their clerks, some of which after, by prescription, grew to be officers in their courts: as *here it is put for example*, that the justices of the benches in their circuits had clerks that enrolled all pleas pleaded before them, as anciently they used to have, that is, as by the common law." So that by this comment, Lord Coke declares that the statute is in this respect but confirmatory of the common law; and further, that the case to which the legislature had applied this declaration, is only put by way of example. He then proceeds, "Now the cause of making this branch was, that the king was informed that he might erect offices for entering and enrolment of records in his courts of justice, and especially justices of assize, which this branch declareth to belong to the justices, and that they had enjoyed this of ancient time, that is, by common law." Here then Lord Coke declares the common law, and expressly states the encroachments of the crown: and that for the remedy of this particular encroachment, the statute declared the common law. "And the reason (says he) is twofold. These reasons of Lord Coke the attorney-general has treated as ludicrous. I think I am sufficiently alive to the ridiculous, and have a due sense of the facetious powers of my learned friend the attorney-general; but in this instance I am so dull and stupid as not to feel the ludicrous effect of these reasons. The first of them is, "for that the law doth ever appoint those that have the greatest knowledge and skill, to perform that which is to be done." Now, for the life of me, I cannot see the joke. On the contrary, if I were looking for a grave and satisfactory reason, fit to come from the lips of one of the sages of the law, and to be incorporated in that great comment, which is, more than anything that I know, the evidence of the common law, I could not have found one more so in every respect than this. These were the feelings of ancient times—the presumption then was in favour of the wisdom and integrity of judges, and that they would exercise their offices with honesty and judgment. But it is in these days to be supposed, that judges will not exercise their rights with impartiality and integrity! Such were not the feelings of Lord Coke, or of that day, or under which our common law has grown.

The second reason given by Lord Coke is, that "the officers and clerks are but to enter, enrol, or effect that which the justices do adjudge, award or order, the insufficient doing of which maketh the proceeding of the justices erroneous, (this is a precise statement of the

\* 2 Inst. 425.

duty of the clerk of the pleas in the several courts), than which nothing can be more dishonourable and grievous to the justices, and prejudicial to the party: therefore the law, as here it appeareth, did appropriate to the justices the making of their own clerks and officers, and so to proceed judicially by their own instruments; and that this was the common law, the king cannot grant the office of the shire or county clerk (who is to enter all judgments and proceedings in the county court) for that the making of the shire clerk belongeth to the sheriff by the common law, as in Mitton's case it appeareth, *et sic de cæteris*." If a century had been employed in condensing the reasons of this common law principle, it could not have been done in words more emphatical than those of Lord Coke. The attorney-general says, the court has no interest in the proceedings but only the party. This is not the law. The judges are interested, first in the propriety of their own judgments, and next in the faithful entering of them. They are interested in having their judgments duly taken down and enrolled by their own instruments. They are likewise interested in the safety and rights of the subjects, suitors in their courts. They are the persons to guard that safety and those rights. From the moment that courts of justice are framed, from that moment the rights and the duties of protecting the subject devolve upon them, and it is their interest as well as their duty to protect his rights. And yet we are now told, that courts are not proper judges of their duty, but are to be called to the tribunal of some other court, to answer for their discharge of those duties of which the law has constituted them the only judges. It is a doctrine in the highest degree illegal and unconstitutional, fraught with the most mischievous consequences, and one which ought to be instantly met and put down.

For the doctrine thus laid down by Lord Coke, he refers to Mitton's case, 4 Rep. 32. In that case, the crown appointed a sheriff, and then appointed a shire clerk. The question was between the sheriff (who claimed a power of appointing the shire clerk) and the appointee of the crown. This was in 26 Elizabeth, 1584. The argument for the crown admitted, that if the sheriff were the judge of the county court, the right by common law belonged to him. The whole question turned upon this, whether it was the sheriff's court or not. The attorney-general says the question was whether it was the property of the sheriff or not; and with some degree of triumph asked, "if the Exchequer was the chief baron's court?" No one ever said that it was; but in the same sense as the sheriff's court is his, the Exchequer is the court of the barons. They are both the king's courts, though these judges preside in them. The true and only inquiry was this, was the sheriff the president of the court? And it is then laid down, "that law and reason require that the sheriff, who is a public officer, and minister of justice, and who has an office of such eminency, confidence, peril, and charge, ought to have all rights appertaining to his office, and ought to be favoured in law before any private person for his singular benefit and avail." To this case Lord Coke adds a decision by Anderson and Popham with regard to gaolers, to the same effect. All are parts of the same principle

and analogy, namely, that a derivative office is inseparably incident to its principal. In Mitton's case many precedents of appointments by the king were stated; but what was the answer? "*judicandum est legibus, non exemplis.*" that is to say, that if the law be clear, instances the other way are to be considered not as precedents, but as usurpations. Now apply these principles to this case: although the king may have the power of appointing the judges who constitute the court, yet having once constituted them to be a court, the appointment of their clerks must be incident to their office, and the crown cannot take it from them. In Mitton's case, though the crown had the appointment and removal of the principal, yet it was held not to have the appointment of the subordinate officer.

In the case of *Harcourt v. Fox*, cited on the other side (1 Show 526) this doctrine is still more strongly exemplified. There the king might by virtue of his prerogative appoint any of the justices *custos rotulorum*; but the moment he did appoint one, then, *ex necessitate* and by the common law, such *custos* must have the appointment of clerk of the peace.

Such is the law as laid down by C. J. Holt, who was one of the most distinguished men in the history of our law. He suffered under the tyranny of James II., for his integrity and principles, and for his efforts in establishing our civil and religious liberties. After the Revolution he was made by King William chief justice of the King's Bench: and by his learning and talents he dignified and adorned that high situation to which he had been raised by his integrity and independence. It is therefore (allow me to say) a flippancy of getting rid of the authority of such a man to say that he had a cause involving a similar point on his own part, and was therefore influenced in giving his judgment. His words are (530) "the clerk being the person that must be trusted with the rolls to make entries upon, to draw judgments, to record pleas, to join issues, and enter judgments, then of common right, by the common law of the land, it belongs to him that hath the keeping of the records, to nominate this clerk, and not to any one else." Here the keeping of the records is relied on as if the right of appointment grew out of it. The case of the *custos rotulorum* was peculiarly circumstanced. All the justices were of equal degree, and they could not agree amongst each other, which of them should have the right that must belong to one, namely, of nominating the *custos rotulorum*. If they could have agreed, it would have become the usage of the court that the one so agreed upon should appoint, and there would then have been no pretence for the interference of the crown. But this not having been done, the crown of necessity appointed the *custos*, and he, when so appointed, had of course the nomination of the clerk of the peace.

The powers of superior courts do not grow out of the keeping of the records, but the keeping of the records belongs to them as judges of the courts. The custody of the records is incident to the pronouncing of the judgments. Thus it is said "that all the justices being judges of record, the records of the court must belong to them, and *certiorari's*

to remove them must be directed to the justices in general, &c.\* I take this case to be a most governing one upon this subject. Your lordships see that the right of having the custody of the records is not derived from the act of the crown appointing a custos, but the law annexes the custody of the records to the merely being judges in the court. And in like manner Lord Coke states this right of appointment to be in the court from its constitution, and without reference to any custody of the records; he deduces it not from any such custody, but solely from their being judges.

All the points in this case of *Harcourt v. Fox* are important; because justices of the peace, custos rotulorum, and clerk of the peace, are all offices created within time of memory; they did not exist at common law; their origin was recent. But yet the consequence of the common law principle that wherever a court is created they are to appoint their own clerks, did, when this new jurisdiction was created, attach to it; and this is the reason why the attorney-general was so unwilling to allow this right to be in the court by common law, but would have your lordships suppose it must have been in them, if at all, by what he calls the original constitution of the court. At all times, and under all circumstances, the court, who are to pronounce the judgment, must nominate the clerk; so that even if other persons had originally been the judges, and then new persons should be appointed, the common law principle would attach, and those new persons would have the nomination. For instance, your lordships see, that upon the creation of this new jurisdiction of justices of the peace in the time of Edward III., there did not result to the king a right of nominating their clerks, but the common law principle took it out of the king, and put it into the court; and so by the common law, the justices of the peace had the appointment of the custos; but they not being able to agree upon the particular person who should exercise that right, the king nominated one; but even then, the king could not nominate a man who was not in the commission. And yet if he be the fountain of all office, except so far as a court has the appointment from its original constitution, or by prescription, (as has been asserted) he might have done so. Why is it then that he could not? because when the legislature had once created a new court of record, the appointment of its clerks necessarily belonged to that court. Your lordships will find that Lord Holt has expressly stated these courts to have been created within time of memory. He says, "the commission of the peace did commence in time of memory, and the justices were appointed by the crown, not before the 1st of Edward III., and then they were made in lieu of the conservators of the peace, who were as ancient officers as the law knew." The conservators were at common law, and to them of right belonged the nomination of their own clerks. Then the constitution of the court was changed; instead of conservators, there were appointed justices of the peace; but still the common law attributes of judges were transferred to those new officers,

\* 1 Show. 528.

and in virtue of them, they also had the nomination of their clerks. So in 4 Mod. 173. S. C. "It is plain that it was not an office time immemorial, because the commission of [the peace is not so." It then mentions the original of the office of custos, and goes on, "Afterwards it became incident to the office of the lord keeper to nominate the cust. rot. and then because of the necessity of one to make entries and join issues, the custos appointed a clerk for that purpose, who is now called clerk of the peace; and this seems very agreeable to the statute of Westm. 2, by which it appears, that such officers and clerks who are to enter and enrol pleas, were always appointed by the judge or chief minister of the same court."

The next authority to which I shall call your lordships' attention, is Skroggs v. Coleshil, 1 Dy. 175. a. b. The office of exigenter of London and other counties became vacant, and afterwards the chief justice of the common bench died, and during the vacancy of both offices, the queen granted to Coleshil the office of exigenter, and then appointed Brown chief justice, who refused to admit Coleshil, and admitted Skroggs his nephew. The queen commanded Sir Nicholas Bacon, keeper of the great seal, to examine and report the title of Coleshil. And he having convened the judges of the Queen's Bench, the chief baron, the attorney-general, and the attorney-general of the duchy, "took a clear resolution after a long debate and hesitation of all the premises, that the title of Coleshil was null, and that the gift of the said office by no means, and at no time belongs or can belong to our lady the queen, but is only in the disposal of the chief justice for the time being, as an inseparable incident belonging to the person of the said chief, and this by reason of prescription and usage. And it follows from this, that our lady the queen herself cannot be chief justice in the said bench." It appears however, that the queen was not satisfied with this exclusion to which she was subjected, for "notwithstanding the said resolution of the judges aforesaid, the queen upon importunate suit, directed her commission to the Earl of Bedford and nine others, giving them authority to hear and determine the interest and title of the said office, &c." And afterwards, "Coleshil exhibited a bill to those commissioners stating his title, and Skroggs demurred to the jurisdiction, for which he was committed to the fleet, and there remained for two weeks: and then request was made by three serjeants in the bench to grant a *corpus cum causa*, directed to the warden of the fleet. And upon consideration of the court, the request was held reasonable, and to be granted, because he was a person in the court, and a necessary member of it. And note the words of the statute West. 2. c. 30, for the origin of clerks of assize, &c. All justices shall have in their circuits clerks to enrol all pleas pleaded before them, like as they used to have in times past. And so it seems in reason, that the justices were before the clerks, and made clerks at their pleasure."

I do not mean to quit this argument without explaining the words "prescription and usage," above used; because it has been argued from them by the attorney-general, that this right of appointment was

vested in the chief justice by a personal prescription. The term "prescription" in this instance means this, that by the common law the right of appointment was necessarily vested in all the judges of the court, but that the personal right of appointment as exercised by the chief justice alone, was founded upon "prescription and usage," which transferred that power which was originally in the whole court, to him individually; exactly what we say has been done in the present case. Upon this part of the case, the authority already cited from Anderson\* is material, as also the case of *Brownlow v. Cop and Michell*, Mo. 842. Brownlow was the prothonotary of the Court of Common Pleas; the crown appointed another person, and Brownlow brought his assize against the appointee of the crown. He waived his privilege, and brought his assize in the King's Bench. The king directed his writ to the justices, reciting that he had by his patent granted the making of supersedeas's to the defendant, and requiring the justices not to proceed *rege inconsulto*. It was insisted that the writ should be quashed, and there was a long argument upon it. The mode of arguing does not exactly appear, but the crown admitted they had not the right, by entering into an undertaking with the court, not to appoint in future, thus clinging to their usurpation at the very moment they were obliged to admit that it was a usurpation. And an indenture was actually executed to that effect.

After all these authorities and all these principles, it might well be supposed that in England this question would be set at rest. But it was not so; and the crown once more attempted to raise it in the case in *Show P. C.* cited by the attorney-general.† This was the case of *Bridgeman v. Holt*, reported also in *Skinn.* 354. And this case itself contains the principles upon which the common law right of the chief justice has been established. I wish to apprise you, gentlemen of the jury, that the uniform usage in England is, that the crown has no right to appoint, and in fact never does appoint, the officer called clerk of the Pleas, either in the King's Bench, or the Common Pleas, or in the Exchequer.

From the statement of this case of *Bridgeman v. Holt* by the attorney-general, your lordships might imagine that C. J. Holt had pleaded a prescriptive personal right, and not a right at common law. Now, the first thing material to be observed in that case is, that it was an action of assize, and the general issue was pleaded; so that it did not appear from the pleading, whether the defendant's claim rested on prescription or on common law. The whole case came out upon evidence, of which it will be necessary to trouble the court with the detail. The first piece of evidence given by the plaintiff was the patent from the crown. The defendant insisted that the office of clerk of the Pleas was not grantable by the crown, but that the right of appointment belonged to the chief justice of the King's Bench. And to prove this, it was shown that the business of the officer is to enrol pleas between

\* Cavendish's Case, 1 And. 152.

party and party only, that is to say, common pleas, and had nothing to do with pleas of the crown : that all the rolls and records in this office were in the custody of the chief justice : that all the writs to certify or remove records in this clerk's office are directed to the chief justice : and from the nature of the employment, it was insisted, that in truth he was but the chief justice's clerk : and that consequently the office must be granted by the chief justice. Thus, they first state the nature of the office, and then the particular reasons which gave the right of appointing to it, to the chief justice. "And for further proof it was shown by the records of the court, that for the space of 235 years past, this office, when void, had been granted by the chief justice." It has been asked, why, if the chief justice had really this right by common law, should he be so absurd as to go into evidence of the usage? I would be glad to know whether there is any common law right claimed by the crown in this case? Or has such a right been abandoned by the counsel for the crown? For the whole of this day, and part of yesterday, has been employed by them in giving evidence of the usage. If the crown have no common law right, then let them give up any claim to it; and if they have, they cannot lay any stress upon Lord Holt's going into evidence of usage. The fact is, that Lord Holt did no more than the attorney-general has done in this very case, or than any prudent man would. He first showed his common law right, and having the usage in his favour, he offered that usage in evidence in farther confirmation of his common law right. But I undertake to show that his right was determined on the ground of common law, and not of any personal prescription.

In the first place, his counsel "insisted upon the mere right of granting the said office, viz., that it was not grantable by the crown, but was an office belonging to the chief justice of the King's Bench, and grantable by him." In the next place, "it was observed on behalf of the defendant, that in all these records produced and read in court, after the mention of the surrender to the chief justice, there are these words, 'to whom of right it doth belong to grant that office whosoever it shall be void.'" Again, "it was further insisted and proved that there are, in the nature of clerks, three considerable officers of the Court of King's Bench; the first and chiefest is the clerk of the crown." And here let me answer the objection that our argument would go to prove too much, as according to it the clerk of the crown ought also to be appointed by the court. We mean only to say, that in the case of Common Pleas the court has such a right. The clerk of the crown (Shower 113) is the attorney-general and prosecutor of the crown, and is to draw all indictments, informations, &c., in pleas of the crown, and this without the interference of the court. The crown might therefore justly enough say, that an office of this nature should be in its own disposal; but yet even in that case, so strong was the leaning in favour of the general common law principle, that this clerk also was originally appointed by the court. Com. Dig. "Courts." B. 4. A statute was afterwards framed (15th Edward III.) to this effect: "It is consented



that if any of the offices aforesaid (which are mentioned in the act) or the controller or chief clerk in the Common Bench or King's Bench, by death or other case, be ousted of their office, the king, with the consent of the great men, &c., shall put another fit person in such office." After the making of this statute, the king appointed the clerk of the crown, which he had never done before; and though the act has since been repealed, yet it having been considered as in this respect declaratory of the common law, the crown has continued still to appoint the clerk of the crown in the King's Bench; but on the circuits the senior judge appoints the clerk of the crown.

"The second officer (say the counsel in the case in Shower) is the prothonotary or chief clerk for enrolling pleas between party and party in civil matters; he and his under clerks do enrol all declarations, pleadings, &c., in civil causes, especially where the proceedings are by bill. This clerk files in his office all the bills, declarations, &c., and all the writs of this court in civil matters are made by him and his under clerks, and tested by the chief justice; and he hath the custody of all returns of elegits, executions, scire facias's, and the filing of all bills, every of which are, in the eye and judgment of the law, in the hands of the chief justice, whose clerk this officer is.

"The third is the custos brevium, who keeps all the rolls and records of judgments in this court, which are also said to be in the custody of the chief justice; and this office, when void, is in his gift and disposal."

The defendant then insisted on the statute of Edward VI. against the sale of offices,\* which contains a salvo to the two chief justices and judges of assize to dispose of the offices in their disposition, as they used to do, and so far recognizes the common law right of the judges.

And then to prove the defendant's title, the grant of the chief justice was produced and read and proved, and that the defendant was admitted and sworn.

To answer all this evidence, there was produced the copy of an act of parliament made in 15 Edw. III., allowing the king, as already mentioned, to fill certain places when vacant, and it was urged, that by virtue of this act, the king had the right of appointing to the office.

Upon this evidence, the court declared they would nonsuit the plaintiff. Now if this were a case in which the right of the chief justice had rested (as alleged) upon a personal prescription, it was a case to go to the jury, but if on the other hand, it were a right at common law, then it was a question for the court itself to decide. Having put the act of parliament out of the way, the court would nonsuit, because there was a clear common law right in the chief justice, which if not taken out of him by the act, would bar the plaintiff. The counsel for the crown did not deny, that if the act were out of the way, the court were right, but they insisted that it was impossible to get rid of the act, and prayed the court that it should go to the jury. The court did what they ought not to have done, and did suffer it to go to the jury; and the jury found that this office did not pass to the crown under the act.

\* 5 and 6 Edward VI. c. 16.

The plaintiff's counsel then tendered a bill of exceptions, on the ground that the court and not the jury ought to have judged of the act of parliament, which bill the court very properly refused to sign, inasmuch as this was done at their own instance and desire, whereupon they went to the House of Lords. In the report of this case in *Skinn.* 355, it is said the counsel pressed it should go to the jury, and the judges accordingly left it to them.

What then was the case of Chief Justice Holt, on the whole of this trial? Your lordships will recollect he was not hampered by any particular pleading, but was allowed to give everything in evidence under the general issue. The opinion of the court clearly was, that (the act being once out of the way) there was a principle that enabled them to decide in favour of the defendant. This could only be a common law principle, which was a question for the court and not for the jury. The defendant did in evidence, what we have been obliged to do in pleading, that is, he showed a common law right in the court at large, and then a transfer of the exercise of that right by usage and prescription to the person of the chief justice. Had Chief Justice Holt spread his title out upon the record, he would not have called it a prescription. It was nothing more than an usage. He would have stated his title exactly as we do here, namely a right at first inherent in the court, but by usage to be exercised by the chief justice.

There is a great distinction between prescription and usage. A prescription implies a grant: an usage implies no such thing. On the contrary, the idea of a grant would be inconsistent with it. An usage is a customary mode of modifying or qualifying an existing right. But in no case does it imply a grant. It is merely what becomes a practice. Hence it is not necessary, for the validity of an usage, or in order to constitute the practice of a court, to go beyond time of legal memory. Forty or fifty years, or any time which is long enough to show the court, that such a thing is the practice, will suffice. A course of the court when ascertained, is the law of the court, and is binding not only upon that court itself, but upon all other courts.

We have been driven to strictness in pleading, and been obliged (perhaps fortunately) to state our title with a degree of accuracy, to which Lord Holt was not bound. He showed in evidence first the law, and then the usage grounding his own right. And just so have we done in pleading. In fact, the usage of a court must be decided by the court, and in Lord Holt's case there could be no question for the jury upon that point. Had the question been upon a personal prescription, it must have gone to the jury, but the court negated that supposition, by expressing their determination to nonsuit the plaintiff.

I think therefore that the case establishes two points for me: first, that the defendant there set up and established a common law right in the court: and next, that besides that, he showed an usage to give that right to the chief justice, that is to say, an usage of which the court, and the court only were to judge.

Tuesday, November 19.

My lords and gentlemen of the jury,—The head of argument of which I treated yesterday, was the common law right of the court to appoint to this office, and in investigating that head, and the authorities referred to in support of it, I have endeavoured to show that the ground on which the right is vested in the chief justice of the King's Bench and Common Pleas in England, must be a principle of the common law, which annexed the right to the court, and then an usage enabling the chief justice to appoint, and that the right cannot be founded upon any personal prescription in the chief justice. I do not think it necessary now to recapitulate these arguments. The last argument I submitted from the case in Shower, was, that the court could not have proceeded upon the notion of a prescription, inasmuch as they declared their intention of non-suiting, and would have done so, had it not been for the importunity of the plaintiff's counsel.

In addition to that argument, I have a few more remarks to offer upon this case, which appear to me to be most material. If the title there relied upon had been a prescription against the crown, your lordships know it must have been founded upon the supposition of something which the crown might lawfully grant, for every prescription implies a grant. The argument on the other side is, that it was not the usage of the court that was relied on, but a prescriptive right in the person of the chief justice. This right, if not derived from the court, must have been derived from the crown. It will be necessary therefore to probe this position, that the right is vested by prescription.

Let me ask in the first place, had the king a right to make a grant of his power of nomination? And secondly, if he had, might he have granted it to an absolute stranger, or was he bound to grant to one of the court? If he had the right at all, it must be either generally and without restriction, or in the modified way I have just stated, namely, a right to grant to one of the court, and to no other. If the former is asserted, and if the proposition be, that the king has a right to grant to any person at his pleasure, I must beg leave totally to deny it; because I think your lordships will find, that where there are any certain rights and prerogatives remaining in the crown, and undeparted with (I am now, for argument's sake, supposing the right of nominating this officer not to be out of the crown,) these are original and inherent prerogatives of the crown, and cannot be divested by the constitution of the King's Bench. If this particular right was vested in the crown, it was so vested for the public benefit, and could not be departed with. If this be so, though the king, it is true, might grant the office, yet it is equally true, he could not grant to another the power of granting the office. For I lay it down as a principle of law, that though the king may depart with his lands, which are his private property, and though as to them there might therefore have been a prescription against him even prior to the *nullum tempus* act, yet from the nature of the thing, such prescription must be confined to such things as the king may lawfully grant.

It is so laid down by Lord Mansfield in the case of the Mayor of Hull v. Horner, Cowper, 102. He refers to the case of the King v. Brown, and says, that even before the *nullum tempus* act, he had always held, that there might be a prescriptive right against the crown. But he confines it to cases where the crown might lawfully grant.—This indeed is so clear upon principles of reason, of analogy, and of policy, that it is scarcely necessary to cite authorities in support of it. To instance a familiar case; if I appoint a trustee to act for me, he may do anything necessary for the execution of his trust, but he cannot transfer the trust itself. That is a personal confidence, and cannot be conveyed to another. So it is with regard to the crown, which is a public trustee. Though it may grant an office to any person it thinks proper, yet it cannot transfer the right of nominating to such office. If (as we are now supposing) the right of appointing to the office of clerk of the Pleas was not attached to the Court of King's Bench, and if the exercise of it in the crown was not confined to any member of that court, then it must be an original right in the crown, for the benefit of the public, and therefore the crown must be disabled from granting it. Your lordships will find, that the moment anything is vested in the crown, which in the contemplation of law is for the public good, that moment is the crown disabled from transferring it. In the case of the temporalities of a bishop, they are vested in the crown during the vacancy of the see. It does not very clearly appear that the public benefit requires that such a right should not be granted away. It might at first be well supposed, that it was a sort of private property in the crown, and accordingly it was not originally clear, but that the crown might have transferred it. But yet it is declared by Magna Charta, that these temporalities shall not be sold. From the moment it was ascertained by this declaration, that such a prerogative was a public one, from that moment was the crown incapacitated from deputing it. And Lord Coke, in his commentary on Magna Charta (2 Inst. 15.) lays it down, that there can be no prescription for these temporalities against the crown. The same thing is laid down, Com. Dig. Grant G. 2. And indeed this is strictly consonant to the spirit of our civil polity. And in confirmation of this doctrine, I beg to refer your lordships to the case of Colt and Glover v. Bishop of Coventry. Hob. 140, 154. The court there say, "But a lapse (as I have said) is an act and office of trust reposed by law in the ordinary, metropolitan, and lastly in the king (who is *certum et stabilitum iustitiæ*) the end of which is to provide the church of a rector, in default of the patron; and yet as for him, and to his behoof. And therefore, as he cannot transfer his trust to another, so cannot he direct the thing wherewith he is trusted, to any other purpose; and therefore, though the king or bishop may suffer the church to stand void (which yet is *culpa*) yet they cannot bind themselves, that they will not fill the church, for that were *injuria et malum in se*; and therefore shall be judged in law, in deceit of the king; for *eadem mens præsumitur Regis, quæ est juris, et quæ esse debet, præsertim in dubiis.*"

Allow me now to apply this general analogy of the law to the present

question, namely, whether the case in *Show.* could have been decided on the ground of a personal prescription. To suppose it was, necessarily infers that the right of nominating to the office was a prerogative not departed with by the crown; and then the claim of the chief justice must have been this, that the king being intrusted with this right, had delegated that prerogative to another person; just in the same manner (though less in degree) as if he had delegated the right of appointing his judges or other ministers of justice. Now this, I say, he could not do; because such a prerogative is for the public advantage, and cannot be deputed.

I have put this supposed right of delegation alternatively, either as a general one, or as modified in a particular way. Let us now consider the second supposition, viz., that the right is to be granted only to one of the court. What is it that has so restricted it? If there be nothing in the nature of the court or the common law to restrict it, I do not know what else can. And if it be by the common law, the right of granting the office necessarily belongs to the court. It is impossible for ingenuity to confuse this argument or to get out of it. If this supposed prescription be not void as asserting a general right of delegation in the crown, it must inevitably admit a right in the court.

The cases in England have decided this very point; that is, that there is a right by common law in the court, but that it is exercised by one only, namely the head, of the court. Whether this be said to be by prescription or by usage, (if it be granted there is a common law right in the court,) is a matter perfectly indifferent, as to either the rights of the parties, or the determination of the question. If it were clear that there was a right in the court, though it might be erroneously stated in the pleading, that the chief justice's right is founded on usage instead of prescription, yet still the crown having no right, this *quo warranto* information could be wholly unwarrantable.

It appears from the pleadings here, that the chief baron is the chief judge of the Pleas side of the Court of Exchequer; that the chief baron has named this defendant as the officer, and that he has been admitted as such by the entire court. So that if I am right in saying there is a common law right in the court, and that that right is some way or other (no matter how) vested in the chief judge, there is here a complete title admitted upon the record. Nay, if it be even alleged that that right never could be taken out of the court, yet still I say there is a clear title on this pleading, because the court made this appointment.

A prerogative process to question such an appointment is an abuse of the prerogative. What concern is it of the crown's, in what manner the court have exercised their right? They have exercised it, and the crown has nothing to do with it. See whether the grantee of the chief baron has not done what he was bound to do in pleading. The attorney-general admitted that if this right was by common law in the court (and this will be most material in another part of this case) it could not be taken from them by grant, or prescription, or anything short of an act of parliament. It is true, that being once vested in the

court, it could not be divested out of them, either by grant, or by prescription, which implies a part. Therefore when we plead our title according to the nature of this proceeding (not give it in evidence as we were entitled to do, and as was done in the case in Shower) as a title arising from a usage or practice of the court it must avail; for although no usage can divest the court of its right, yet it may modify such right, and determine by whom in particular it may be exercised. This is not a grant, nor a prescription, but the usage (which is the law) of the court; a law to be recognized not only by the court itself, but by all other courts.

The argument of the attorney-general against this claim is, first that no such usage in point of fact exists; and secondly, that it is not a lawful usage. I have already mentioned, that a usage differs from a prescription, in that prescription supposes a grant, whereas usage does not, but on the contrary, cannot be supported by a grant. And in proof of this distinction, I beg leave to refer to Gateward's case, 6 Rep. 61, where it is said, "that every prescription ought to have a lawful beginning, but otherwise of a custom; for though that ought to be reasonable, it need not be intended to have a lawful beginning, as custom of Gavelkind Borough, English, &c. The common law is the general usage of the entire land; but a particular usage (such as Gavelkind,) is only a reasonable act which need not to have had such beginning as a prescription." And therefore when we talk of the usage of a court it is totally different from a prescription, and cannot have originated in a grant; it grows merely by admitting such a certain practice. Nor is it necessary, that such a usage of a court should exist from time immemorial; for this would be tying up the hands of a court, and preventing it from altering its practice, however inconvenient it might be found to be. Indeed it is monstrous to assert that the usage of a court requires to be from time beyond memory; and the contrary was expressly decided in Deverell's case, 2 Anstr. 624. The question in that case was whether Deverell should be confirmed in the place of clerk in the remembrancer's office. It was relied on (that he should not be passed over, and it was argued, as here, that the usage insisted on against him, was not a usage from time immemorial. But Chief Baron Macdonald's answer to that is as follows: "It has been argued that no usage can have effect to bind this question, unless such as could be legally set up as a prescription. I cannot agree to this argument. In offices in every court, new customs and new usages grow up, and get firm root by continuance much short of legal prescription." It was not necessary for me to have cited this authority, because it stands to common sense, that a court of justice must cease to be such, where it is not at liberty to alter its own practice, and to appoint such officers as it thinks fit.

Upon this part of the case, your lordships will find that the argument of C. J. Treby in *Owen v. Saunders*, 1 Lord Raym. 163, is very material. He is speaking of the office of *custos rotulorum*, and supposes that he may have been originally named by the justices themselves, and

that the clerk of the peace may have been nominated by him, with the consent of the court. His words are: "The original of this office of cust. rot. is not very clear; but in all probability, the trust of the conservation of the Rolls was committed to one of the justices of the peace, and then he was called *custos rotulorum*: and probably by the consent of his brethren he nominated the clerk of the peace. He is called so, 13 Hen. IV., 10 pl. 33. And in Dyer 175 b. it is said that it seems in reason that the justices were before clerks. 12 Ric. 2, c. 10, calls him clerk of the justices, and appoints him wages. 2 Hen. VII. 1, first makes mention of the *custos rotulorum*, &c." Now, in this, two things are important to be observed. First, that all this is alleged to be within time of memory; the establishment of justices of the peace is so, and consequently so must this usage. And secondly, that the power of nominating the clerk of the peace may have been given by the justices at large, and by their consent, to one of their brethren; and this, by a usage of the court. And it is also to be remarked, that no doubt is here entertained of the legality of such usage. The only doubt is as to the fact.

I take it, therefore, that the usage of a court with respect to matters within its jurisdiction, makes the law; it binds the court itself and every other court: and every court is bound *ex officio* to take notice of it, just as much as if it were the law of that particular court. It is a thing not questionable—not traversable—nor for a jury to decide upon—but is a question for the consideration of the court. This is clearly exemplified in Lane's case, 3 Rep. 16, a very strong case. By the general law of the land, the lands of the king cannot pass unless by grant under the great seal. But nevertheless, by the usage of the Court of Exchequer, the king's lands may pass under the seal of that court. And this is so, not by any general law of the country, but by the usage of that particular court, which, in that instance, makes the law. Lane's case arose in the Common Pleas, and three points were there resolved by the court. First, "that although by the common law no grant of any land by the king is available or pleadable but under the great seal of England, and although in this case it was not alleged that in the Exchequer the common course of the court was to make such leases under the seal of the court; yet it was adjudged that the said lease under the Exchequer seal was good, and that by the common usage of the Court of Exchequer: for the customs and courses of the king's courts are as a law, and the common law for the universality thereof doth take notice of them: and it is not necessary to allege in pleading any usage or prescription to warrant the same. And so it is holden in *L. 5, E. 4, 1, a.* and *11 E. 4, 2 b.* that the course of a court is a law: and in *2 R. 3, 9, b.* it is holden that every court of Westminster ought to take notice of the customs of the other courts: otherwise it is of courts in *patriâ*." Now, after reading this case, I cannot help feeling and complaining of it as a monstrous hardship in the present case, upon the defendant, upon the Court of Exchequer, and upon this court, that by this proceeding we should

be called upon to establish in evidence the usage of the Court of Exchequer. Suppose the present defendant were an officer of this court, and your lordships had admitted him, the crown claiming the right of appointment: by the very same right of prerogative by which this information is filed, it might have been filed in the case I have just put. The one is as much a supreme court as the other; both have the same right of admitting their own officers: and both are equally uncontrollable in the exercise of that right, unless by way of appeal. Suppose, then the attorney-general had thought fit to do so in the case of an officer of this court, and this without any claim on the part of the crown (for we are now supposing the right to be absolutely vested in the court), and suppose he had called on your lordships to send up an issue to the jury, to try what was the course of the court, what would your lordships, what would the jury, what would the public say to so gross an abuse of the royal prerogative? I put it to the good sense and feeling of the counsel for the crown themselves, whether they will involve this court, the Court of Exchequer, and the public, in the monstrous consequences of such a proceeding—whether they will put upon this court the odious task of deciding upon the customs of another superior court—or whether they will expose the Court of Exchequer to the humiliation of submitting to such a censure? I appeal to them, whether they will persevere in such a course of proceeding, when they see it thus dilated into its monstrous disproportions, until it at length assumes the gigantic form of unconstitutionality? If your lordships think it right, send your tipstaff into the Court of Exchequer, to drag the judges of that court from the bench, in order to give this court an account of their conduct. If this proceeding is to be persevered in, we shall be compelled to produce one of the learned judges of that court to prove the usage; if the court can submit to the indecency of such a spectacle, if we must be forced to do so, we shall produce Mr. Baron George, and your lordships shall see what has been the usage of the Court of Exchequer, and in what various instances rights and duties, which were originally vested in the court, have been exercised by a particular individual of it.

Every court is bound to notice the usage of another. If it were stated in a book of entries, that by the requisition of the court, the chief baron had the right to a certain appointment, would not that be considered as a sufficient authority? That is what is done on the record here: for it is stated that the officer was admitted. If we are obliged to resort to the proof of that usage, we shall show, that the taking and signing of all recognizances—the signing of all writs after judgment—of every writ of *Habeas Corpus*—the examining and signing of every taxed bill of costs—the signing of every writ of privilege, of all commissions of rebellion, all *venditioni exponas's*, all writs of supersedeas, and all injunctions in cases of estrepement, are, by the usage of the court, confined to the chief baron alone. Every writ of error directed to the Court of Exchequer is, by the same usage, allowed by the chief baron alone. On his *allocatur* alone the clerk of the Pleas is authorised to transmit the record, and without his *allocatur* he cannot do so.



In all those cases in which any patronage is vested in the court, (for example, in the appointment of crier and tipstaff,) by the usage of the court, such patronage is exercised by the chief baron alone. And not only in the Court of Exchequer, but in every court in England and Ireland where any patronage is exercisable in the appointment of its officers, it is, in point of fact, exercised by the chief judge alone. And yet we are now told, it is impossible that this can be done.

I hope the court will not consider me as endeavouring to create any unnecessary embarrassment in this case. I have stated what appears to me to be a most serious one, growing out of this proceeding. I trust the opposite party will tell the court how they are to get out of it. There is an issue joined here upon the usage of the Exchequer: do the counsel for the crown desire that a jury shall try that fact? Are they desirous of diverting a jury from its proper functions; for the purpose of ascertaining a right, which is admitted to exist in the court itself? We are ready to do in this respect as your lordships shall think fit.

I have now considered this case as resting upon the common law, and answered the cases which have been put by the attorney-general on the ground of prescription, as also the argument, that the right, supposing it to exist in the court, could not be exercised by a particular member of it: and I hope I have given to them a satisfactory answer. It now remains, in the first place, to advert to the argument, that there is something peculiar in the constitution of the Court of Exchequer, which makes the law there different from what it is in any other court, and then to observe upon the alleged usage contended to exist in favour of the crown.

In the first place, it is said, that by the peculiar constitution of the Court of Exchequer, the chief baron is not the keeper of the records of that court, nor even all the barons: but that the custody of them is in the treasurer and barons; and that in consequence of this peculiar constitution of the court, the records of the Exchequer must be considered as a parcel of the king's treasure, and as the muniments of his rights. Before I go into the examination of this argument, I should be glad to know in what manner, and with what view, it is to be applied? Is this a case between the crown and the Court of Exchequer? Or is it, under the pretence of a prerogative investigation, an experiment to try whether there can be a right in any third person, such, for instance, as the treasurer? I cannot conceive that the latter is the meaning of this information, because that would be an abuse of the prerogative, which I think the persons concerned for the crown would be incapable of advising. I must take it, therefore, that this is a proceeding, not for the purpose of knowing whether there be a title in the treasurer, but whether, by the constitution of the court, they can hold this title against the crown.

Now, as to the argument that the Court of Exchequer is established for the recovery of the king's debts, and that suitors can only sue in it on the fiction of being the king's debtors, and that, therefore, the

common pleas of the Court of Exchequer are not the pleas of the subject, but the king's pleas. I hold all this to be the very quintessence of prerogative pedantry. If this doctrine were to be pushed to its extent, it would go to show that in the King's Bench also, the appointment of the clerk of the Common Pleas ought to be in the crown. For in that court also, a party is obliged to sue under a fiction, namely, that the defendant has been guilty of a breach of the peace. In like manner, in any case, the party, if he fails, is liable to be amerced "*pro falso clamore*," and he would thus be subject as a debtor to the king. If fictions of law are to be resorted to, and every remote degree in which the rights of the crown may be supposed to be affected is to be brought in aid of the claims of the prerogative, there is not a muniment of public justice which may not be considered as part of the king's treasure.

It was objected by the attorney-general, that the argument drawn from the keeping of the records would prove too much, because it would go to show that the *custos brevium* should also be appointed by the court. The *custos brevium* of the King's Bench in England is in the appointment of the crown, but not the *custos brevium* of the Common Pleas. And what is the reason of the difference? Because in the latter, the writs are original writs; whereas in the King's Bench they are judicial, or at least the greater part of them, and of consequence, in illustration of the common law doctrine, and according to what is laid down by Lord Coke, the court which pronounces the judgment has an interest in having these writs properly entered. They therefore appoint the clerk of the writs, where the writs are judicial, but not otherwise.

Now as to the constitution of the Exchequer. If the chief baron of that court has not, from the usage of the court, the right of appointing to this office—if, I say, he is precluded from it by the particular constitution of the court, it is to be inquired upon what other officer it could devolve. If the common law be as I have stated, it could not devolve upon the crown: it must devolve upon some other officer. It would suffice to answer to this part of the case, that there is no claim set up by any other officer of the court, but that the claim is made by the crown alone. It is to be observed, that no such argument can arise upon the issue on the usage of the crown, but only on the second issue. And on this issue, the only way in which it can affect the right, is by showing that by the constitution of the court it cannot be in the chief baron. If it cannot be in him, I cannot imagine any other person in whom it can be, except either the chancellor of the Exchequer, or the treasurer of the Exchequer. As to the first of these officers—he is no judge of the common law side of the Exchequer, and never was. He never exercised any judicial function on that side of the court. The pleas at the common law side are before the barons only: but on the equity side they are before the chancellor, treasurer, and barons. And as to the custody of the records, the chancellor of the Exchequer never had it, either actually or constructively. The only function which he ever exercises on the law side of the court is, that he is holder of the seal,

there being but one seal for both sides, law and equity. As therefore he holds the seal, he must necessarily use it for the law proceeding. But yet, so careful was the law that this circumstance of his holding the seal should not entitle him to interfere in the law side, that by his oath he is precluded from using the seal in any law proceeding without the consent of the treasurer or chief baron, or some other baron: and in no act connected with the judicial power of the court can he use the seal without their concurrence. The form of his oath is, "the king's seal you shall carefully keep, and shall seal no process except such as shall be ordered by the treasurer or chief baron, or some other baron, except only original process." So that the chancellor of the Exchequer could not of himself have used the seal in appointing to this very office, unless by applying to the chief baron.

Now by what law is it, that the chief baron is in this instance substituted for the entire court? Is it by act of parliament? or by prescription? No: but by the usage of the court. But I only use this at present for the purpose of showing, that the accidental circumstance of their being but one seal induced the necessity of disabling the chancellor from using it without the warrant of the chief baron.

Another argument relied on is, that the chancellor of the Exchequer is the person who appoints to this office of clerk of the Pleas in England. I suppose it is so: but it is equally true that the king does not appoint to it. The office of chancellor of the Exchequer in England is in its nature different from ours. For a long series of years, the person exercising that office in England has also filled the office of under-treasurer of the Exchequer in England. The act of parliament giving him precedence, describes him as such. In all grants and acts of parliament where he is named, he is so described. And in the writ which issued for inquiring into the state of the public records in the country, and in which the two chancellors are named, the one (the English officer) is described as chancellor of the Exchequer and under treasurer, and the other simply as chancellor of the Exchequer.

The treasurer was originally the head of the law side of the Exchequer, and so long as he continued so, he had in virtue of that situation the appointment to such offices as were in the disposal of the law court. He has, however, from a remote period ceased to be the head of the law side; but in England, from the commencement, when he had that right of appointment, a prescription has prevailed in his favour of continuing to appoint; and from that period to the present, there has been a uniform exercise of the right by him in England; whereas throughout all that period, no such right has been exercised by the treasurer in Ireland. Nor is this an argument to be lightly dealt with. The chancellor of the Exchequer of Ireland has not been treasurer in Ireland, except by accident; the two offices have never gone together as they have done in England. The chancellor of the Exchequer in Ireland cannot have any law right; for a period of 400 years the offices of treasurer of the Exchequer and chancellor of the Exchequer have been separated. And hence, the chancellor of the Exchequer in

Ireland never has exercised the right of appointing to any of the law offices of the Exchequer. So that the chancellor of the Exchequer in Ireland has no common law right, and so far from having a prescription in his favour, he has never even set up a claim. The chancellor of the Exchequer in England on the other hand has always held the office which entitled him to grant the offices of the law side of the court.

It seems that originally, by the constitution of the Exchequer, this right of appointment would belong to the treasurer as head of the law side, and as long as he acted as such, the common law would have continued to him that right; but when he ceased to act, then of course it ought to devolve upon the next acting officer. At what period exactly the treasurer ceased to act, is involved in obscurity. It was not probably all at once, but by degrees; and thereupon the chief baron became the acting chief law officer. Had the treasurer continued ever since to this day, it is not for me to say whether or not he would still have had an actual right; that is a question with which I have nothing to do. I do not mean to pronounce any opinion as to whether the chief baron in England could controvert the right of the English treasurer; but he certainly could controvert the right of the crown. In England the chief baron would have a very different case from that which we make. He would have to say, that an officer who originally had this right of appointment, in virtue of his office, and who though he had ceased to exercise his office, had yet continued to exercise such right of appointment, was not entitled to appoint; perhaps he could not say so. But in this country an officer, such as the chancellor of the Exchequer, who never had the right, could not now in the first instance set up a claim. So that as to any argument drawn from the chancellor of the Exchequer in England, it is wholly (to use a phrase of my learned friend the attorney-general) a chimera. No claim is here made by the chancellor of the Exchequer, or on his behalf; the only ground of the case is an alleged right in the crown. And this right is stated, not as one derived from and incident to the right of appointing the chancellor of the Exchequer, but as inherent in the crown, and as part of its prerogative.

It remains to consider how far the treasurer can affect the right of the chief baron. Originally the treasurer perhaps had this right; but when he ceased to act, the chief baron, as the acting chief judge, then became entitled to appoint. In confirmation of this, allow me to mention the case of the creation of a new court. For example, the creation of a new Court of Error in this country by the act of 1800.\* A new officer thereupon became necessary, namely, the clerk of the Pleas of that court. And so strongly felt was the force of the common law principle that the right of appointment would belong to the head of the court, that the act of parliament makes a special provision giving the right of appointment to the crown. Here is a direct legislative recognition of the common law right. This provision was considered as a

great hardship, and the chief justice of that day, (the late lamented Lord Kilwarden) complained of it, as an injury done to him, that he and the court were deprived of the right. And here I may observe, that in the former Court of Error, the chancellor who was the head of it, nominated his secretary to be the clerk.

Having premised so much, I shall proceed to consider how far, originally, the treasurer was a judge of the common law side of the Exchequer. The statute *de scaccario*, made in the 51 Hen. III., st. 5, sect. 7, enacts, "And the warden of the king's wardrobe shall make accompt yearly in the Exchequer in the feast of St. Margaret; and the treasurer and barons shall be charged by oath, that they shall not attend to hear the pleas or matters of other men, while they have to do with the king's business, if it be not a matter that concerneth the king's own debt." And the 8th section adds, "And the king commandeth the treasurer and barons of the Exchequer, upon their allegiance, and by the oath that they have made to him, that they shall not assign any in their rooms, but such as this act meaneth of, and that the Exchequer be not charged with more persons than is necessary." Here the treasurer and barons are alluded to as the persons who have the nomination of such people in the Exchequer; the chancellor of the Exchequer is not mentioned.

An act made 12 Rich. II., c. 2, to regulate offices, enacts as follows: "Item, it is accorded, that the chancellor, treasurer, keeper of the privy seal, stewards of the king's house, the king's chamberlain, clerk of the rolls, the justices of the one bench, and of the other, the barons of the Exchequer, and all other that shall be called to ordain" (this word "ordain" comes upon one rather by surprise, for the attorney-general has been insisting that ordination is not an appointment), "name, or make justices of peace, sheriffs, escheators, &c., shall be firmly sworn that they shall not ordain, name, or make justices of peace, &c., for any gift or brocage, favour or affection, &c." Not a word here of the chancellor of the Exchequer.

The 2nd Hen. VI., c. 10, makes all officers who appoint clerks, answerable for such clerks.

The next recognition of these officers is in stat. 6, Edw. I., c. 14, whereby the king grants to the citizens of London that disseisees shall have damages by recognizance of assize, by which they recover. "And it shall be commanded unto the barons and to the treasurer of the Exchequer, that they shall cause it every year to be levied by two of them at their rising after Candlemas."

Then comes the 10th Edw. I. addressed, "The king to his treasurer and barons of the Exchequer, greeting." And in sect. 10, "Moreover we provide, that all debts whereunto the sheriffs make return that the debtors have nothing in their bailiwicks, &c., shall be estreated in Rolls, to be delivered to faithful and circumspect men, which shall make enquiry thereof, after such form as shall be provided by the treasurer and barons." This, your lordships observe, is a regulation as to common pleas returns.

In 13 Edw. I., c. 8, it is directed that the writs mentioned in it shall be enrolled, and at the year's end the transcripts sent into the Exchequer, that the treasurer and barons may see the sheriff's answer.

Maddox, in his History of the Exchequer, thinks it was the part of the treasurer to act with the barons in matters relating to the revenue.

I shall now show that these powers have long since ceased on the part of the treasurer. Your lordships will find in the statute 20 Edw. III., c. 2, "In the same manner we have ordained, in the right of the barons of the Exchequer, and we have expressly charged them in our presence that they shall do right and reason to all our subjects, great and small; and that they shall deliver the people reasonably, and without delay of the business they have to do before them, without undue tarrying as hath been done in times past." The barons of the Exchequer, your lordships will observe, are here enjoined, as the only persons concerned. In remarking upon this statute, Lord Coke, 4 Inst. 115, says, "Hereby it appeareth, that to them belongeth doing of right and reason in legal proceedings."

So the statute 31 Edw. c. 12, constituting the Court of Exchequer Chamber, recognises the barons as then the only judges of the law side.

Again the 5 Rich. II., c. 10, after reciting that certain complaints had been made of the officers of the Exchequer, gives to the barons full power to hear such complaints.

Lord Coke, 4 Inst. 118, in treating of the equity side of the Exchequer, says, "The judges of this court are the lord treasurer, the chancellor, and barons of the Exchequer: generally, their jurisdiction is as large for matter of equity as the barons in the Court of Exchequer have for the benefit of the king by the common law."

And in 4. Inst. 109, he lays it down, "All judicial proceedings, according to law in the Exchequer, are *coram baronibus*, and not *coram thesaurario et baronibus*."

In the Bankers' case (82) Lord Somers, (who we know was not interested to enlarge the jurisdiction of the barons), speaking of the court of Exchequer, says, "but if it be considered in its several parts, as to what is intrusted distinctly to the treasurer and chamberlains, and what is put under the direction and government of the barons, it comprehends distinct courts, and such as have no proper communication one with another; though, perhaps, as to some things, the treasurer, chamberlains, and barons are intrusted jointly: as my Lord Chief Justice Coke 4 Inst. 105, says they are with the custody of the judicial records." The passage of Lord Coke here alluded to is, "Albeit the barons, as hath been said, are the judges, yet the treasurer of the Exchequer is joined with them in keeping of the records, whereof the barons are judges, for they are parcel of the king's treasure." This passage of Lord Coke relates entirely to an information of intrusion into the king's lands, which, of course, are the king's treasure; and these records are kept not in the office of the clerk of the Pleas, but of the treasurer's remembrancer.

All writs of error, it is true, are, in the King's Bench and Common

Pleas, directed to the chief judges of those courts, whereas in the Exchequer they are directed to the treasurer and barons. But that we are not to be concluded by the form of the writ appears from 2 Inst. 381, where Lord Coke, speaking of the writ *ex parte talis*, says, "The writ in the register and *F. N. B. ubi supra*, is, *coram thesaurario et baronibus, nostris de scaccario*, but it ought to be *coram baronibus de scaccario*, according to the act, and that the rather, because the barons are (as hath been said) the sovereign auditors of England, and herewith agreeth Fleta." So, though on the treasurer's ceasing to be the head of the court, the form of the writ should have been altered, yet it continued to be the same. But notwithstanding the direction of writs of error to the treasurer and barons, the records are in the custody of the barons only, and so in all records, removed by writ of error, it appears on the face of the pleadings. The writ itself mentions the judgment to be given by them only: and though directed to the treasurer and barons, yet it is allowed by the chief baron only, he being, in fact and of right, the head of the common law side of the court, and upon his allocatur alone is it that the clerk transmits the record. There are a variety of records in the Exchequer, which are the king's treasure, in which the king has an interest, and which are in the custody of the treasurer's remembrancer; there are others in which the crown is also interested, and which contain proceedings before the barons; and, thirdly, there is a class called common pleas, or pleas between subject and subject, and they are in the custody of the barons, and of the clerk of Common Pleas, as their clerk. But to argue from the records being in the treasurer's custody, as part of the king's treasure, is absurd, because the treasurer originally kept the records of the King's Bench and Common Pleas also, so far as the king's rights were concerned; so that if this argument be well founded, it would give to the crown or to the treasurer the right of appointing also the clerks of the pleas in those courts. But the treasurer never claimed that right, nor has he, since he ceased to be a common law judge, ever claimed to appoint the clerk of the pleas in the Court of Exchequer. The offices of chancellor of the Exchequer and of treasurer have been united immemorially in England, and the oath of the chancellor of the Exchequer in England is different from that of ours. It contains no restriction, as ours does, as to the use of the seal. Here there is no claim by the treasurer, and, in fact, no such officer has for some time existed, although the form of the writs continues to include him. The English treasurer is called in records by various names, sometimes the king's treasurer, sometimes the treasurer of England (2 Madd. 41). The treasurer of Ireland is sometimes called lord treasurer, treasurer, and the 33rd of the king calls him high treasurer; and he has been sometimes called treasurer of the Exchequer, and sometimes our treasurer of the Exchequer. The judicial duties cannot be put in commission. What is become of them? I cannot see. The last grant is to one of the Boyle family; and the office of vice-treasurer was formally abolished in the person of Mr. Clements, in 1795. The king now appoints a receiver-general. { By the act of last

session consolidating the offices of chancellor of the Exchequer in both countries, the same person is to execute the duties of both, which shows the impossibility of his being a judicial officer on the common law side of the Irish Exchequer.

Now as to the length of time which has been urged on the part of the crown, it will be conceded, that if this right was at first vested in the court, it could not be taken out of them but by act of parliament, or by prescription: no length of time short of a prescription can deprive them of it. A court of justice is not like an individual; no encroachment on its rights can bar them. Littleton (S. 413) says, "no dying seized (where the tenement come to another by succession) shall take away an entry. As of prelates, abbots, priors, deans, or of the parson of a church, or of other bodies politic, &c., albeit there were twenty dyings seized, and twenty successors, this shall not put any man from his entry." And Co. Litt. 250. a. says, this is applied to bodies politic, whose successors come in in the post, and not to natural persons, whose heirs come in in the per. And the same is also laid down, 2 Inst. 154. 155. "Wherefore should not the successors of a bishop, dean, abbot, prior, &c., be as well in the per, as the heir by descent? and the reason thereof is, for that the heir cometh in by his ancestor, and therefore a descent shall take away an entry, and the warranty of the ancestor shall barre the heir; but in case of succession, a dying seized taketh not away an entry, nor the warranty of the predecessor doth bind the successor." Here, too, I have to mention a case which occurred in this court, the King v. Carmichael. The crown had appointed the clerk of the peace for the county of Carlow in the time of Henry VIII., and from that time downwards. Mr. Bruen, as cus. rot. granted to Carmichael; the attorney-general filed an information against him; Carmichael pleaded the facts, and had judgment against the crown. The sole argument was, whether the clerk of the peace derived under the custos; for if he did, it was not disputed that the custos would have the appointment; and the right being shown to be in the custos, the length of time was held to make no title for the crown. That decision has been acted upon ever since.

I shall now apply myself to the question of usage, and will at present suppose there is a common law right in the court. I must suppose that, or the question of usage would be immaterial; for otherwise there must be judgment against the chief baron's grantee. This alleged usage is urged as amounting to a legal prescription. It is not contended on the part of the crown that there is any act of parliament to give them this right. If they mean to rely upon usage as evidence, whence to presume an act of parliament, I say that is illegal. The case of Hewett v. Parish of St. Andrew, in this court, is said to favour such a presumption. That case was afterwards on in Chancery, and it was stated to my Lord Redesdale (who then presided in that court) that such a doctrine had been acted on. It struck him with surprise, and he objected to it what cannot be answered, that if such a doctrine were allowed, there would be an end of all the ancient and received notions of



prescription. According to them, no prescription can be admitted, except a legal commencement could be presumed; but if an act of parliament is to be presumed to make a new law, there is an end of all restriction upon prescription. Why is it that a prescription *de non decimando*, is not valid? because it could not have a legal origin. But we have only to suppose an act of parliament, and it could. In fact, such a presumption as this would amount to a power of legislating, and saying that length of time shall have the effect of making that law, which otherwise could not be so. Lord Redesdale denied there was any precedent for such a doctrine, and refused to act upon it.

But even if this were a case in which the court would submit such a presumption to a jury, it is hopeless to look for any evidence to warrant it. It is an usage against the common law, which I conceive could never have arisen in this country. The common law was introduced here, in the 12th year of King John's reign, and it abrogated every usage contrary to it; and as time of memory is previous to that period, it follows that in this country there can be no prescription against the common law. In the case of Tanistry (Davies 37, 38, 39, 40) it was held that the introduction of the common law into Ireland abolished these customs. And the same would have been the consequence of its introduction into Wales: but for the purpose of preventing it, the stat. of Wales (27. H. VIII. c. 26. s. 27.) appoints commissioners to inquire into the customs of Wales, and expressly saves them. And accordingly, in this country the custom of gavelkind prevailed before the introduction of the common law, as appears from Sir James Ware's antiquities, but it was then abolished. Gavelkind is good at this day in England, because it is a part of the local common law. Any custom that might have a legal commencement, may prevail in Ireland as well as in England: but the common law of England, when introduced here, abolished all customs at variance with it, notwithstanding those customs might be legal in England. If previously to that period, a subject had a grant of lands, that would not have been disturbed; in like manner of anything not contrary to the common law. It is to be remembered, that we are now taking for granted the right is in the court: it is contended that there is a prescription to take it out of them, and put it in the crown. Now I say that cannot be: that is a prescription which could not have a legal origin, and if not, it cannot have any validity.

Further, the pleading of this as a prescription in the crown, presupposes it has no common law right. For where a prescription is set up for anything, it is an admission that the law does not give it. *Noy. 20, Pells v. Towers. Com. Dig. Prescription; F. 4. Wilson v. Bishop of Carlisle, Hob. 107.*

Now, gentlemen of the jury, a word to you upon this question of usage. - The evidence of it has been derived from a book of extracts agreed on both sides to be read. - In the first place, there is no evidence of any exercise of this alleged right on the part of the crown until the year 1403, 254 years within time of memory. The first document showing by whom any appointment was made, is in 1375, and that was

an appointment by the court. The first appointment by the crown was in 1403. Where the actual entries do not appear, to show by whom the earlier appointments were in fact made, the first presumption is that they were made according to law. If then the defendant be right in saying the court has a common law right, this court is bound to presume, in the absence of the records, that the earlier appointments were made by the court, who thus had the right. I admit it is a presumption liable, like all others, to be rebutted by contrary evidence, but it is good till so encountered. And in analogy to this, in the case in Shower, where Chief Justice Holt, in aid of his common law right, referred to the usage, he only produced the entries for 250 years, although the entries went farther back; and for this reason, that it was to be presumed the earlier entries were in conformity with the right.

Gentlemen of the jury, I have now to call your attention to the first of these entries, that is an order for payment to Bromley in 1332. Gentlemen, it has been argued that all these entries, showing that payment was made to this officer out of the king's treasury, are so many proofs that the appointments were made by the crown. But you will find that in the case where the appointments were made by the court, the entries are also for payment out of the king's treasury. So that this circumstance affords no evidence who it was that appointed. The crier of the Court of Exchequer, who is confessedly appointed by the chief baron, is also paid out of the treasury. I take it therefore that the case may be cleared of all these entries.

The next entry is in 1334, 8th and 9th Edward III., and is for payment to John de Carleton as clerk of the Pleas. This John de Carleton was also appointed chamberlain. The patent appointing him to this latter office appears, but no patent is to be found appointing him clerk of the Pleas. Here is an entry stating him to hold both offices, and yet the patent for one appears, and not for the other. It cannot be said that the patents are lost; for here is one. If we suppose him appointed by the court, it is natural enough that there should be no entry of the mode of his appointment, because nothing more would be necessary than his admission by the court. But, on the other hand, if the crown had appointed, a patent would have appeared, and that not being the case, the inference is irresistible, that he was not appointed by the crown.

The next document is an order for payment to Simon de Legaston, dated 14 Dec. 1342, and in the same year is one to Robert Baynard. It is here material to remark, that during this period there appears to have been a scramble for this office, and the appointments are involved in confusion. This circumstance of two orders for payment to two different persons in the same year sufficiently shows it.

In 1344, John de Hacksey appears to be sworn in before the treasurer and barons, and the same John de Hacksey is again sworn in in 1357; there is no reason to show why. There was evidently some contest for the office during that interval. And here let me observe, that the evidence of the swearing in has been preserved; then why not the evidence of an appointment by the crown, if any?

Then, in 1352, is an order for payment to John de Carleton, the same who was formerly appointed. You will recollect, gentlemen, that to support the allegation of the crown, of a prescription, there must be an uniform uninterrupted usage. After all this comes an order, in 1355, for payment to Robert Baynard; and again, 1363, for the same person, who held till 1375. It will not be contended that, up to this period, there is any evidence of an appointment by the crown, or indeed by any person. There is some evidence against the crown.

Now comes the entry in 1375, the first which is clear as to the mode of appointment. It is not surprising that, after the state of confusion in which the title to the office had been involved, it should be thought expedient to put an end to all doubt, by the ministers of the court joining in an appointment. Accordingly, in this entry it is stated, that John de Penkeston "stood ordained" by the chancellor and treasurer of Ireland, and the barons, and others "our ministers of our Exchequer aforesaid." Much has been observed upon this appointment. First, it is said, it was made by the lord chancellor of Ireland, and not the chancellor of the Exchequer. Let it be so; it is indifferent to me. But then a record is produced, to show that Robert de Emeldon was chancellor of the Exchequer, in order, by a subsequent entry, to show this appointment must have been by him. It clearly appears, however, that this first instance of an appointment is not by the crown, and that it was thought necessary that the treasurer, barons, and other ministers of the court should concur. Many expedients have been resorted to, to get rid of this record. It is said, the wind was unfavourable, the packet could not sail—the king's letter did not arrive, and the office was of so much importance, and the necessity for filling it so urgent, that all the principal officers met, and appointed. It is curious, that this appointment was made in 1375, and the entry was not made till two years after. Had the steam packet been delayed all this time? Another remarkable fact is, that no entry is to be found of the appointment itself, though it was certainly made by the court. And the king, when he orders payment to this officer, not only recites his appointment by the court, but expressly states that to be his title. It is conceded, that though an interruption in the possession will not destroy a prescription, yet an interruption of the right will. Here then is an entry on the part of the crown, acknowledging that Penkeston was lawfully ordained by the court. It cannot be said the law officers had not time to communicate with the crown before this entry was made. Now if the appointment was an extraordinary one, would not the king have asserted his prerogative? He does not do so. So that, in short, this is a prescription set up by a crown, to be maintained by uninterrupted usage, and the very first entry brought to prove it is destructive of the right. I really cannot help commiserating my learned friend who is to reply to me, for the hopeless task he has to encounter, of persuading you, gentlemen of the jury, that this is a clear, uniform, uninterrupted usage.

This appointment was in 1375. It is a curious fact in natural his-

tory, and one that deserves to be particularly recorded, that the wind blew in the same direction for eight and twenty years; for so long this Penkeston held the situation.

In 1403, it appears that William Sutton was appointed by the crown, and in 1423, (1 Hen. VI.) he was confirmed. This is the first instance in which the crown exercised the right. The grant of the office, 1 Hen. VI. recites an *inseximus* of letters patent to Sutton, recognising the appointment of Penkeston, and concludes by confirming them, "any grant of the said office by our chancellor of the Exchequer or any other person or persons notwithstanding." So that this first instance of any appointment by the crown, begins by recognising the appointment by the court, and concludes by being validated by a *non obstante* clause. I protest, it is really difficult to continue an argument upon such a thing. If we suppose a right at any time in the chancellor of the Exchequer, that instant we destroy the king's claim: for the argument is not that the right is in the crown, as incident to the power of appointing the chancellor of the Exchequer: but that it has a distinct inherent, independent right by prescription. Is a grant by the crown with a *non obstante* clause, is that, I ask, to be evidence for the crown? It is not, it cannot be, evidence of anything but an unconstitutional usurpation. The *non obstante* doctrines, as we know from our history, were so rooted as to be admitted even in the courts of law, whether right or wrong, anything could have been done by a *non obstante* clause. It is wonderful our liberties could have survived such a doctrine. If there had not been a hoyauncy in the British constitution which made it incapable of sinking, if there had not been a spring in the minds of the English nation too strong to be subdued, if they had not been predoomed to be a free people, their liberties could never have survived so deadly an instrument of tyranny and usurpation. It was urged and acted upon till the revolution, and to use the language of the luminous and classical commentator on the laws of England, "it did not abdicate Westminster-hall, till James the Second abdicated the throne." And shall such a thing as this, be sent up in our days to a jury, as evidence to the right of the crown?

Up to the period of Penkeston's appointment, all, as I have observed, was confusion. After this appointment there was none—no small evidence that where the court acted, their appointment was acquiesced in as rightful. But from the appointment of Sutton, the *confusion* begins again. James Blakeney is next appointed, it does not appear by whom, or when.

The next entry is in 1430, 27th July—a very important one. It states, that the crown had granted to Robert Dyke <sup>of New</sup> Chancellor of the Exchequer, "And moreover by reason of the office of <sup>the</sup> clerk of the pleas in our Court of Exchequer is <sup>at the said office of</sup> the said office of chancellor of the green wax <sup>member and part the same;</sup> and the same office of clerk of the pleas, and annexed to Robert de Emeldon as chancellor of the said Exchequer, has been held by <sup>Er</sup> of record, and also by other persons as we <sup>are</sup> informed," it then g

Dyke the office of clerk of the pleas. Now, suppose it were true that the office of clerk of the pleas is member and parcel of the office of chancellor of the Exchequer, it destroys the right of the crown, because on that supposition the right belongs to the chancellor of the Exchequer: and if it be false, then it amounts to an acknowledgment that the crown did not claim by virtue of its prerogative. "And that the same office of clerk of the pleas has been held and occupied by Robert de Emeldon as may be of record in our treasury, and by other persons, as we are informed." This is the crown's statement of its own title. Now, I say, that whether the statement be true or false, it equally destroys the right of the crown. The crown is clearly looking for arguments to support its usurpation. Robert Dyke appointed Stannaher and another his deputies. The recital of that appointment is, that Robert Dyke was nominated in 1 Hen. VI. At the very time of the grant to this Dyke the office of clerk of the pleas was full, by William Sutton, to whom it was previously granted. So that the crown having appointed Sutton to the prejudice of the right of the chancellor of the Exchequer, then grants to Dyke the office of clerk of the pleas, as parcel of the very same office as chancellor of the Exchequer; and the reason is "because it was so held by Robert de Emeldon," who had been in 1348, (a hundred years before), *locum tenens* of the treasurer. He is so recited 22 & 23 Edw. III. in a patent granting to William de Burton. When the crown had the right, the entry is made so early as 1348. In this grant of 1431, therefore, the crown rests its title on the office of clerk of the pleas being part of that of chancellor of the Exchequer, and refers to Robert de Emeldon, as the only instance in support of its being so: and upon referring to that, it appears he was also *locum tenens* of the treasurer, an office which might of itself have given him a right: and all this when the office was full by Sutton, the crown's own grantee. Even after this assumption of right, that is to say, in the year 1432, and in 1436, there are orders for payment to Sutton: so that this claim of title was clearly an usurpation by the crown, and not only that, but an usurpation by the crown on its own grantee. The whole proceeding is a complicated tissue of folly and usurpation, and affords no evidence whatever of any right.

After this, (1438) John Hardwicke is appointed chancellor of the Exchequer and clerk of the Pleas, and in the same year, notwithstanding this appointment, the chancellorship of the Exchequer is given to John Baynard. Again, in the same year, on the 5th of June, this office is granted to Richard de Waterton. Here are three different persons appointed by the crown in one year.

In the same year (1438) is an order to admit Cunningham and White as deputies, and on the 14th of December, in that year, an order to pay Sutton, the very man who was appointed in 1403. And yet, after all this confusion, it is gravely said, that this is a case of irrefragable, uniform, and consistent usage. It is really astonishing, that with such documents before them, the counsel for the crown should venture to state them as evidence of an uninterrupted possession in the crown.

I hold in my hand the draft of an act of parliament, which was presented to the House of Commons, before my lord chief baron could lay his case before the house. It was carried hastily and precipitately through that house, and presented to the lords on the very same day. It was read a first time—it was ordered for a second reading, and it would have been carried there also on the third day, but for one noble lord. This act, as it was first framed, and had nearly passed, recited, "Whereas the office of clerk of the Pleas, in his majesty's court of Exchequer in Ireland is an ancient office; and whereas the said office has hitherto been held under the appointment of his majesty and his predecessors." This really looks as if there had been some misgiving on the part of those concerned for the crown, that they could not maintain an uninterrupted usage, and therefore would not venture to state it to be immemorial. But the House of Commons, when they passed this statute, must have imagined there was such an usage. If, instead of the words used, the expression had been, "Whereas the crown has now and then enjoyed," the act would never have passed. However it was passed, the house having conceived there was an immemorial usage. It was thrown out in the Lords, and the new act which has been passed, does not recite any enjoyment by the crown. That was retracted, because it could not be maintained; and yet they now bring forward to influence a Dublin jury, what they had not the audacity even to assert to the legislature!

Gentlemen, there are a number of other entries. 29th September, 1439, Waterton is appointed clerk of the Pleas. 1st October he is sworn in in Chancery, and a writ issues from the chancellor to the barons to admit him. Is this a lawful mode of appointing?

In 1445 is a patent from the crown confirming the deputy of Hardwicke. Then there is a grant of the office of chancellor of the Exchequer and clerk of the Pleas to Hardwicke and Shelton by authority of parliament. They were also appointed collectors of customs. The "authority of parliament" means this, that these officers' fees being charged upon the customs, this could only be by authority of parliament.

In 1448, we find a grant of the offices of chancellor of the Exchequer and clerk of the Pleas to Birmingham and Fitz Robert. Then an order to pay Fox and Powel as deputies. In 1451, Birmingham and Fitz Robert apply to be allowed their fees. Next is an order to pay Browne as their deputy. Then in 1452, an order to pay Toole, the deputy of Birmingham, and another to John Dennis in 1453.

In 1460, we find a grant to Pickering of the office of clerk of the Pleas. This is said to be "by bill of the lieutenant himself and by authority of parliament." Now if a presumption is to be made of an act of parliament, this would probably be relied on as such by those concerned for the crown. We can show the meaning of this authority of parliament. The Duke of York, the father of Edward the Fourth, was then lieutenant in Ireland. It was thought a desirable thing on the part of Henry the Sixth, who was then king of England, to induce the

Duke of York to accept the lieutenancy of Ireland, in order to get him out of the way. He accepted the situation, but determined to fortify himself in it; for we find from Cox's History of Ireland (160) that he only consented to take it, on the express conditions, first, that he should be lieutenant for ten years; secondly, that he should receive the whole revenue, without accounting; thirdly, that he should have treasure from England; fourthly, that he should let the king's lands to farm; and fifthly, that he should appoint to and dispose of, all offices at his pleasure. And now I make the gentlemen a present of the authority of parliament.

The next appointment is by the crown to Delahide and Dartas. And there is a special act of parliament made for the purpose of ratifying that appointment. This single fact demonstrates that the crown had no right. If the king was entitled, why should he pray the legislature to give him what he had before? Will it be said that at that time there was any act of parliament enabling the crown? What now becomes of this presumption? What becomes of the king's inherent right? Gentlemen of the jury, if it be possible to have a plain document showing that up to a certain period the crown had no right, this act of parliament is that document. The crown cannot get out of it: It is vain to try. It cannot be said that the act is for the purpose of enabling the two offices to be held together; that was often done before. No, gentlemen, it was clearly and manifestly for the purpose of enabling the grantees of the crown to hold against the general rule of law.

From this period till the statute of Henry VII. there is but one appointment, namely, to Woffer. When, or by whom that was made does not appear. It may be presumed to have been by the court. The statute of Henry VII.\* was then passed, making the judges dependent upon the crown. If while they held during pleasure, and while the *non obstante* doctrine continued, the judges had questioned the king's right, they could not have prevailed; for the crown had the power by a *non obstante* to compel the admission of its officer. Whilst the *non obstante* claim existed, it was just the same thing as if it was exercised. Arguments therefore, drawn from the acquiescence of the judges during that period weigh nothing. Would it, I ask you, gentlemen, have been advisable for them to go to law with the crown, while they were removable at its pleasure? What do you think would have been their fate, if they had? Do you think that my Lord Chief Baron O'Grady, if he had held during pleasure, would have set up the present claim? We know from history that Lord Coke lost his office for asserting his common law right, and insisting upon the appointment of Filazer in his court. It is sometimes accounted for otherwise; but this was his real offence; and it is so stated by Blackstone, and in the life of Lord Coke, in the *Biographia Britannica*. We now, thank God, live in better times. The affairs of this country are no longer considered as of the same provincial insignificance in which they were formerly held: and the rights of the court

and of the subjects in this country are on the other side of the water held as sacred as the rights of Englishmen. I am far from insinuating that even here there would be any disposition to take advantage of the dependent situation of a judge, if he were dependent. I sincerely believe there is not an individual in the profession, or in the community, more incapable of stooping to a base or unworthy action than his majesty's attorney general. But to talk of acquiescence on the part of judges in former times, as affording a presumption in favour of the crown, is ridiculous; because the whole history of England from the period of the union of the Houses of York and Lancaster to the Revolution, is nothing but a series of usurpations by the crown on the rights of the people. Ware's history shows the usurpations committed on the rights of the treasurer and chancellor of Ireland, and when they were spoliated, it is not surprising that those of the judges should. It was not till the 22nd year of his reign, that the judges in Ireland were made independent of the crown; and in addition to this, from the time of the Revolution to the present, all the grants of this office from the crown have been in reversion, so that no vacancy has occurred to act upon, before the present appointment.

Gentlemen, I have exhausted my own strength and your patience. I shall not attempt to recapitulate. Our case rests upon the common law: we claim the same rights as the judges in England. As to an interrupted usage in the crown, gentlemen of the jury, if you think there is evidence of it, if you are ready to find upon your solemn oaths that which has not been so much as asserted to the legislature, let it be so, and in God's name find a verdict for the crown.

THE END.