SPECIAL REPORTS

OF THE

INDIAN LAW COMMISSIONERS.

—No. 1.—

No. 1.
On Civil Judicature in the Presidency Towns.

REPORTS ON CIVIL JUDICATURE IN THE PRESIDENCY TOWNS,

dated respectively the 15th February and 25th July 1844, with connected Papers.

Home Department, Legislative, No. 11, of 1844.

Home Department, Legislative, 10 May 1844.

To the Honourable the Court of Directors of the East India Company.

Honourable Sirs,

We have the honour to transmit the accompanying Report, dated 15th February last, from the Law Commissioners, on the subject of Civil Judicature in the Presidency Towns, with a revised draft of Act for establishing a Court of subordinate Civil Jurisdiction in the city of Calcutta. The original draft on this subject was submitted to your Honourable Court with para. 52 of our despatch No. 33, dated the 30th December 1842.

2. We have felt that the subject of this Report involves so much of legal technicality, that we prefer to reserve our own judgment upon it until the opinions of the highest authorities in law and jurisprudence at home shall have been taken, upon the propriety of adopting the scheme recommended by the Law Commissioners, and we therefore request that your Honourable Court will take measures for obtaining such opinions.

We have, &c.

(signed) *Ellenborough.*
W. W. Bird.
T. H. Maddock.
C. H. Cameron.

Fort William, 10 May 1844.

From the Indian Law Commissioners, to the Honourable the President of the Council of India in Council; dated 15 February 1844.

Legis. Cons. 11 May 1844. No. 5.

Honourable Sir,

We have now the honour to report upon judicature in the Presidency towns, confining ourselves for the present to the civil branch of the subject.

We believe, that in no other country are the judicatures of the capital so completely isolated from those of the provinces, as in the three Presidencies of British India.

In the way of appellate judicature, or of general superintendence, the Supreme Courts have scarcely any connexion with the courts of the mofussil. And in the exercise of their original jurisdiction, those courts, and the courts of requests, have been appointed to administer law in the Presidencies, with as little reference to the improvement of Indian jurisprudence and Indian judicature in general, as if the Presidency towns had to this day been factories in which the Imperial Court of Delhi permitted our Sovereign to administer justice to her own European subjects.

No. 1. On Civil Judicature in the Presidency Towns.

We have already announced, in our Report upon the *Lex loci* of British India, our recommendation for the establishment at each Presidency town of a College of Justice or High Court of Appeal, consisting of the Judges of the Supreme Court and those of the Sudder Dewanny Adawlut. This high court will exercise appellate jurisdiction, and have general superintendence over all the judicatories of the provinces, and preserve regularity and uniformity of procedure amongst them.

But we would have the mofussil courts taught not only by precept, but by example.

We consider the reform of the Presidency Courts of the greatest importance, not only for the purpose of ensuring the best administration of justice in those towns, but for the still higher purpose of making them fit models for the imitation of all the other courts of the country.

In two respects the courts now existing in the Presidencies are very unfit models:

First, in respect that small causes are adjudicated by a different court and according to a different procedure from all other causes.

In some particulars, the small causes enjoy great advantages over the others; in some, these others enjoy great advantages over the small causes.

At present there is no way in which a suitor in the Presidency towns (Bombay is a partial exception) can have the benefit of cheap and rational procedure (particularly in the *vivâ voce* examination of his adversary) without foregoing the benefit of that legal learning which secures the correct application of the substantive rules of law and equity. Nor is there any way in which a suitor can get the benefit of that legal learning, except by sacrificing the advantages of cheap and rational procedure.

Yet there is in reality nothing incompatible in these two sorts of advantages, though perhaps they have never yet been united in practice. To unite them is one of the main objects of our present scheme, and we shall begin our Report by explaining in what way such suits as usually fall within the jurisdiction of courts of requests, will be dealt with under the system of courts proposed by us.

The second respect in which the courts existing in the Presidencies are very unfit models, is that the rules of law which are called law, and the rules of law which are called equity, are administered by two different jurisdictions.

In the result we contemplate the administration of all the substantive law of the country, put into the form of codes, by one system of courts.

But it seems clear to us, that the rules of law which are called law, and the rules of law which are called equity, should, in their present condition, be administered by one system of courts in the Presidencies, as they already are in the mofussil. On account, however, of the magnitude of this experiment, and on account of the high authorities which may be vouched against it, we propose to proceed by steps.

We propose only to give to our new court power to administer complete justice, that is, to administer equity as well as law, in all suits within its jurisdiction; and we propose that its jurisdiction shall be concurrent with, not exclusive of, the jurisdiction of the Supreme Court in actions at law, leaving to the Supreme Court alone for the present all the rest of its equitable jurisdiction.

We ourselves feel perfectly confident of the success of our experiment, but confidence of the success of such an experiment cannot be attained without long and careful reflection; the public therefore cannot be expected fully to share it.

But proceeding as we propose by steps, all that can be imagined to be put to hazard by failure, is of trifling value, compared with the benefits to be attained by success.

For suppose that, as we expect and intend, the suitors at law should be drawn away from the Supreme Court by the greater cheapness and simplicity of the new procedure, and the faculty of examining the adversary; and suppose further, that, contrary to our expectations, the new judicature, original and appellate, should not appear to those who may watch its operation with a view to the interests of justice, to be a powerful instrument for the discovery of truth, and for the correct application of the rules of substantive law, then the whole of that large portion of equity which is not consequent upon a suit at law, would remain untouched, and if ever reformed at all, would be reformed in some other way. The whole machinery would be left standing, and the portion of equity and of law drawn away by our new court, would revert to its original condition.

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On the other hand, if the experiment should, as we venture to foretel, be completely successful, the Government could then proceed with the greatest confidence to provide that the new court should entertain all suits in equity, whether based upon previous proceedings at law or not.

In like manner and for the same reason (viz. the doubt which may be felt by the reflecting portion of the public as to the success of our experiment), we do not recommend the abolition of the common-law jurisdiction of the Supreme Court. We believe that such a measure might be unpopular, and we think that our object may be attained in a gentler way, and without shocking any prejudices, by allowing the two systems to subsist together. We do not even intend to protect the jurisdiction of the new court, by enacting that no one who sues at law in the Supreme Court shall recover costs.

If this plan is adopted there will be two roads open at once by which the suitors of the Presidencies may obtain the great benefit, of having the profound learning of the Judges of the Supreme Court applied to their affairs.*

To disentangle transactions which the ignorance, negligence and fraud of mankind have complicated, and to refer each essential part of the transaction to the principles of law or jurisprudence which ought to govern it, must always be the subject-matter of a science and an art. It is vain to expect that this science and this art can be fully mastered without long and arduous discipline. That discipline the Judges of the Supreme Court have gone through, and it is because of the high value we set upon their science and art, that we are so anxious effectually to open the advantages of them to the public.

When these two roads are open at the same time, it will be very instructive to observe what sort of causes are carried by the new road, and what sort by the old. Our own belief is, that in no long time it will become disreputable to sue at law in the Supreme Court. It will soon be understood, that a plaintiff who prefers bringing his action there, is a man who is afraid of being personally examined as to the truth of his case, a man who shuns equity and good conscience, a man who wishes to entangle his adversary in the meshes of written special pleadings, and to have his cause decided upon some point foreign to the merits of it.

In this state of things, we of course expect that the common-law jurisdiction of the Supreme Court will wither away in the presence of its rival, and that the legislature will shortly be able to abolish it without exciting alarm or regret.

There are two other respects in which the tribunals of the Presidencies are, in our opinion, unfit models :

First, in respect to their method of pleading.

Secondly, in respect that the public is not associated with them in the business of judicature.

In the Supreme Court there are the elaborate rules of English pleading, calculated, for the most part, as we believe, to produce the best results when they are observed; but as the pleading is not oral, the mode in which the neglect of them is visited upon the suitors, produces great mischief, and the consequence of this mischief has been a very strong prejudice against special pleading.

To such an extent has this prejudice run, that every unfair attempt to put aside in an argument the real merits of the case, is, in popular language, called special pleading. It must be confessed, however, that the confusion of thought which is implied in such an application of the term "special pleading," is owing quite as much (if not more) to the indiscriminate defence of the English system, as to the indiscriminate attack upon it.

The truth is, that special pleading, that is to say, the logical rules which constitute the essence of it, and which are of universal application, is not only, what Mr. Serjeant Stephen calls it in his admirable treatise on the subject, "a fine juridical invention," but is the method which ought to be followed in all disputes,

* The only qualification we have introduced into the Act for the professional Commissioners, is, that they shall be barristers of five years' standing: under this provision the judges of the Supreme Court might of course be employed in administering justice in the new court. But if they should not be so employed, the suitors will have ready means of obtaining the benefit of their learning, under the scheme which we are recommending, by appeal to the College of Justice.

No. 1.
On Civil Judicature in the Presidency Towns.

putes, whether forensic or not, by parties desirous in good faith of terminating their disputes.

In the court of requests the pleading is oral, but is subjected to no rules.

In neither tribunal is there any jury, or any portion of the public appointed to perform such functions of a jury as are really useful.

The Draft Act for establishing our new court, embodies our project for reform in both these particulars; but we beg to reserve the full discussion of them for a future Report. We are aware that with respect to them differences of opinion exist, while with respect to the subjects of our present Report, we have sanguine hopes of unanimity.

Before entering upon the subject-matter of our Report, we have to make one more prefatory statement.

We have considered anxiously whether it would be better to treat the two topics, viz. the incorporation of small-cause jurisdiction with general jurisdiction, and the incorporation of equity jurisdiction with common-law jurisdiction abstractedly, or by a critical examination of the principal English cases which bear upon the subject.

We have decided upon the latter course. We are sensible, however, that it has some serious disadvantages. Such an examination must, of necessity be incumbered with difficult and repulsive technicalities. And as the cases are not imaginary ones, devised by human ingenuity for the illustration of the subjects, they unavoidably contain much matter which is not so illustrative, which matter must nevertheless be examined, for the full understanding of that which is so illustrative. These cases do not resemble the experiments which the chemist invents in order to test his doctrines, and from which he studiously excludes every thing that is foreign to his purpose. But they resemble the chemical processes of nature, which the chemist observes, and in observing which he is forced to pay attention to many things which are beside his immediate purpose, in order that he may be sure he understands what is within that purpose.

On the other hand, these cases possess the great advantage of reality. They are part of history. They exhibit the actual sufferings of human beings under the rules of English procedure, and show how those sufferings might have been prevented; or they show how impending sufferings actually were prevented by the benevolent, yet questionable interference of the judges in relaxing those rules. These cases contain also (and this consideration alone would have determined our course), nearly all the arguments by which the system we are endeavouring to reform, has been defended.

A refutation of these formidable arguments, formidable, as we believe, principally from the high station and still higher abilities of those from whom they have proceeded, seems absolutely essential to our purpose, and is in truth all that is essential to it.

We trust, therefore, that we shall be excused for the dryness, perplexity and technicality of the details into which the course we have adopted will inevitably lead us.

We now proceed to explain in what way such suits as usually fall within the jurisdiction of courts of requests, will be dealt with under the system of courts proposed by us.

It is not to be questioned, that there are a great many suits which, so far as regards original jurisdiction, any sensible man of business is competent to decide without the aid of technical knowledge, and the appointment of unprofessional judges for the decision of such suits, is a measure suggested by a due regard to economy. But it does not appear to us that this object is accomplished in a convenient manner, by two wholly independent sets of courts separated by an arbitrary pecuniary limit, and administering justice under rival systems of procedure, especially when the inferior set decides causes without any more regular and constant supervision, than can be exercised through writs of certiorari and actions of trespass against the judge. The consequence of this arrangement is, that practically the inferior court decides without any control. All its decisions are acquiesced in, though it cannot be supposed that they are all right; or that they are as nearly all right as they would be under the check and stimulus of appellate jurisdiction. We believe there has been no instance of a certiorari to the Calcutta Court of Requests. As far as we know, its proceedings have never

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till lately been called into question. In a late case, a defendant, irritated by a decision against him in a suit which (though the Commissioners had been in the habit of deciding cases of the sort) was beyond their jurisdiction, used, as is alleged, intemperate language to the court, said that the proceedings and decree against him were all illegal, and brought his action against the Commissioner in the Supreme Court, where he recovered judgment upon demurrer.

We think this an invidious way of keeping the inferior court within the limits which are intended to circumscribe its proceedings; and accordingly, in our own system, this is done without any harsh pressure from above, by a smoothly working internal organization of the whole system of courts. If such a case as that to which we allude, which was an action against an executor, were to come before the Subordinate Civil Court which we are proposing, the chief Commissioner (who must be a barrister of five years' standing), would reserve it for himself, or some other professional Commissioner. If by mistake he should assign it to an unprofessional Commissioner, that Commissioner would send it back to him. If by a second mistake the unprofessional Commissioner should not send it back, but proceed to hear and to decide, he would indeed exceed the limits intended in point of convenience to circumscribe his proceedings; but he would not in point of law exceed his jurisdiction; for that has no other limit than the jurisdiction of the Subordinate Civil Court, of which he is a member. Any error he might have fallen into would be set right upon appeal to the chief Commissioner, but the decision of the unprofessional Commissioner would be supported if it should turn out to be right, although, according to the policy of the law, the suit is not one which ought to have been brought before him.

The mode of proceeding by action of trespass against the judge, is applicable only to a case in which the court has exceeded its jurisdiction. So long as the court keeps within the limits assigned it by law, the only mode in which it can be interfered with is the writ of certiorari. This writ may be obtained from the Supreme Court, by any party to a suit in the court of requests, not only upon the ground of excess of jurisdiction, but, it seems, upon any ground from which it can be inferred, that complete justice will not be done by that court. Applied by an English court of law to a court of requests, it is a remedy of an extraordinary and rather violent nature, by which the cause is, as it were, snatched away by a superior indeed, but not superordinate tribunal, to be dealt with according to a different procedure, and upon different principles.

The modes by which in English procedure a superordinate court sets right the mistakes of its subordinates, are writ of error and writ of false judgment.

The certiorari is the mode in which a superior, but not superordinate court controls the proceedings of those which are inferior, but not subordinate to it. The nature of this writ is well explained as far as regards our purpose, by the case of Groenwelt *v.* Burwell.

"The censors of the College of Physicians have power by their charter, confirmed by Act of Parliament, to fine and imprison for malpractice in physic; and accordingly they condemned Dr. Groenwelt for administering *insalubres pillulas et noxia medicamenta*, and fined and imprisoned him: and the question being, whether error or certiorari lay, &c., it was held per Holt, Chief Justice, 1st. That error would not lie upon the judgment, because their proceeding is not according to the course of the common law, but without indictment or formal judgment; yet, 2d. That a certiorari lies; for no court can be intended exempt from the superintendency of the King in his court of B. R."—1 Salk. 144.

Now it is quite reasonable, that in superintending such a collegiate and professional judicature as this, the Court of King's Bench should be satisfied with keeping the inferior tribunal within its jurisdiction; and with seeing that there is no manifest partiality in the proceedings; and should not undertake to decide whether what this learned body had pronounced to be "*insalubres pillulæ et noxia medicamenta*," were really so or not. But it seems to us quite extravagant to say (as is in effect said by using the certiorari as the sole instrument for controlling a court of requests), that a small debt differs from any other debt in the same way as the mala praxis of a physician differs from an ordinary offence.

According to the spirit of our plan, cases which involve questions of law of any difficulty, ought to be decided originally by the professional members of the court; but some questions of law must inevitably arise in the suits which will be assigned to the unprofessional members, and we have therefore provided, that their decrees, as well as those of their colleagues, shall be consistent with

equity and good conscience, following such law as would be administered to the parties by the Supreme Court.

The direction and limitation thus expressly given to equity and good conscience, and which are perhaps tacitly implied in the terms themselves, appear to us of very great importance; and we do not see how we can ensure that this direction and limitation of the equity and good conscience of unprofessional judges shall be constantly observed, otherwise than by giving an appeal from them to judges who have received a legal education.

A court, which should proceed according to any supposed equity and good conscience without reference to law, would be an institution of very questionable utility, or rather such a course of procedure would be impracticable. For it is in truth impossible to say what equity and good conscience require, in a country where there is any law, without considering what were the lawful and conscientious expectations in respect of the subject-matter of the parties concerned; and it is impossible to know what these expectations were, without knowing the law which the parties had in their contemplation.

Even in cases of contract, which are emphatically the province of equity and good conscience, it is impossible to proceed without advertence to the existing law. In many contracts, much is implied by law beyond what is expressed. A bill of exchange, one of the most common contracts, does not express any of the rights and obligations which are created by the act of drawing it. They are all implied by law. How, then, is it possible to adjudicate according to equity and good conscience between the parties to a bill of exchange, without adverting to the law out of which their expectations arise? To put a particular case: let us suppose an action brought against the drawer, and that the defence is, that no notice of the dishonour of the bill was given him. Unless the judge knows, first, that the law imposes upon the drawer an obligation to pay the bill if the acceptor does not; and secondly, that the holder of the bill cannot enforce the obligation if he has omitted to give notice of dishonour to the drawer; unless, we say, the judge knows these things, he may as reasonably expect to find the equity and good conscience of the claim or of the defence, by making the parties draw lots, as by searching for it in his own breast and in the bit of paper before him.

Perhaps, however, it may be asked, if every thing is to be decided according to law, in what sense is this court a court of equity and good conscience?

The answer to this question, so far as regards the cases intended to come before the unprofessional Commissioners, is, we apprehend, that English courts of law have rules of procedure (pleading, evidence and practice) which frequently, though accidentally, shut out the equity and good conscience of the case. The lawful and conscientious expectations of the parties do not depend upon these rules, as they do upon the rules of substantive law. Two men who are conscientious, and who believe each other to be so, do not, when they enter into a contract with each other, expect to have any thing to do with the rules of procedure, and make their contract without any reference to such rules. A court of equity and good conscience, deciding such cases as we intend to come before the unprofessional Commissioners, is then simply a court which is not precluded, by its rules of procedure, from fulfilling the lawful and conscientious expectations of the parties.

It would be difficult to assign any other than technical reasons why such courts should be considered as outcast from the general administration of justice in the country.

Whitelocke, in treating of the Court of Chancery, quotes a gloss on the Grand Coustumier of Normandy, fit to be adverted to upon an occasion of this kind:

"In magistratibus imperium communicatum non est liberum, sed regulis juris subjectum; etiamsi causa ei esset commissa in conscientiâ quia tunc intelligetur de conscientiâ legibus munitâ.—F. 4, 6, gloss."

This gloss Whitelocke thus translates and expands:—"In magistrates, the government (power?) communicated is not free, but subject to the rules of law; though the cause be committed to him in conscience, because that is to be understood a conscience armed with law; not that which one builds to himself. But he must follow the conscience of the public laws; not his peculiar conscience."—Whitelocke's Notes upon the King's Writ, &c. vol. II. p. 393–4.

This doctrine appears to us to be of universal application. We would commit no causes to the conscience which a judge builds to himself. We hold that a court

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for the recovery of small debts ought to follow the conscience of the public laws, not the peculiar conscience of the judge who happens to be presiding in it; and as a consequence, we hold that such a court should be incorporated with the general judicial system, and subject, like all other courts of original jurisdiction, to have its errors set right by appeal.

It is, however, true, that those courts of conscience of which the sole or the principal object is the recovery of small debts, have never been admitted within the pale, so to speak, of English judicature.

We shall notice in another place a project which Lord Mansfield seems to have entertained, of dealing with their proceedings by means of an action for money had and received (which he was fond of calling a bill in equity), as the Courts of Chancery and Exchequer deal with the proceedings of courts of law by bill in equity properly so called. This project was never followed up, and if it had been, its remedial operation must needs have been very small. But in a late case (Scott *v.* Bye, 2 Bing. 344), an attempt was made to bring the proceedings of the Southwark Court of Requests under the supervision of the Court of Common Pleas, by means of a writ of false judgment, which is the regular mode of correcting the errors of an inferior court not of record. The Common Pleas held that they had no jurisdiction.

Some of the observations made in the judgment delivered, will help greatly to illustrate our own views of the subject.

Chief Justice Best said: "In the court of requests, pleadings in writing are not required, and would be highly inconvenient. A party may be examined as a witness, and the judgment is to be according to equity and good conscience, that is, such as a plain man, ignorant of the rules of law, which the judges of that court must be, shall think just. If the expense and delay that must be occasioned by an appeal to the Common Pleas, did not entirely defeat the object of the legislature in creating courts of requests, can a court, the decisions of which are wisely subject to fixed rules, be a proper tribunal to correct the proceedings of courts where the judges are left to the guidance of their own arbitrary discretion?"

All the other judges took the same view, and Mr. Justice Burrough, putting the principal objection still more pointedly than the Chief Justice, observed, "the words 'equity and good conscience' imply a course of proceeding different from that of the common law, and one of which we are not competent to form a judgment."

According to our conception, the true theory of courts of requests is not that the questions which come before them should be decided by plain men, ignorant of the rules of law applicable to those questions; but that the questions should be of so simple a nature, that the law applicable to them may be presumed to be within the reach of any plain man of ordinary education.

We readily admit, that the expense and delay of an appeal in the form of a writ of false judgment, would defeat the object in view, but the appeal which is intended to be given in our system, will be as cheap, simple and rapid as it is possible to make it. Indeed one of the great objects we most constantly keep in view in our recommendations regarding procedure, is to bring the learning of highly educated judges to bear in the speediest and least expensive manner, upon the disputed rights of all classes of the community.

We have already said that it does not enter into our contemplation to give "arbitrary discretion" to any class of judicial functionaries; and as to the incompetence of English judges to form a judgment of a course of proceeding such as is implied by the words "equity and good conscience," we remark, that the proposition affirming such incompetence, must be understood with special reference to the occasion. Upon a writ of error, or a writ of false judgment, they are incompetent, and if the legislature were to insist upon bringing the proceedings of courts of conscience for revision before them by either of these writs, or by any proceeding in the nature of these writs, the consequence might be, that, notwithstanding the simple and rational nature of the procedure below, the lawful and conscientious expectations of the parties might sometimes be disappointed, by the reversal of decrees which, though arrived at in an irregular manner, might very well stand according to equity and good conscience.

But without going out of the circle of English practice, a mode of proceeding in the nature of an appeal from unprofessional to professional judges, may be found, which, as far as regards the due subordination of form to substance, is

every thing that can be desired: we mean, the mode of proceeding by motion for a new trial, and it is accordingly from this that we propose to borrow the principle of our appeal.

If Mr. Justice Burrough had been hearing a motion for a new trial to set right a mistake committed by the jury in trying a cause, he would have expressed himself very differently respecting equity and good conscience, from what he did in the above cited case of Scott *v.* Bye. He would have declared that he understood perfectly well what was meant by those words, and that he was bound to decide in accordance with their meaning.

We propose to examine, with some attention, the leading English cases upon motions for new trials. This examination will show that the principle of confirming upon appeal what has been done irregularly by unprofessional judges (for such juries are when their verdict involves matter of law), provided the justice of the case has been attained, is known and practised in English procedure; and also what a beneficent effect the principle has already produced in the English system, by preventing the disappointment of lawful and conscientious expectations.

Lord Mansfield, inquiring into the whole doctrine of new trials, says,—"The rule laid down by Lord Parker seems to be the best general rule that can be laid down upon this subject, viz. doing justice to the party, or, in other words, attaining the justice of the case."—1 Burr. 395. In another case, he says,—"Though the ground of the verdict should be wrong, yet, if it clearly appeared to us now, that upon the whole no injustice had been done to the defendant, or if it clearly appeared to us now that the plaintiffs, by another form of action, could recover all they have got by this verdict, we think the court ought not to grant a new trial."—2 Burr. 936.

Upon the same subject Lord Camden says,—"We are forced to say, the verdict is according to the justice of the case, and on a motion for a new trial we are desired to grant it for a fault in the declaration against the justice of the case. But if I had only the case of Dearly *v.* The Duchess of Mazarine, 2 Salk. 646, to warrant me (though the jury were liable to an attaint in that case), I would not grant a new trial in the present case."

In the same case Mr. Justice Bathurst says,—"But the court can see in this case, that justice and equity are with the plaintiff, and they never will grant new trials when the verdict is on the honest side of the cause. The case of Smith *v.* Page, 2 Salk. 644, is a very strong case to this purpose. In ejectment, the plaintiff was a mortgagee, and claimed by surrender, whereas the land was not copyhold, and the defendant claimed only by a voluntary conveyance; the verdict was for plaintiff, and the court of B. R. would not set it aside and grant a new trial against the honesty of the cause."—2 Wils. 302.

The case of Edmondson *v.* Machall, was an action of trespass for assaulting and beating the plaintiff's niece *per quod servitium amisit.*

The case proved on the part of the plaintiff was aggravated by many circumstances of ill-treatment. Another cause stood next in the paper for trial which was brought by the niece against the same defendant for the same assault. The counsel for the plaintiff declared their intention of not trying that cause, and withdrew that record. The jury found a verdict for the plaintiff, damages 300 *l.*, which it was admitted were not excessive, if the jury were not confined to the consideration of the mere loss of service to the plaintiff.

Mr. Justice Ashurst said,—"That the judges of this court had consulted with the rest of the judges on this case, and the result of their opinion was, without giving any positive opinion upon the question of law, that this rule (a rule for a new trial) ought to be discharged. An application for a new trial is an application to the discretion of the court, who ought to exercise that discretion in such a manner as will best answer the ends of justice. It does not require much penetration to see what are the ends of justice in the present case. It is certain that the girl herself ought to have some satisfaction for the injury she received, and that she consents not to try her action; the question is, whether justice has not already been done, for it was admitted at the bar, that if the injury she sustained could be taken into consideration in this action brought by the aunt, the damages, which the jury have given, are by no means excessive. Then there does not appear to be any ground for the defendant to call on the discretion of the court to send this cause down to be retried on a technical objection in point of law; and all the judges are unanimously of opinion, that,

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as complete and substantial justice has been done, there is no reason to grant a new trial.

"On the plaintiff's undertaking to pay over to the niece the damages, after deducting the costs of this action, and on the niece's undertaking not to proceed in the action in which she herself was plaintiff. Rule discharged without costs." —2 T. R. 4.

In the case of Wilkinson *v.* Payne, Lord Kenyon says,—"In the case of new trials, it is a general rule that in a hard action, where there is something on which the jury have raised a presumption agreably to the justice of the case, the court will not interfere by granting a new trial, when the objection does not lie in point of law. This rule is carried so far, that I remember an instance of it bordering on the ridiculous, when in an action on the game laws, it was suggested that the gun with which the defendant fired was not charged with shot, but that the bird might have died in consequence of the fright; and the jury having given a verdict for the defendant, the court refused to grant a new trial. In this case though the first marriage was defective, a subsequent one might have taken place: the parties cohabited together for a length of time, and were treated by the defendant himself as man and wife: these circumstances, therefore, afforded a ground on which the jury presumed a subsequent marriage. And if there were any ground of presumption, it is sufficient in a case like this. In this case the parties did not intend to elude the Marriage Act, but all their friends were fully informed of and concurred in the former marriage, and I think we should ill exercise the discretion vested in the court, if after the jury had presumed a subsequent legal marriage, under all the circumstances of the case we were to set aside their verdict. In a late case of Standen *v.* Standen the jury presumed a legal marriage, though there was strong evidence to induce a suspicion that there had not been time enough for the banns to have been published three times."—4 T. R. 469.

In the same case Mr. Justices Buller says,—"If the verdict be consistent with the justice, conscience and equity of the case, we ought not to grant a new trial. This is not so strong a case as Dearly *v.* The Duchess of Mazarine, where the court refused to grant a new trial, though the verdict was against law."

In the case of Cox *v.* Kitchin, the same celebrated judge again lays down the same doctrine. The judge who tried the cause had directed the jury, in case they should be of opinion that the defendant was living in a state of open adultery at the time of the contract made, to find a verdict for the plaintiff, for, as the husband under those circumstances would not then be liable, he thought the wife must be liable herself.

"This case comes before the court under very different circumstances from those of the case cited (a case had been cited to show that the law was against the plaintiff). The question there arose on demurrer, whereas this is a motion to set aside a verdict. Motions for new trials are governed by the discretion of the court. When the judge at Nisi Prius has thought fit to save a point, the court has been in the habit of considering itself in the situation of a judge at the time of the objection raised. But this case comes before us without any point saved, and, therefore, we must look to the general justice of the case before we interpose by granting a new trial; nor is it necessary we should nicely examine whether the defendant be strictly liable in point of law. The leading reported decision on the subject of granting new trials, is that of the Duchess of Mazarine. There can be no doubt but that was the case of a verdict against law; yet the court said, that as the justice and conscience of the case were clearly with the verdict, they would not interpose."

He then discusses the law of the case, and concludes—"But whether she be strictly liable or not, it appears that she has lived as a feme sole, that she has represented herself as such, and has obtained credit under that character. The defence, therefore, is dishonest and unconscientious, and on that ground I think that the court ought not to interpose." The rest of the court concurred on this last point, and the new trial was refused.—1 Bos. and Pull. 339.

The case of Smith *v.* Page, 2 Salk. 644, was an action of ejectment. The plaintiff was a mortgagee, and claimed by surrender (a mode of conveying applicable only to copyhold land), whereas the land was not copyhold. The defendant claimed only by a voluntary conveyance. The verdict was for the plaintiff, and the court would not set it aside, and grant a new trial against the honesty of the cause.

The case of Dearly *v.* The Duchess of Mazarine, was an action for wages

brought against that celebrated Duchess; and the jury found for the plaintiff, though she gave good evidence of her coverture. The court would not grant a new trial, because, says the report, there was no reason why the duchess, who lived here as a feme sole, should set up coverture to avoid the payment of her just debts.—2. Salk. 646.

These two last cases have already been brought partially to notice, being cited in the other cases as furnishing an argument à fortiori for the decision.

We now proceed to remark upon these cases, and to apply the doctrine contained in them to the matter in hand. They may be divided into three classes.

In most of the cases where the verdict of a jury has been sustained upon considerations of equity and good conscience, no rule of substantive law has been contravened by it. Most of them are only illustrations of the principle which we have cited above from Lord Mansfield. "If it clearly appeared to us now, that the plaintiffs by another form of action could recover all they have got by this verdict, we think the court ought not to grant a new trial." In other words, if the plaintiff is by the substantive law entitled to what the verdict gives him, we will not grant a new trial, because the rules of procedure have been violated.

The case in 2 T. R. 4, is not within the letter, but quite within the spirit of this principle. The plaintiff in that case could not in any form of action have recovered what the jury gave her; viz. damages for the suffering inflicted upon her niece. But the niece herself could have recovered those damages, that is in point of substantive law, for in fact she perhaps could not, for want of other proof than her own testimony, which, according to the English rules she could not have been permitted to deliver in a suit in which she was plaintiff. And as all the evidence necessary to prove her title to them had been given in the action brought by the aunt, the court allowed justice to be attained irregularly and compendiously, by the plaintiff undertaking to pay over to her niece the damages, after deducting the costs of the action.

The first class then is, that in which the courts have sustained a verdict consistent with equity and good conscience, though the rules of procedure have been violated in arriving at it.

We may hope that the rules of procedure laid down for the subordinate civil court will never exclude the justice of the case, and consequently that no cases will occur falling within this class. If, however, any should occur, a decision according to the justice of the case will be protected, notwithstanding any irregularity in the mode of getting at it.

The case from 4 T. R. 469, is of a different kind, and comes very near in substance to a verdict against substantive law; covered, however, as is often the case, with the disguise of a presumption of fact. The marriage in that case was invalid; but because, under the circumstances, it was unconscientious in the defendant to shelter himself under its invalidity, the jury found against him, not directly affirming the validity quoad hoc* of the invalid marriage, but presuming that a subsequent valid marriage had taken place.

Such presumptions as the one made in this case, must be clearly distinguished from presumptions made for the purpose of reaching the truth of a matter of fact. These last presumptions belong exclusively to the subject of evidence; but the presumptions in question are not made because the matter of fact is really believed, but because it is desired that the decision should be such as by law it would be if the matter of fact were true. In this case, for example, the presumption was not made because of the probability that a valid marriage had taken place, but because the assumption that such a marriage had taken place produced a state of facts upon which law and justice could pronounce the same decision; whereas, if no valid marriage had taken place, law must have said one thing and justice another. If in this case the proof of a valid marriage would have produced an unjust decision, then no such marriage would have been presumed without proof. This sort of presumption, then, does not belong, or at least does not belong exclusively, to the head of evidence. It is in truth one of

* Buller J. seems to have thought that the verdict might be sustained upon that ground. In that point of view the case would not fall within any of our three classes.

of the artifices by which courts of justice have endeavoured, without legislating, to decide equitably in cases where the words of a law or of a contract are not what they would have been, if the legislator or the contracting parties had contemplated the particular state of facts which happens to call for a decision upon the law or contract in question.

When we come to make a code of substantive law for the Presidencies, and for all persons in the mofussil who may be subject to the lex loci, of which we recommended the declaration and enactment in our Report of 31st October 1840, we hope that we shall be able to supply the place of these presumptions, by laying down general principles of jurisprudence. In this very case Mr. Justice Buller said, "I doubt whether it was necessary to prove a legal marriage; considering the situation in which all the parties stood, I think that a marriage in fact was sufficient." This opinion (whether it be good English law or not signifies nothing to the present purpose), must have been founded upon some maxim of jurisprudence, never perhaps expressed, but capable of being expressed. Until, however, maxims of this kind which have not been incorporated into English law are expressed in a code, the presumptions of fact which are made to supply their place in the English system, may, we think, be usefully and consistently sanctioned.

The second class, then, may be described as those cases in which the courts have sustained a verdict consistent with equity and good conscience, though some presumption of fact has been made, or must, to sustain the verdict, be made, which would not be permitted to be made (the real probability of the fact being the same), if it operated against the equity and good conscience of the case.

In the three last cases, constituting our third class, the jury seems to have taken upon itself to mitigate the rigour of a rule of substantive law, by considerations of equity and good conscience, and the court to have refused upon the same principle to grant a new trial.

Upon this class of cases it would be sufficient at present to observe, that they are not such as an unprofessional Commissioner ought to take upon himself to decide: we shall, however, before we conclude this part of our Report, take occasion to express our opinion on this kind of legislation by tribunals, whose proper function is to administer law.

The mode by which we propose to guard against the danger of erroneous decisions of the unprofessional Commissioners on the one hand, and on the other hand against the danger that substantial justice may be defeated by an appeal from unprofessional to professional judges, is not by the introduction of any exotic principle into English judicature, but of a principle long known and acted upon in that system with very beneficial effect.

The principle is applicable also, and is applied by us, to the case of an appeal from an inferior to a superior professional judge, but it is never applied by us where a rule of substantive law has been infringed. In the English system it is not so applied, where the infringement has taken place by the misdirection of a professional judge, the reason of which is well worth considering for the sake of illustration.

In writs of error, nothing but questions of strict law come before the appellate court. On motions for a new trial, the court, as we have seen, does consider the question whether upon the whole justice has been done by the verdict, and in general sustains the verdict if it can decide that question in the affirmative. But there is an exception in the case where the verdict has been given in consequence of a misdirection by the judge. The courts will never sanction an incorrect proposition of law laid down by a judge, though they will sanction a verdict involving such a proposition, provided it have not been laid down by the judge. In the case of Wilson *v.* Rastall, Lord Kenyon says, "there is not a single instance where a new trial has been refused, in a case where the verdict has proceeded on the mistake of the judge;" and a little further on, "wherever a mistake of the judge has crept in, and swayed the opinion of the jury, I do not recollect a single case in which the court has ever refused to grant a new trial."—4 T. R. 759.

The principle of this exception we conceive to be, that the courts have felt, that when a proposition laid down by a judge is brought to their notice, they are bound to say either that it is law, or that it is not law, and in the former case to adopt it, and in the latter to reject it, to all intents and purposes. If, therefore, they adopt an incorrect proposition of law laid down by a judge, they adopt it

as a rule for other cases; whereas, when they sanction a verdict involving an incorrect proposition of law, the incorrect proposition avails only as regards the particular case in judgment, and forms no rule for the future.

We do not mean that the whole case affords no authority for the decision of like cases coming before the court in the same way; for if the course adopted was proper on one occasion, it must be proper on all occasions involving the same exigency. We mean only, that the erroneous proposition of law is not by this conditional sanction erected into a principle, and adopted with all its logical consequences. It is adopted so far only as it conduces to produce a decision consistent with equity and good conscience, and would no more be admitted as law in a case in which it is not required for this purpose, than those presumptions of which we have treated above would be admitted as proof of a fact in a case where the existence of such a fact is not required for the same purpose.

If a discretionary power to mitigate the pressure of rules of substantive law is to be given to the courts at all, we think it quite right that such a power should be thus limited. For every rule of law, so long as the legislature suffers it to subsist, ought to be presumed by the courts to be beneficial in its general operation, and therefore ought to be relaxed only in those particular cases (be they many or be they few) in which circumstances presumably not contemplated by the legislator, would cause a strict and literal execution of his commands to work injustice.

Our court, however, is not to be invested with any such discretionary power. It is to decide according to the substantive rules of English law, when they are not inconsistent with the substantive rules of English equity; and when that is the case, according to those latter rules. If there are any cases in which a court applying those substantive rules by means of such a procedure as we recommend, will not reach the justice of the case, we think it better to call upon the legislature for a remedy, than to give a discretionary power to the judges.

We do not say that under no circumstances is such a discretionary power over the rules of substantive law desirable, but only that it is not desirable under the circumstances with which we are here concerned.

We have now explained the provisions made in our system for incorporating with general judicature the jurisdiction both original and appellate over those causes which, according to the English plan, are left to the uninformed equity and good conscience of courts of requests, unless the plaintiff chooses rather to submit to the expensive technicalities of the superior courts. We proceed to the consideration of a more obscure and difficult topic, viz. the incorporation of equitable with legal jurisdiction.

In the perusal of the following criticisms we beg it may be borne in mind, that we have selected such cases as most forcibly illustrate the evils of separating law from equity generally; we have not confined ourselves to those cases which exhibit that particular portion of those evils for which we are now suggesting a remedy; our object being not only to prove that the step we are now proposing to take is a step in the right direction, but also that the point which we intend as the terminus of our course in this direction, is the right terminus.

In our Report upon the substantive law to which, we think, all persons in the mofussil, not subject to Hindoo or Mahommedan civil law, should be subject, dated 31st October 1840, we expressed a strong opinion against the separate administration of law and equity which obtains in the English system. We contemplate as the ultimate result of our labours upon this subject, the administration by one uniform set of courts, of a code composed (with additions and alterations) of the materials supplied by English law and English equity. This result, however, must be regarded as distant; but the present occasion appears to be a fit one for taking a very important step towards it. The nature and extent of that step will be understood from what follows.

The subject is very intricate, and much adventitious obscurity has gathered about it, from the want of accurate distinction between schemes for investing courts of law with equitable powers by means of legislative interposition, and schemes for doing the same thing by mere judicial authority. All schemes of the latter kind must be defective, must be productive of consequences not desired by the framers of them; because no judge, however much disposed *ampliare jurisdictionem* for the benefit of the suitors in his court, can venture by mere judicial authority to assume all the powers and to create all the machinery which

are necessary for the effectual exercise of equitable jurisdiction. The legislature alone can give these powers and this machinery.

The opponents of this branch of law reform can say with truth that Lord Mansfield failed in his attempt to accomplish it; that Lord Kenyon, Lord Eldon, and Lord Redesdale have pronounced his attempts to be extremely mischievous; and that Mr. Justice Buller, who was his favourite disciple, is believed, upon the high authority of Lord Eldon, to have recanted in his latter days, when mature experience had shown him the fallacy of his early opinions.

If these statements could neither be answered nor explained away, it would be impossible to deny that they form a very strong presumption against the success and the prudence of any such enterprize as that in which we are now endeavouring to engage the Government of India. But a careful examination of the leading cases at law and in equity, upon which these statements are founded, will show that they may be completely explained away, so far as regards our purpose, by the distinction above brought to view. Perhaps, also, it will appear from this examination, that even the inherent deficiency of the instrument with which Lord Mansfield worked, would not have rendered the attempt so unavailing, if the zeal and industry of later judges and Chancellors had not been so steadily exerted to counteract it. If, instead of this, Lord Mansfield's doctrines had been followed, it is probable that the public opinion on the subject would have been changed, and that the legislature would in time have conferred the necessary powers upon the common-law courts. It is possible also, that Lord Mansfield thought the process of attachment might be employed for enforcing any equitable jurisdiction which the courts of law might succeed in acquiring.

Sir James Scarlett (now Lord Abinger), in a communication to the Commissioners on Courts of Common Law (from which we have borrowed some of the provisions of our scheme), published in the Appendix to their first Report, expresses himself as follows:

"The courts of common law should be possessed of sufficient power in all cases of actions properly brought before them, to oblige the parties to do justice to each other, without having recourse to a bill in equity. Those who look to the history of the common law from the accession of Lord Mansfield to his high station in the Court of King's Bench will perceive, that if the same liberal and enlightened spirit had always prevailed in the courts of common law, many of the difficulties in the way of suitors would long since have vanished: he first allowed a defendant to have a commission from the court for examining witnesses abroad. The legislature has slowly and at length allowed the same privilege to a plaintiff."—p. 655.

We proceed to the examination of the cases. Lord Mansfield, finding himself frequently obliged in the Court of King's Bench to do what he felt to be unjust, and what he knew that the courts of equity would on that account render of no effect, looked anxiously for every occasion on which, by the exercise of judicial discretion, he might assimilate the doctrines of his court to those of the equity courts, and thus do justice at once to his suitors, instead of driving them to seek it elsewhere at the cost of much money and much time. For this he was stigmatized by Junius as an "admirable Prætor," and by Lord Redesdale from the bench as having "on his mind prejudices derived from his familiarity with Scotch law." The desire of a judge to be saved from the necessity of doing manifest injustice might, one should think, be accounted for without having recourse to prejudices in favour of the Scotch or Roman systems. Lord Mansfield, no doubt, admired this part of those systems, because he desired to decide justly; he did not desire to decide justly because he saw in those systems the means of doing so.

One occasion which presented itself to him of assimilating the decisions of his court to the decisions in equity, was the execution of powers of appointment.

In the case of Rattle *v.* Popham, it appeared that upon a marriage settlement a power was given to every tenant for life, when in possession, to limit the premises to any woman he should marry for her life, by way of jointure, and in lieu of dower. The tenant for life made a lease for 99 years determinable on the death of his wife. Lord Hardwicke, in a court of law, held the lease not to be warranted by the power. The widow brought her bill in the Court of Chancery, and Lord Talbot, arguing from the same premises, the power and the lease, without any other circumstance, held the lease to be warranted by the power, and decreed the defendant to pay all the costs both at law and in equity. —See 2 Strange 992; 2 Burr. 1147; 7 T. R. 480; and Cunningham 102.

Lord Mansfield thought this a very inconvenient and absurd collision of law and equity, and he thought moreover that on this particular subject, viz. the execution of powers of appointment, the collision was not rendered necessary, nor even justified by technical principles. He thought that powers of appointment, being originally in their nature equitable, and only falling under the cognizance of courts of law by virtue of the Statute of Uses, whatever is a good execution of a power in equity ought to be a good execution at law. He seems, however, to have been fully aware, that both the legal and equitable decisions on the subject were inconsistent with this doctrine.

The short history of this matter is as follows:—In Whitlock's case, 8 Rep. 69 b., it was laid down and agreed by the whole court, that under a power to make an estate for three lives, the donee cannot make a lease for 99 years determinable upon three lives.

This resolution of the Court of King's Bench, Lord Nottingham, when Lord Keeper, declared might be laughed at. This was in the case of Smith *v.* Ashton, Mich. 1675. In Freeman's Cases in Chancery, Appendix 309, he is thus reported, "but when it doth appear that it was intended the person should have such a power, the Court of Chancery will not be strict in all the circumstances of executing it; and he said the resolution in Whitlock's case, 8 Co. (where an estate is made for 99 years, if three lives lived so long, in pursuance of a power to make leases for three lives), may be laughed at; and therefore although *æquitas sequitur legem*, generally, yet sometimes *lex sequitur æquitatem*, and the judges of late have made larger constructions of powers, as appears in Cumberford's case, 2 Roll. 262."

It does not here appear, with perfect distinctness, whether Lord Nottingham meant that the decision in Whitlock's case might be laughed at because it was bad law, or only because it was such law as a court of equity would take care to render of no effect. But enough appears to warrant us in believing, that this eminent Chancellor did not (as some later equity judges have done) hold it to be the duty of the common-law judges to presist in making decisions at law, which were sure to be laughed at in equity.

It was, however, upon the authority of the resolution in Whitlock's case, that the above-mentioned case of Rattle *v.* Popham was decided at law.

Lord Mansfield's opinion upon that case, and upon the subject in general, is expressed in the case of Zouch *v.* Woolston, 2 Burr. 1146:—

"There is good sense in what Mr. Dunning said (Mr. Dunning was counsel for the defendant), that executions of powers should have the same construction, force and effect in courts of law, which they have in courts of equity, because the Statute of Uses transferred that mode of real property from equity to the common law. Whatever is a good power or execution in equity, the statute makes good at law."

This and other observations of Lord Mansfield in the case of Zouch *v.* Woolston, gave rise to the violent assault which Lord Redesdale made upon him in the case of Shannon *v.* Bradstreet, 1 Schol. and Lef. 52:—

"Lord Mansfield had on his mind prejudices derived from his familiarity with the Scotch law, where law and equity are administered in the same courts, and where the distinction between them which subsists with us is not known; and there are many things in his decisions which show that his mind had received a tinge on that subject not quite consistent with the constitution of England and Ireland, in the administration of justice. It is a most important part of that constitution, that the jurisdictions of the courts of law and equity should be kept perfectly distinct; nothing contributes more to the due administration of justice. And although they act in a great degree by the same rules, yet they act in a different manner, and their modes of affording relief are different; and any body who sees what passes in the courts of justice in Scotland, will not lament that this distinction prevails. But Lord Mansfield seems to have considered that it manifested liberality of sentiment to endeavour to give the courts of law the powers which are vested in courts equity; that it was the duty of a good judge *ampliare jurisdictionem*. This, I think, is rather a narrow view of the subject; it is looking at particular cases rather than at the general principle of administering justice, observing small inconveniences, and overlooking great ones. On this argument of Mr. Dunning, Lord Mansfield said that 'there was good sense in what he said,' and that 'whatever is a good power or execution in equity, the Statute of Uses makes good at law:' very good; but the statute does not make good at law what was not good in equity, but which a court of equity, by its peculiar

peculiar mode of acting, will make good. This distinction Lord Mansfield was much disposed to overlook; for example, he considered contracts for leases to be leases, and was followed by Mr. Justice Buller. Great inconveniences ensued, which are now happily got rid of. A court of equity makes good a contract by decreeing an actual lease; a court of law cannot do so. Lord Mansfield inclined to hold a party bound by a contract not to set up his legal title in ejectment, and so in many other instances; forgetting what he himself had been familiar with in his practice in equity, and that he would endanger half the titles in the kingdom.

"Mr. Justice Buller held, that when a mortgage term had been once assigned in trust to attend the inheritance, the owner of the term could not make it a mortgage term again, and in consequence he drove the mortgagee into a court of equity, and produced that very mischief which Mr. Justice Wilmot, in Zouch *v.* Woolston, considered to be a very grievous one; Lord Mansfield is represented by the Reporter in the case of Zouch *v.* Woolston, as having said that 'after the 'Statute of Uses, courts of equity reasoned as they would have done if that 'statute had not been made. And yet, whatever is an equitable ought to be 'deemed a legal execution of a power; for there can be no circumstance to affect 'a remainder-man personally in conscience when a power is not duly executed, 'any more than the issue in tail or the successor of an ecclesiastical person if a 'lease is not duly made.' If these words really dropped from Lord Mansfield, he must have totally forgotten all that passed while he was in practice in courts of equity. This would overturn the case of Coventry *v.* Coventry, and all the cases on jointuring powers. The cases of tenant in tail and of ecclesiastical persons are totally different; there was no power to bind a remainder-man arising from the nature of an use previous to the Statute of Uses; and as to ecclesiastical persons, they are prevented by statute from making leases except pursuant to the statute, and all leases not made pursuant thereto are expressly made void against the successors, to all intents and purposes. The same Reporter makes Mr. Justice Wilmot say, 'it is much to be lamented, that after the Statute of Uses the courts of common law had not adopted all the rules and maxims of courts of equity.' It is scarcely to be believed that this could have fallen from Mr. Justice Wilmot; and if Lord Mansfield found fault with the decision in the case of Rattle *v.* Popham, as he is represented to have done, I think, with deference, that there was no ground for the remark. I must therefore consider what is thus attributed to Lord Mansfield and Mr. Justice Wilmot in the case of Zouch *v.* Woolston, as of no authority on this subject; and I think I am warranted by the decision in Campbell *v.* Leach (made with the concurrence of such high authorities as Lord Chief Justice De Grey, and Chief Baron Smyth) in saying, that a contract of this description does bind a remainder-man."

Before we proceed to consider these objections of Lord Redesdale with reference to our own purpose we must endeavour to clear up some of the difficulties which appear to us unnecessarily to perplex this controversy. When Lord Redesdale insinuates that the expressions attributed to Lord Mansfield and Mr. Justice Wilmot* are so absurd that it is hardly to be believed that they really could

* When Lord Redesdale said "it is scarcely to be believed that this could have fallen from "Mr. Justice Wilmot," he was, perhaps, only using a courteous form of expressing his abhorrence of the doctrine against which he was contending. If he really meant to express a doubt whether Mr. J. Wilmot had said what Sir J. Burrow attributes to him, we think that doubt may easily be dispelled.

In the life of Chief Justice Wilmot it is stated, that, "He uniformly lent Mr. Burrow his papers, with such short notes as he took himself," p. 14. It is therefore very unlikely that the reporter should have mi-apprehended his meaning.

But there is independent evidence that the opinion in question, viz. that "it is much to be lamented that after the Statute of Uses the courts of common law had not adopted all the rules and maxims of courts of equity," was in accordance with, or rather was only a particular case of the general opinion which Chief Justice Wilmot entertained upon the English system of law and equity. In the case of Collins *v.* Blantern he is reported to have used the following words:

"The third point is, whether this matter can be pleaded. It is objected against the defendant that he has no remedy at law, but must go and seek it in a court of equity; I answer, we are upon a mere point of common law, which must have been a question of law long before courts of equity exercised that jurisdiction which we now see them exercise; a jurisdiction which never would have swelled to that enormous bulk we now see, if the judges of the courts of common law had been anciently as liberal as they have been in later times; to send the defendant in this case into a court of equity, is to say that there never was any remedy at law against such a wicked contract as this is. We all know when the equity part of the Court of Chancery began. I should have been extremely sorry if this case had been without remedy at common law. *Est boni judicis ampliare jurisdictionem*, and I say, *est boni judicis ampliare justitiam*; therefore, whenever such cases as this come before a court of law, it

could have used them, he seems to us to be under a great misapprehension of their meaning, and also to suppose that the differences between them and his own opinions were more numerous than in truth they were.

The only fundamental difference, from which all the rest are deducible, is as to what is a good execution of a power in equity, putting law out of the question..

Lord Redesdale admits, that whatever is a good power or execution in equity, the Statute of Uses makes good at law; but he implicitly denies that such an execution of a power as the lease in the case of Rattle *v.* Popham, is good in equity. According to him, it is only such an execution as a court of equity, by its peculiar mode of acting, will make good. Lord Mansfield, and Mr. Justice Wilmot, on the other hand, would have said, and, as it appears to us, with rigorous accuracy, that the lease was a good execution in equity; and that the only reason why a court of equity acts in such cases in the peculiar mode alluded to, is for the purpose of making such an execution of a power good at law. And consequently, if the courts of law had (as Lord Mansfield thought they ought) held such executions of powers to be good at law by the statute, because they were always good in equity, there would have been no necessity for courts of equity to interpose with their peculiar mode of acting, so far as regards the execution of powers. When Lord Mansfield held an agreement for a lease to be a lease, he was proceeding on different grounds. The Statute of Uses did not help him then. He was no longer availing himself of technical principles to get at equity in a court of law, but encroaching upon equitable jurisdiction, with no other excuses than the desire of doing justice, the equitable origin of the purpose to which the action of ejectment has been applied, viz. that of recovering the land, and the doctrine that ejectment, being a fictitious action invented by the courts, no party ought to be permitted to prevail in it against good conscience. But in his doctrine respecting the execution of powers, he was able to deduce the conclusions at which he desired to arrive, from the letter and spirit of the Statute of Uses, that statute having converted a large portion of equity into law. We do not think it necessary to quote any of the numerous equity cases in which it is distinctly laid down, that such an execution of a power as the one in question, is good in equity. It would, indeed, be sophistical to quote them against Lord Redesdale; for he, of course, did not mean to dispute the proposition as it is used in those cases, but only to explain it. To show (that is) that when the authorities say a good execution in equity, they mean an execution which will be made good in equity by the mode of acting peculiar to the courts administering that system. That is the real question on which Lord Mansfield's opinion and Mr. Justice Wilmot's, are to be set against Lord Redesdale's; and it is not properly a question of English equity, but a question of general equity, and one of which none of the English equity cases afford any solution. It could not, indeed, ever arise for practical solution in any English court of equity. It could only arise for practical solution in a country where there are no courts but courts of equity.

The question, stated generally, is this. When A is bound in conscience (as for example by having contracted) to make a good title to B, why does a court of equity direct him to execute a conveyance? Is it for the purpose of conferring upon B a good title both at law and in equity, or merely a good title at law? We conceive it is for the latter purpose only.

So little has this part of the theory of our legal constitution been considered, that, as far as we know, the only authorities on it are, first, that of Lord Mansfield and Mr. Justice Wilmot themselves, in this case of Zouch *v.* Woolston, and some other cases (if we are not mistaken in supposing that this doctrine is involved in them), and secondly, that of Professor Austin, in his notes to the Table containing "The arrangement which was intended by the Roman Institutional Writers (according to the opinions current amongst civilians from the latter portion of the 16th to that of the 18th century)."

"According

is for the public good that the common law should reach them and give relief. I have always thought that formerly there was too confined a way of thinking in the judges of the common-law courts, and that courts of equity have risen by the judges not properly applying the principles of the common law, but being too narrowly governed by old cases and maxims, which have too much prevented the public from having the benefit of the common law." 2 Wils. 350.

"According to English equity," says Mr. Austin, (*i. e.* according to the law which certain of our courts administer) "a sale and purchase, though it is styled a contract, imparts to the buyer, without more, dominion or *jus in rem*. In the technical language of the system, what is agreed to be done is considered as done. The subject of the sale is his, as against the seller especially; and the subject is also his, as against the world at large. The only interest in the subject which remains to the seller is a right in re *alienâ*, a mortgage or lien expressly or tacitly created, to the end of securing the equivalent for which he has aliened.

"But according to the antagonist system, which is styled pre-eminently Law, a sale and purchase, without more, merely imparts to the buyer jus *ad* rem. The seller is obliged by the sale to transfer the subject to the buyer, and, in case he break his obligation by refusing or neglecting to transfer, the buyer may sue him on the breach, and recover compensation in damages. But that is the extent of the right which the sale imparts. The property or dominion of the subject still resides in the seller, and, in case he convey the subject to a third person, the property or dominion passes to the alienee.

"Now, if the antagonist law were fairly out of the way, the right of the buyer according to equity would stand thus: Unless the seller refused to deliver the subject, and the buyer, in that event, were satisfied with his right to compensation, the sale and purchase, though styled a contract, would give him completely and absolutely dominion, or jus *in rem*. He could vindicate or recover the subject as against the seller himself, and as against third persons who might happen to get the possession of it. The so-styled contract would amount to a perfect conveyance.

"But, by reason of the dominion or property which remains to the seller at law, the sale and purchase, even in equity, is still imperfect as a conveyance. In order that the dominion of the buyer may be completed in every direction, something must be done on the part of the seller. He must pass his legal interest in legal form. He must convey the dominion or property which still resides in him at law, according to the mode of conveyance which law in its wisdom exacts.

"To this special intent or purpose, the buyer, even in equity, has merely jus *in personam*, or (borrowing the language of the Roman lawyers) the subject of the sale, even in equity, continues *in obligatione*.

"Speaking generally, the buyer, in contemplation of equity, has dominion or jus *in rem*, and speaking generally, the sale, in equity, is therefore a conveyance.

"But to the special intent or purpose which is mentioned above, the buyer has jus *in personam*, or (changing the shape of the expression) the seller remains obliged. This right *in personam certam* and this corresponding obligation, equity will enforce in specie. And in respect of this right *in personam*, and of this corresponding obligation, the sale, even in equity, is properly a contract."

This is a very explicit statement of the general doctrine of English equity; and, if it is also a correct one, it follows, with regard to the execution of powers for meritorious consideration, that, as soon as the Statute of Uses had put "the antagonist law fairly out of the way," every court in the country ought to have held that such an execution of a power as was, speaking generally, a conveyance in equity before the statute, and only not a conveyance in equity for the special purpose of enforcing the obligation to make such a conveyance as "law in its wisdom exacts," every court in the country, we say, ought to have held such an execution to be a perfect conveyance to all intents and purposes.

Now, if this doctrine be kept in view in the examination of the dispute about the execution of powers, it will be seen that (be the doctrine correct or incorrect) Lord Mansfield knew perfectly well what he was about, that there is no ground for accusing him of having forgotten all that passed while he was in practice in courts of equity, and of overturning all the cases on jointuring powers, nor for assuming that he held a contract of the sort in question not binding on a remainder-man.

Sir E. Sugden, in his work on Powers, adopts Lord Redesdale's view of the question of general equity, and also his two suppositions; first, the supposition that Lord Mansfield was altogether forgetting that question, whereas we believe

that it was distinctly present to his mind, and that all his conclusions are logically deduced from it; and secondly, the supposition, which we believe to be equally unfounded, that Lord Mansfield thought his doctrine, that the execution of powers should receive the same construction at law as in equity, was in accordance with the course which, under the existing circumstances, courts of equity had adopted.

On the question of general equity, and on the supposition that Lord Mansfield had neglected it, Sir Edward Sugden merely adopts what Lord Redesdale had said. But with respect to the other supposition he observes, "Lord Mansfield adduced this decision of Lord Talbot's (the decision in equity in Rattle *v.* Popham) in support of his favourite doctrine, that whatever was an equitable, ought to be deemed a legal execution of a power. In a late case before Lord Redesdale, in which he combated this doctrine, he said that if Lord Mansfield found fault with the decision in the case of Rattle *v.* Popham, as he was represented to have done, he (Lord Redesdale) thought, with deference, that there was no ground for the remark; and indeed, notwithstanding Lord Mansfield's assertion, it appears from a manuscript note of the case, which will be found in the Appendix to this volume, that Lord Talbot admitted clearly that the power was not well executed at law, but he relieved the wife against the defective execution on the general rule of equity."

Now there is no assertion of Lord Mansfield inconsistent with this version of the case. He never meant to say that Lord Talbot found fault with the decision at law. He did not adduce the case in support of his own favourite doctrine, but for the purpose of showing what mischiefs had ensued because courts of law had omitted to adopt that doctrine, and had thus driven courts of equity to deal with these cases, just as if the Statute of Uses had never been enacted.

All this derives strong confirmation from what Lord Mansfield himself afterwards said, in the case of the Earl of Darlington *v.* Pulteney:—

"It is very difficult to maintain on any principle of law, reason or convenience, a distinction between equitable and legal executions of powers, which were originally in their nature equitable, but they are by the Statute of Uses transferred to common law. Mr. Kenyon has said very truly, that at common law, powers were unknown. They were modifications of trusts, and directions to the trustees which bound his conscience, and which he was compellable in a court of equity to execute. The Statutes of Uses transferred entirely all that was equitable into a legal modification; and the courts of law were then bound to ask what was the equity. It has likewise been very truly said, that there were few cases upon the execution of powers before the statute 27 H. 8, c. 10, and none have come down to our time by way of precedents. Powers, therefore, being a new thing, and the courts of law having no equitable precedents in point to guide them, compared them at first to conditions, which they are not at all like; and consequently held that they should be construed strictly. They looked upon them in the lights of powers vested in a third person over the estate of another man; whereas in fact they are only a different species of ownership, and enjoyment of property. But a long series of precedents has now settled in the Court of Chancery, that in the construction of powers, wherever the power is executed for a meritorous consideration, namely, as a provision for a wife or child, or for the benefit of creditors or purchasers, there the precise form prescribed for its execution need not be strictly pursued, and if it is now settled, it is settled on principles that existed before.

"That being the case, courts of law ought to follow equity, because there should be a general rule of property; and, if the courts of equity say, we will presume that when the execution is for a meritorious consideration, a strict adherence to the precise form was not intended, and therefore it is not necessary; the moment the same rule is fixed and adopted at law, every man who creates, and every man who is to exercise a power, understands what he is to do. In the construction of powers, originally in their nature legal, courts of equity must follow the law, be the consideration ever so meritorious; for instance, powers by a tenant in tail to make leases under the statute, if not executed in the requisite form, no consideration ever so meritorious will avail. So with respect to powers under the Civil List Act, powers under particular family entails, as the case of the Duke of Bolton, &c.; equity can no more relieve from defects in them, than it can from defects in a common recovery. The principle upon which

which the rule of construction in these cases is founded is, that there is nothing to affect the conscience of the remainder-man. Therefore it is difficult upon principles to maintain any distinction between equitable and legal execution of powers."—Cowp. 266.

It is remarkable that Lord Redesdale takes no notice of this case. Yet, if Lord Mansfield's reasoning in it is considered with care, and without a disposition to find him in the wrong, his meaning can scarcely be misapprehended. His doctrine and that of Mr. Justice Wilmot, unaltered in substance, but shaped so as to obviate the misunderstanding to which it has been subjected, may perhaps be thus expressed.

As soon as the Statute of Uses had passed, courts of law were bound to ask what was the equity, because the statute said that the law should follow the equity. But unfortunately, having no equity precedents to guide them, they took a wrong direction, and, comparing powers to conditions, which they are not at all like, held that they should be construed strictly. A long series of equity precedents has now settled, that wherever the power is executed for a meritorious consideration, the precise form prescribed for its execution need not be strictly pursued. It is true these precedents are all since the Statute of Uses; but they proceed on principles of equity that existed before the statute, principles therefore which the courts of law ought to have adopted immediately upon the passing of the statute. If they had done so, there would now be a general rule of property. A clear intention to execute a power for a meritorious consideration appearing in writing, would be a good execution of the power both in equity and at law. There would be no occasion for courts of equity to exercise in these cases their peculiar authority, of compelling a party to do what in conscience he ought to do. They have only been driven to exercise that peculiar authority by the mistake which courts of law made in not adopting equitable principles after the statute, neither would there be any occasion to adopt the questionable doctrine that a remainder-man is bound in conscience to do what the particular tenant ought in conscience to have done; for the remainder-man in these cases would be bound in law by what the particular tenant had actually done; and "the case of Coventry *v.* Coventry, and all the cases on jointuring powers," so far from being overturned, would thus rest on a more intelligible and secure foundation.

This, as it seems to us, was the doctrine of Lord Mansfield and of Mr. Justice Wilmot, to which they desired to bring back the courts wherever they were not bound by express decisions. But they never meant to say that their doctrine had been adopted even by courts of equity. On the contrary Lord Mansfield expressly says, that after the Statute of Uses, courts of equity reasoned as they would have done if that statute had not been made. That is to say, finding that, notwithstanding the statute, courts of law did not inquire what was the equity, and follow it, and that the statute was therefore pro tanto a dead letter, they had no other means of enforcing equity but by doing as they would have done before the statute, that is to say, by decreeing such formal assurances, or adopting such other modes as would protect the parties from the effect of the erroneous doctrine adopted by the courts of law.

We have now shown perhaps, that Lord Mansfield and Mr. Justice Wilmot were technically right in thinking, that a clear intention to execute a power for a meritorious consideration appearing in writing, is actually a complete execution in equity, putting law out of the question. But at all events we have shown that Lord Mansfield and Mr. Justice Wilmot assumed that proposition, and that, if it be assumed, their whole doctrine is coherent and intelligible, at variance with the decisions at law, and even with the decisions in equity so far as these last admit the correctness of the decisions at law, but in other respects not subversive but confirmatory of them.

It was necessary to clear away the obscurity which hangs over this controversy, before we could say with confidence, as we now can, that (with one exception to be presently noticed) none of Lord Redesdale's or Sir E. Sugden's arguments against permitting courts of law to adopt equitable doctrines, apply to our plan. Those arguments all depend upon the inability of courts of law to compel specific performance; but the court we are recommending is to have that power.

In another point of view, the long discussion into which we have been led, has

a practical value directly applicable to the general purpose of this Report. For we believe that nothing is more calculated to throw light on the somewhat abstruse subject of English equity, than a careful examination of this remarkable controversy.

It is most probable, as we have already hinted, that Lord Mansfield, if he had succeeded in making his doctrine the practical rule of the courts of law, intended either to procure from the legislature an express authority to compel specific performance, or to use the power of granting an attachment, which is inherent in the courts of law, for the accomplishment of that purpose. But however this may be, the arguments of Lord Redesdale (with one exception) have no application to any court which is effectually in possession of such a power.

The exception is the argument drawn from the alleged defects of the Scotch courts, and it is a mere sophism.

The Scotch courts are bad. The Scotch courts administer law and equity together; therefore, courts which administer law and equity together are bad.

Not only is the argument vicious, but the viciously deduced conclusion is a different proposition from the conclusion aimed at by all the sound arguments which Lord Redesdale employs.

The conclusion deduced from the vicious argument is, that law and equity cannot be properly administered by the same courts.

The conclusion aimed at by the sound arguments is, that equity cannot be properly administered by a court not furnished with powers and machinery like those of the English Courts of Chancery and Exchequer.

This difference, glaring as it is, was not perceived by Lord Redesdale himself (for we cannot suppose that he intended to mislead), and consequently he has not pointed it out. The result is, that among lawyers, and that large class who take their opinions upon such subjects from lawyers, an opinion prevails that Lord Redesdale has shown the project of administering law and equity in the same court to be a plausible but shallow scheme, which cannot bear the test of a learned and searching inquiry.

The next of Lord Mansfield's attempts to introduce equity into a court of law which we shall notice, is the case of Weakly *ex dem.* Yea *v.* Bucknell, Cowp. 473. Sir Wm. Yea had agreed to grant the defendant a lease for 21 years from Lady-day 1758. The defendant had been in possession and paid the rent for 18 years, but no lease was ever granted or demanded by the defendant. On the 13th September 1775, notice in writing was given by the lessor of the plaintiff "to quit at Lady-day 1776." The question was, whether the lessor of the plaintiff was entitled to recover.

Lord Mansfield stopped Mr. Gould, who was about to argue for the defendant, saying there was no occasion to give himself any trouble in so plain a case.

He then adverted to the want of a stamp (a matter foreign to our purpose) and proceeded thus: "It is an agreement for a lease for 21 years; and the defendant has been in possession *eighteen* of them. Then the lessor of the plaintiff gives notice to quit, and brings an ejectment. He has agreed for a valuable consideration not to give notice. Shall he then give notice? There might be circumstances perhaps which might let him in to maintain an ejectment. For instance, if he had tendered a lease, and the defendant had refused to execute it, whereby the plaintiff had incurred a loss. But here there is no such circumstance; and if the court were to say this ejectment ought to prevail, it would merely be for the sake of giving the Court of Chancery an opportunity to undo all again. If the lessor of the plaintiff should recover at law, equity would immediately set it right, and he would be obliged to pay the costs of both suits."

This doctrine was not approved of in England, and the contrary seems to have been considered as established in the case of Yea Bart. *v.* Rogers, which was argued before all the Judges in the Exchequer Chamber. A second argument was awarded, but the case was never brought before the judges again. "As I collected at the time (says Mr. East, now Sir E. H East), Lord Loughborough, Chief Justice; Gould, Ashurst and Buller, Justices, were of opinion, that the defendant's equitable title might be set up as a defence to the ejectment. Lord Kenyon, Chief Justice; Eyre, Chief Baron; and Heath, Justice, were decidedly of a different opinion: and with these it is probable that the other judges coincided, though I have no authority for saying so; and no public opinion

opinion was ultimately delivered on the case. But that an equitable title cannot be set up in ejectment has ever since been considered as settled."—See 5 East's Reports, 138 n. (*a*.)

In this manner Lord Mansfield's equitable doctrines respecting agreements for leases were quietly got rid of in England. In Ireland their fate was some what different. There they appear to have been followed by the courts, but to have called forth a very vehement protest from Mr. Justice Kelly, in the case of Lessee of Lord Massey *v.* Touchstone, 1 Scho. and Lef. 67 n. (*c*.)

The action was an ejectment. Lord Massey had agreed " to set the farm of Knockmore to the said Bennet and Touchstone jointly and severally, for the term of three lives to be named by them, at the rent and on the terms mentioned in the within and above proposal (a proposal containing the terms), to commence on the first day of May next. Leases to be perfected at the request of either party."

Lord Carletone, Chief Justice, and the other two judges, relied upon the distinction between a clear and a doubtful equity, holding this to be of the latter sort, and declining to give any opinion on the question, whether if there had been a clear equity for the defendant, it would have availed him.

Mr. Justice Kelly delivered his opinion as follows:—" I could wish that the learned Lord (Lord Yelverton) who delivered his opinion upon this case at Nisi Prius had had an opportunity of considering his own judgment; and I am sure he would now have decided this question in another manner; but he had the authority of a very great judge, and it misled him. Let us consider a moment whether it would not subvert all the rules of discrimination between law and equity, if we were to say that this verdict ought to stand. Lord Carleton, with his usual cautious discretion, has declined entering into a consideration of the authorities on which the argument is founded; but I will do so. For the very first time I ever read that case of Yea *v.* Bucknell, in Cowper, I was astonished at it, and saw that it would be a decision productive of very great mischief. It is admitted in this case that the plaintiff has a clear legal title, and that the defendant has no legal title, but merely an equitable one: then it becomes a question (and till the decision in Yea *v.* Bucknell, it never was a question) whether a legal title should succeed in a court of law against no legal title. I have some experience in these courts, and before Cowper's Reports were published in this country, I will venture to say that no attempt to set up an equitable defence in ejectment, where the plaintiff's title was clear at law, was ever made. See the consequences that follow from the practice. The defendant has an equitable title only, if the plaintiff cannot recover at law, that title will remain a good defence to the defendant for ever, in every ejectment brought by the plaintiff, unless the court of law shall make itself a court of equity; if the defence is good now it will be good 20 years hence: then see the situation of the lessor of the plaintiff. He cannot recover; the defendant holding possession, pays him no rent, names no lives, and yet remains in possession unless the plaintiff goes into a court of equity; was there ever an instance where a man who wanted a specific execution was permitted to drive the person having the legal title, into equity. Where a man, having a legal title, was forced into equity against a person having barely an equitable title. In this very case, for example, see how principles would be subverted. Suppose the defendant were driven into a court of equity, he might go thither with a clear case to entitle him to relief; but if the plaintiff is driven into equity, the defendant lies under no difficulty if he can only prove his article, whereas the plaintiff cannot succeed, for a court of equity will dismiss his bill and tell him 'your title is at law; go into a court of law,' and then it will come to this, that the plaintiff will not be relieved either at law or in equity; at law this article bars him, and having a title at law, he cannot go into equity."

These consequences are certainly of a startling kind, but that they are deducible from any doctrine of Lord Mansfield understood in the sense in which he intended it to be understood, cannot be admitted. Mr. Justice Kelly, indeed, only asserts that they are so deducible 'unless the court of law shall make itself 'a court of equity.' But he must have known perfectly well that Lord Mansfield did intend to this extent to make his court a court of equity, and therefore the elaborate exposition he gives of the absurd consequences which would have followed if Lord Mansfield had meant what he did not mean, was, to say the least, unnecessary.

"If the defence is good now, it will be good 20 years hence." True, if the circumstances remain the same.

"Then see the situation of the lessor of the plaintiff. He cannot recover; the defendant holding possession, pays him no rent, names no lives, and yet remains in possession, unless the plaintiff goes into a court of equity." So says Mr. Justice Kelly. But what would Lord Mansfield have said? We know what he would have said, not only from the reason of the thing, but from what, for the purpose of guarding against this very misapprehension, he actually did say in the case of Yea *v.* Bucknell. "There might be circumstances, perhaps, which might let him in to maintain an ejectment. For instance, if he had tendered a lease, and the defendant had refused to execute it, whereby the plaintiff had incurred a loss." From this it is quite manifest that in the events supposed by Mr. J. Kelly, Lord Mansfield would have said, "The defendant names no lives, and thereby prevents the lessor of the plaintiff from performing his agreement. The defendant pays no rent, and thereby the lessor of the plaintiff has incurred a loss. These circumstances let him in to maintain an ejectment notwithstanding the agreement, which would otherwise have barred him."

This branch of Mr. J. Kelly's attack fails, then, entirely for want of a foundation. We proceed to consider the remaining branch which relates to the supposed incompetence of a court of law to appreciate the equity in such cases.

"I have heard a distiction mentioned (it is in one of the English cases) between a clear equity and a doubtful equity. I would be glad to know how it is possible for a judge, sitting in a court of law, to say that any thing is a clear equity. That is a matter that depends on all the facts of the case, and not on the instrument: a judge in a court of law has nothing to do with equity; he must leave it to its proper tribunal; he cannot form an opinion without going into all the circumstances of the case, and would a court of law permit a defendant to go into all the evidence in the case necessary to show that he had what is called a clear equity? For instance in this case, to prove that all the particulars of this article were performed. See what a scene of evidence you must go into. Further, the judge at Nisi Prius in this case could not say the defendant's title is equitable, unless he lets the plaintiff go into a case to show that it is not; then the plaintiff must come prepared to examine witnesses as to every circumstance in the equitable agreement. Thus the judge makes himself a judge of equity in a court of Nisi Prius, and leaves it to the jury to determine whether the defendant is entitled to a specific execution."

The zeal of this defence of the sacred boundaries between law and equity appears to us much more conspicuous than the discretion. Mr. Justice Kelly seems entirely to have forgotten that the agreement in this case, and all the circumstances of performance and non-performance are beyond all question the proper, legitimate, constitutional subjects of common-law jurisdiction. If the defendant in this case had brought an action against Lord Massey for a breach of his agreement to grant a lease, nothing is more certain than that the judge and jury at Nisi Prius must, in order to say whether there was any breach of the agreement and to estimate the damages, have gone into all that scene of evidence which is here represented as being altogether beyond their power and their competence.

The whole of this argument of Mr. Justice Kelly is a fallacy, based upon the groundless assumption that this agreement, and the performance or non-performance of it, are matters exclusively for the cognizance of courts of equity. He calls it an "equitable agreement." It is not an equitable agreement; it is a strictly legal agreement. All that is equitable in the matter, all that can with any colour of reason be alleged to be beyond the competence of a court of law, is the title to the land arising out of the legal agreement.

The fallacy of Mr. Justice Kelly's argument may be placed in a still more striking light, by considering the foundations of the power assumed by the courts of equity to compel specific performance. Great legal authorities have looked upon the assumption as an unwarrantable intermeddling with things which are the proper subjects of legal cognizance. In the case of Bromage *v.* Jennyng, Roll. Rep. 368, pl. 21, the court of King's Bench granted a prohibition to the Marches of Wales to prevent a suit in equity upon a promise for good consideration to make a lease, because the party might have an action upon the case at common

common law. "And it being urged that this was usually done in Chancery, Coke, Doddridge and Haughton replied, that without doubt a court of equity ought not to do so, for then to what purpose is the action upon the case and covenant? And Coke said, this will subvert the intent of the covenantor, when he intends to have it at his election, either to lose the damages, or to make the lease, whereas here they would compel him to make the lease against his will; and so it is if a man be bound in a bond to infeoff another, he cannot be compelled to make a feoffment; and by Doddridge, if a decree be made that he should make a lease, and he will not do it, there is no other remedy but to imprison his body, and the serjeant who moved it, confessed that he did it against his conscience by reason of the use," and a prohibition was granted accordingly.

The objection here made to the remedy of specific performance, viz. that it renders useless the common-law remedies by action on the case and covenant, is now justly exploded; but that such an objection should ever have been made by great lawyers, shows in a peculiarly forcible manner, how perversely wrong it is to treat an agreement to make a lease as a subject-matter belonging exclusively to courts of equity.

Courts of equity themselves hold no such doctrine as this. They hold doctrines strikingly inconsistent with it. Before Lord Somers's time they would not even entertain a suit for specific performance of an agreement, until the plaintiff had first recovered damages at law for the breach of it. According to Mr. Justice Kelly, courts of law are incompetent to perform the investigation which is necessary to determine whether a party asking for specific performance of an agrement, has a clear equity. According to the Chancellors who preceded Lord Somers, not only are the courts of law competent to this investigation, but they are the only courts which are competent to it. They held this investigation in a court of law to be the indispensable preliminary to their equitable interference.

This doctrine, it is true, has received two considerable modifications in modern times. But taken with these modifications, the doctrine, though a less striking, remains in substance an equally strong argument against Mr. Justice Kelly's views.

The first modification was, that, after Lord Somers's accession to the woolsack, the Chancellors, instead of insisting that the plaintiff should actually recover damages at law before he could claim equitable relief, thought it sufficient to determine themselves whether the plaintiff would be entitled to damages at law. —See the observation of Sir Thomas Clarke, M. R., in the case of Dodsley *v.* Kinnersley, Amb. 406.

The second modification is thus described in argument by the counsel in the case of Williams *v.* Steward, 3 Merivale, 481: "There are cases, undoubtedly, where the court will maintain the bill, notwithstanding some formal objection which would preclude the party at law, as the lapse of time, &c. But the true distinction is, that the subject-matter must be such as would enable the party to recover in damages, but where the subject-matter is otherwise, a court of equity cannot interfere."

We will not undertake to say whether this distinction reconciles all the cases. The subject is discussed by Mr. Fonblanque in a note to the Treatise of Equity, Vol. I. p. 151, note (*c*), and treated by him as doubtful; but all that is necessary for the purpose of our argument seems well established, viz. that where there is a legal agreement, and no formal objection which would preclude the party at law, a court of equity will not decree specific performance unless it is satisfied that the party is, under the circumstances, entitled to damages at law.

That is, the courts of equity hold, that in such cases the question whether there is a clear equity, depends upon the question whether there is a clear title to damages at law.

Mr. Justice Kelly's objections to Lord Mansfield's doctrine, have therefore no validity whatever. The only valid objection to it is, that a court of law has not the power to decree specific performance, nor any equivalent power.

When we say the only valid objection, we mean the only valid objection drawn from considerations of utility and convenience, for with regard to mere technical considerations, it must be admitted that Lord Mansfield was guilty of innovation in this matter. If, however, the nature and history of the action of ejectment, and in particular the nature and history of the execution in it, is considered, it will appear that his doctrines harmonize much better therewith than the doctrines of his predecessors and successors. In the first place, the action of ejectment is

No. 1. On Civil Judicature in the Presidency Towns.

fictitious, and it is a general principle, that fictions are only permitted to be used for the purpose of obtaining justice, and not for the purpose of doing injustice. But secondly, the execution in ejectment, so far as the possession of the land is obtained by it, was borrowed by the common lawyers from the courts of equity.

There is some doubt as to the exact period of this change. The following is Sir William Blackstone's account of it: "When the courts of equity began to oblige the ejector to make a specific restitution of the land to the party immediately injured, the courts of law also adopted the same method of doing complete justice; and in the prosecution of a writ of ejectment, introduced a species of remedy not warranted by the original writ, nor prayed by the declaration (which are calculated for damages merely, and are silent as to any restitution); viz. a judgment to recover the term, and a writ of possession thereupon. This method seems to have been settled as early as the reign of Edward 4, though it hath been said to have first begun under Henry 7, because it probably was then first applied to its present principal use, that of trying the title to the land."—Comm. 3. 200.

Now it seems manifest, that if the common lawyers introduced this kind of execution into the law, for the purpose of sparing the party the trouble and expense of two suits instead of one, if they gave possession of the land because they knew that if they did not the courts of equity would; à fortiori ought they to have refused possession to the lessor of the plaintiff in those cases in which they knew that the courts of equity would take it away from him, and restore it to the defendant. When, therefore, Lord Mansfield remarked, "if the court were to say, this ejectment ought to prevail, it would merely be for the sake of giving the Court of Chancery an opportunity to undo all again;" he spoke not only in the spirit of reason and justice, but also in the spirit of those ancient lawyers who first turned the action of ejectment into a means of recovering possession of the land.

The next example we shall give of Lord Mansfield's attempts in this kind, is his using the action for money had and received as a bill in equity, for the purpose of relieving a party from the consequences of a judgment given in an inferior court, which, from defect of jurisdiction, had not been able to go into the whole case. He did this in the case of Moses *v.* Macfarlan, Burr. 1005. We had occasion to advert to this case in the part of this Report which treats of the mode of correcting the errors of inferior courts, and we shall have occasion to advert to it again in the Report which treats of special pleading; but the present is the proper place for bringing to view the main doctrine contained in the case, and the objections which have been made to it. In the course of this examination it will be seen, that the principle of giving to one court jurisdiction over only part of the facts of a case, compelling it to decide upon such imperfect grounds, and then correcting the mischievous effects of its decision by calling in the aid of another court which is empowered to go into the whole case, seemed pregnant with absurdity even to a great English lawyer, not of Lord Mansfield's school, when presented to his mind as a novelty. In this instance too, as in so many others, Lord Mansfield does not appear to have been fully understood.

Macfarlan sued Moses in the court of conscience, as indorser of a small bill of exchange, and recovered against him there, notwithstanding an agreement into which he had entered, that Moses should not be liable to pay the money by reason of his indorsement. The court of conscience refused to receive any evidence in proof of this agreement of indemnity, thinking that they had no power to judge of it, and gave judgment against Moses upon the mere foot of his indorsement (which he himself did not at all dispute), without hearing his witnesses about the agreement that he should not be liable; for the Commissioners held this agreement to be no sufficient bar to the suit in their court.

Lord Mansfield, in giving judgment, said,—"It is most clear that the merits of a judgment can never be overhaled by an original suit either at law or in equity. Till the judgment is set aside or reversed, it is conclusive as to the subject-matter of it to all intents and purposes.

"But the ground of this action is consistent with the judgment of the court of conscience; it admits the Commissioners did right. They decreed upon the indorsement of the notes by the plaintiff, which indorsement is not now disputed. The ground upon which this action proceeds was no defence against that sentence."

At the word "consistent," in the above passage, the Reporter says in a note, "Qu. of this? for how can it be legal for any court of law to give judgment for a plaintiff to recover a sum which, as soon as paid, the defendant hath a legal right to recover back again, and that on the very same facts as in the former suit."

Upon this query we observe first, that Lord Mansfield would not have said that the defendant had a legal right, but an equitable right, which in this equitable action might be enforced in a court of law. The defendant had a legal right (Lord Mansfield would probably have said) to recover damages for the breach of the agreement, and an equitable right to recover back the money which, in breach of the agreement, he had been forced to pay; and secondly, that the defendant did not recover it back again on the very same facts as in the former suit. For the fact of the agreement was not before the Commissioners, they having refused to receive evidence of it.

"It is enough for us," Lord Mansfield continues, "that the Commissioners adjudged they had no cognizance of such collateral matter. We cannot correct an error in their proceedings, and ought to suppose what is done by a final jurisdiction to be right. But we think the Commissioners did right in refusing to go into such collateral matter, otherwise by way of defence against a promissory note for 30 *s.* they might go into agreements and transactions of a great value; and if they decreed payment of the note, their judgment might indirectly conclude the balance of a large account."

To this again the Reporter appends a note, containing the following passage: "The above reasoning seems to be contradictory to itself, and is really a contradiction in terms; for it is saying a man has a right, which the moment he has received, the person paying it has a right to recover back, which is a right and no right." The contradiction will vanish, if we say that one party has a legal right and the other an equitable right. The absurdity will remain, it is true, of having legal rights inconsistent with equitable rights, but this Lord Mansfield could not help; and we (much as we object to such arrangements) are nevertheless of opinion, that if there are to be rights inconsistent with equity, and jurisdictions which are to enforce them, equitable rights and jurisdictions to enforce them are a necessary complement of that system.

The opinions of the Reporter are understood to have been shared by a considerable portion of the profession; but the most weighty expression of disapprobation is to be found in the judgment delivered by Lord Chief Justice Eyre, in the case of Philips *v.* Hunter, 2 H. Bl. 414. The arguments used by him are very forcible. They are indeed conclusive, not, as it seems to us, against the equitable relief given by Lord Mansfield under the circumstances of the case, but against any such parcelling out of jurisdiction as renders equitable relief necessary for the purposes of justice, or, in other words, against setting up a court which is prohibited from doing complete justice in the cases which come before it.

"In the argument of the case it is distinctly admitted, that the merits of a judgment can never be overhaled by an original suit either at law or in equity; that till the judgment is set aside or reversed, it is conclusive as to the subject-matter of it, to all intents and purposes. An attempt is made to distinguish between the judgment and the ground of that action, I think not with much success. The proposition that the ground upon which the action proceeded was no defence against the sentence, can hardly be maintained. Suppose it had been a suit in the Court of King's Bench, instead of a court of conscience, would it have been a defence? If it would, why not in a court of conscience? Is there to be a recovery in a court of conscience only to be overturned by an action in the King's Bench? It is said they might go into agreements and transactions of great value; doubtless they might, if those transactions give a defence against a debt of which they have jurisdiction. Is it not necessarily incident? The true objection, if there be an objection, is that such courts ought to have no jurisdiction at all, because the jurisdiction, if they have it, will draw to it cognizance of matters of which they must be very incompetent judges. It may be questionable whether a set-off of a debt arising out of their jurisdiction can be pleaded or used; but that does not draw into question the truth of the proposition, that every thing that goes to the essence of the debt demanded, must of necessity be within their jurisdiction. To say that the merits of a case determined by the Commissioners, where they had jurisdiction, never could be brought in question

over again in any shape whatever, and to say that yet the defendant ought not in justice to keep the money, is not intelligible to me."

* * * * *

"I think the agreement was a good defence in the court of conscience, but if it were otherwise, the recovery there was a breach of the agreement, upon which an action lay; and this was in my judgment the only remedy. Shall the same judgment create a duty for the recoveror upon which he may have debt, and a duty against him upon which an action for money had and received will lie? This goes beyond my comprehension. I believe that judgment did not satisfy Westminster Hall at the time; I never could subscribe to it; it seemed to me to unsettle foundations."

These arguments appear to us very strong to show that a court, which is obliged to decide on part of a case only, and whose decisions must therefore give rise to original suits in other courts, or else work irremediable injustice, ought not to be tolerated; but they do not seem to us to prove, that, when such courts are tolerated, there is any absurdity or inconsistency in having other courts of original jurisdiction to counteract the mischievous effects of their decisions.

An appellate court only interferes where the court before which the matter was first brought, has fallen into error. A court of equity interferes upon a quite different, and in some respects opposite ground. It interferes, because the court before which the matter was first brought, has decided rightly, and in so doing has produced a defect of justice. If the court before which the matter was first brought has not decided rightly, a court of equity would tell a party applying to it, that it had no jurisdiction, that his remedy was by application to the court appointed by the constitution to correct the errors of the one in which he had been litigating. If, indeed, that was one to which the constitution has entrusted final jurisdiction, or whose jurisdiction had in this instance become final, by the efflux of the time limited for appellate proceedings, then the court of equity would be bound to presume that the decision was right, and would be justified in affording its own peculiar relief if the case required it.

These seem to be the principles on which Lord Mansfield proceeded, and that he was right, and Chief Justice Eyre wrong (assuming always that an action for money had and received is, *quoad hoc*, a bill in equity), we think we can prove by the authority of Lord Eldon.

Looking at the question abstractedly, Lord Mansfield thought that the agreement was no defence in the court of conscience, as being beyond its jurisdiction. Chief Justice Eyre thought, that being a defence against the claim made in the court of conscience, the agreement was, for that reason, drawn within its jurisdiction.

Upon this we shall only remark in passing, that, whichever of these high authorities may be right, their difference furnishes us with an argument in the shape of a dilemma against courts of conscience upon the English plan. If Lord Mansfield is right, then such courts must frequently do injustice in the matters which come before them, from defect of jurisdiction. If Chief Justice Eyre is right, then such courts must frequently do injustice, because they are incompetent in point of knowledge to decide the questions thus incidentally, and against the intention of the legislature, drawn within their jurisdiction; and so *quâcunque viâ datâ*, courts of conscience ought to be superseded by the sort of courts recommended in the first part of this Report, to which neither of these objections is applicable.

We return to the subject under discussion.—Lord Mansfield thought, looking at the question abstractedly, that the agreement was no defence in the court of conscience; whether he was right or wrong is immaterial to the present purpose, for he also thought, that as the court of conscience had itself decided that the agreement was no defence because beyond its jurisdiction, and as the court of conscience is a court from which no appeal lies, he was bound to assume the same doctrine for the purposes of this case, whatever might be his opinion of the correctness of that doctrine in the abstract.

In this we can prove by the authority of Lord Eldon, that Lord Mansfield was right. The case of Farquharson *v.* Pitcher, 2 Russell, 81, bears a striking resemblance to that of Moses *v.* Macfarlan in its circumstances, in the arguments adduced and in the decision; and shows, we think, that Lord Eldon, if he could have been brought to admit that an action for money had and received is, for this purpose

purpose a bill in equity, or, which comes to the same thing, if a bill in equity had been filed against Macfarlan, instead of an action for money had and received, would have done exactly what Lord Mansfield did.

It must be remembered, that Chief Justice Eyre's objection is, that the case of Moses *v.* Macfarlan violates the principle "that the merits of a judgment can never be overhaled by an original suit either at law or in equity."

The facts of the case of Farquharson *v.* Pitcher were shortly as follows:—The plaintiff Farquharson, being resident in Martinique, had demands on Æneas Barkly in London. To enforce payment, his friend W. H. Pitcher suggested that his brother Augustus Pitcher, a solicitor in London, should be employed, and in order that Augustus Pitcher might exert himself with more zeal, it was arranged that the business should be represented to him as to be done on the account of W. H. Pitcher. Accordingly, Farquharson executed a deed by which, for a fictitious consideration, he assigned absolutely to W. H. Pitcher his pecuniary demand on Barkly, and he at the same time executed a power of attorney in his favour. The actual agreement, however, between the parties was, that W. H. Pitcher should be merely a trustee for the plaintiff; and in order to show the true intent of the transaction, W. H. Pitcher signed a memorandum, in which he declared that he had no interest in the property assigned, and that the assignment had been executed only to facilitate the recovery of the demand.

Afterwards Farquharson came to London, and finding that no steps had been taken against Barkly, he informed Augustus Pitcher that he was the party actually interested, and requested him to proceed on his, Farquharson's account. A suit was instituted, and Barkly, by way of compromise, paid the sum of a thousand guineas. Augustus Pitcher received the money on Farquharson's behalf, and made some payments out of it to him or on his account.

Augustus Pitcher having acted as Farquharson's solicitor in various other matters and accounts subsisting between them, brought an action against him. Farquarson obtained from the Court of King's Bench a rule calling on Augustus Pitcher to show cause why his bill of costs should not be taxed, why he should not give credit for all sums of money received by him for or on account of Farquharson, and refund what upon such taxation might appear due from him, &c.

By a subsequent order of the Court of King's Bench, the action and the matters of the former rule were referred to the determination of the Master.

In the proceedings before the Master of the King's Bench, Farquharson contended that he ought to have credit for the whole of the 1,050*l.* which Augustus Pitcher received from Barkly, and he produced the memorandum to show that the assignment was merely a conveyance in trust for himself. But the Master decided that the memorandum, not being under seal, did not legally affect or countervail the deed of assignment which was under seal; that therefore he could not take into his consideration its nature, terms or effect; that he could look only at the legal effect of the deed, under which the sum of 1,050*l.* appeared to have become in law the money of W. H. Pitcher, for a valuable consideration; and consequently, that Augustus Pitcher could not be called upon to give credit for that sum to Farquharson, and should be charged with no more in respect of such sum of 1,050*l.* than the moiety thereof, with which he had charged himself in certain accounts delivered and insisted upon by him, and which the Master treated as settled accounts. The Master made his allocatur upon that principle, and by it he directed Farquharson to pay 233*l.* to Augustus Pitcher.

Although Farquharson had been arrested, no bail bond had been given to the sheriffs, and Pitcher obtained a rule to show cause why an attachment should not issue against the sheriffs of Middlesex, for the sum mentioned in the Master's allocatur.

Farquharson then applied to the Court of King's Bench to review the taxation and allocatur, on the ground that Augustus Pitcher had been charged with no more than a moiety of the 1,050*l.*, and that the deed of assignment had been treated as a valid deed for bonâ fide consideration; but the court coincided with the Master's view of the case, and refused to enter into the merits of the memorandum and declaration of trust.

The bill stated these transactions, and the prayer was, that the plaintiff might be declared entitled in equity to have credit for, and to receive the moiety of the 1,050*l.* not already allowed him in account; that a general and equitable account of receipts and payments, and taxation of untaxed bills of costs might be taken and had between the plaintiff and Augustus Pitcher, and directions given for

the payment of the balance; that Pitcher might be restrained from prosecuting either the action then pending, or any proceeding by way of attachment or process of contempt against the plaintiff or the sheriffs, for compelling payment of the sum claimed by him under the allocatur; and that the sheriffs might be restrained from paying the money to Pitcher.

The defendant, Augustus Pitcher, filed a general demurrer.

The counsel for the demurrer argues thus: "The Bill is filed in respect of matters which not only are the proper subject of legal cognizance, but have actually been determined by a competent common law authority. The first order of the King's Bench called on the defendant to show cause why he should not give credit for all sums of money received by him for or on account of the plaintiff, and refund what might appear to be due from him; and by the second order, all the matters of the former order are referred to the determination of the Master. That officer has taken the account, and made his determination; his decision was questioned before the court, and the court was of opinion that he had come to a right conclusion. The Court of King's Bench, therefore, has given the plaintiff credit for all the sums which the defendant received on his account.

"The ground on which the bill proceeds, is, that the defendant has not been charged with the sum of 1,050*l.* received by him in respect of the claim which had been assigned to his brother, but which is alleged to have always belonged to the plaintiff. If the fact be so, the Court of King's Bench and the Master have erred; but that a court of law has erred in a matter submitted to its jurisdiction, and with which it was competent to deal, gives no title to equitable relief."

This we see is precisely the argument of Chief Justice Eyre, with regard to the case of Moses *v.* Macfarlan. He contended that the court of conscience had erred in excluding the agreement from their consideration, and that such error could give no title to the equitable relief sought to be obtained by the action for money had and received in the King's Bench.

The counsel for the demurrer then went on to show, upon principle and upon authority, that the Court of King's Bench had erred in excluding the memorandum from their consideration.

Upon principle they contended that "The assignment could have no more operation in a court of law than the memorandum; a court of law could not pay greater regard to the one than to the other; the circumstance that the one was under seal, and that the other was not under seal, was altogether immaterial. There cannot be a legal assignment of a chose in action in contradistinction to an equitable assignment. There can be no assignment of a chose in action, whether under or not under seal, which will enable the assignee to sue for it in a court of law, in his own name, and without the intervention of the assignor. The effect of an assignment at law, as well as in equity, is to operate on the beneficial interest, not on the legal right. There was nothing, therefore, to preclude the plaintiff from having credit for the whole 1,050*l.*, if he had a just title to it."

They then cited several authorities, to show that a court of law will take notice of a trust of a chose in action, and will consider who are the persons beneficially interested, and they concluded with the proposition that "Equity will not interfere to try again what has been already tried, and to retard the execution of the judgment which has been pronounced."

The counsel in support of the bill said, inter alia, "it was decided (perhaps properly) that the consideration of Farquharson's right to the 1,050*l.* could not be gone into there (in the King's Bench). The same party who prevented a court of law from taking cognizance of the matter, now says, you ought to have enforced your claim at law, and are therefore to be shut out from a court of equity.

"It is vain to argue that there are authorities, according to which the Court of King's Bench might have gone into the question which is raised upon this record. It is sufficient that the bill alleges that the court of law did refuse to enter into the consideration of those matters which constitute the case entitling us to equitable relief. It must be assumed, upon the present state of the record, that the plaintiff has not had, has not been able to have, and is not entitled to have any remedy at law."

This argument, to which it will be seen Lord Eldon assented, is the same as

Lord

Lord Mansfield's in the case of Moses v. Macfarlan. His judgment might, without any alteration of the sense, be expressed, mutatis mutandis, in the very words just quoted, or in the very words now to be quoted form Lord Eldon's judgment.

"The demurrer for want of equity must be overruled," he said; "I do not enter into the discussion of the validity of the several authorities which have been cited, to show that a court of law might have given effect to the equity on which the plaintiff relies. This bill states, that the Master of the King's Bench refused to try the equitable right. I therefore look upon the authority of this very case, as stated in the bill, as an answer for the purposes of this case, to the older authorities which have been cited."

The demurrer was, of course, overruled.

We have never heard that this case has been thought to unsettle foundations, and yet, if the case of Moses v. Macfarlan is to be considered as overhaling the decision of the court of conscience, this case must also be considered as overhaling the decision of the Court of King's Bench. The truth seems to be, that neither case is open to that imputation, that both are examples of equitable jurisdiction, relieving against the decision of another court upon grounds which were excluded, and must be taken to have been properly excluded from the consideration of that court.

The lesson of jurisprudence to be drawn from this discussion is, that if Lord Mansfield erred in the case of Moses v. Macfarlan, he erred only in holding that an action for money had and received was, for the purposes of that case, a bill in equity. That once assumed, the rest of his doctrine follows as a matter of course.

The legislative lesson is, that courts like the Court of King's Bench, ought to be furnished with the means of doing justice in all cases within their jurisdiction, and that courts of conscience, inasmuch as they cannot be furnished with such means without great risk of injustice, ought not to be suffered to exist at all. Both these exigencies are provided for in our scheme.

The case of Bauerman v. Radenius (7 T. R. 663), will supply our next topic. It does not seem clear, from the report of the case, on which side the equity and good conscience lay; but assuming, for the sake of argument, that they were with the plaintiff, against whom the court decided upon strictly legal principles, then the sort of obstruction to justice which occurred, would be remedied by the simple provision, which seems to us clearly desirable upon more general grounds, of allowing the parties to the cause to be examined vivâ voce, in the same way as other witnesses. This cannot be done in the English system, either by a court of law or a court of equity. The only way of accomplishing it is the fantastic one of getting a court of equity to order a court of law to do it. And that such a course as this should seem a wise one to such a man as Lord Kenyon, is one of the most remarkable illustrations of the degree to which a servile and uncritical study of the English system, perverts the understandings of those who engage in it. We look upon Lord Kenyon as the most vigorous intellect among the antagonists of Lord Mansfield. He is also the most candid among those antagonists. He does not, like Lord Redesdale, accuse Lord Mansfield of having Scotch prejudices on his mind; but openly avows his own English prejudices as the sources of his reverence for the separate administration of law and equity.

The case of Bauerman v. Radenius was an action for delivering goods wet and ill-conditioned.

The principal question at the trial arose on the production by the defendant of a letter from the plaintiffs, who were the shippers of the goods, to Van Dyck & Co., entirely exculpating the defendant from all blame or imputation of negligence or misconduct, and stating that he acted in every respect according to the plaintiff's orders, by stowing the goods under their direction. But it also appeared in the same letter, that Van Dyck & Co. were the persons on whose risk the goods were shipped, that they were the persons really interested in the suit, and had indemnified the plaintiffs, their agents, in whose name they had brought this action. Whereupon it was contended at the trial, in support of the action, that, as it was disclosed that Van Dyck & Co. were the real plaintiffs, and the nominal plaintiffs only their agents, the former ought not to be concluded by the admissions of their agents, proved, too, by a letter without the sanction of an oath, and that therefore this evidence ought to be rejected; but

No. 1. On Civil Judicature in the Presidency Towns.

Lord Kenyon being of a different opinion, the plaintiffs were nonsuited. A motion was afterwards made to set aside the nonsuit, and Lord Kenyon, in the course of his judgment, thus expressed himself:

"I have been in this profession more than 40 years, and have practised both in courts of law and equity; and if it had fallen to my lot to form a system of jurisprudence, whether or not I should have thought it advisable to establish two different courts with different jurisdictions, and governed by different rules, it is not necessary to say. But influenced as I am by certain prejudices that have become inveterate with those who comply with the systems they found established, I find that in these courts proceeding by different rules, a certain combined system of jurisprudence has been framed most beneficial to the people of this country, and which I hope I may be indulged in supposing has never yet been equalled in any other country on earth. Our courts of law only consider legal rights: our courts of equity have other rules, by which they sometimes supersede those legal rules, and in so doing they act most beneficially for the subject. We all know that if the courts of law were to take into their consideration all the jurisdiction belonging to courts of equity, many bad consequences would ensue."

Lord Kenyon then illustrates his opinion by the case of an action for a legacy. We omit the illustration here, because we shall soon have another occasion to quote it. Afterwards he proceeds as follows:—"I exemplify the propriety of keeping the jurisdictions and rules distinct, by one out of a multitude of cases that might be adduced. If the parties in this case had gone into equity, and that court had directed an issue to be tried, they might have modified it in any way they thought proper. One of the rules of a court of equity is, that they cannot decree against the oath of the party himself on the evidence of one witness alone, without other circumstances: but when the point is doubtful, they send it to be tried at law, directing that the answer of the party shall be read on the trial; so they may order that a party shall not set up a legal term on the trial, or that the plaintiff himself should be examined; and when the issue comes from a court of equity, with any of these directions, the courts of law comply with the terms on which it is so directed to be tried. By these means the ends of justice are attained, without making any of the stubborn rules of law stoop to what is supposed to be the substantial justice of each particular case; and it is wiser so to act than to leave it to the judges of the law to relax from those certain and established rules by which they are sworn to decide. If the question that has been made in this case had arisen before Sir M. Hale, or Lords Holt or Hardwicke, I believe it never would have occurred to them, sitting in a court of law, that they could have gone out of the record, and considered third persons as parties in the cause."

After some remarks on the circumstances of the case, Lord Kenyon concludes his judgment in the following words:—"It is my wish and my comfort to stand super vias antiquas: I cannot legislate, but by my industry I can discover what my predecessors have done, and I will servilely tread in their footsteps. I am therefore clearly of opinion on principles of law, that the plaintiffs cannot recover in this action, and we cannot in this case assume the jurisdiction of a court of equity, in order to overrule the rigid rules of law."

There is something bordering on the ludicrous in this statement by Lord Kenyon, of the origin of his opinion and of the length of time he had held it, as if 40 years uninterrupted enjoyment of a prejudice could turn it, by a kind of intellectual prescription, into a sound doctrine. It has, however, the merit of great candour, and seems almost to amount to an avowal that, if instead of a judicial decision on what the law was, he had been called upon as a legislator for a recommendation as to what it ought to be, he would have felt it his duty to shake off an opinion which he cherished principally on account of its inveteracy. We do not mean to say that all Lord Kenyon's expressions imply an attention to this distinction; on the contrary, in the course of his judgment his mind appears to vacillate. Sometimes he seems to be simply declaring the law, avoiding any estimate of its merit or demerit, sometimes to be expressing strong approbation of the law, sometimes to be admitting that nothing can be said in favour of it by an unprejudiced person.

This apparent vacillation imposes considerable difficulty upon those who undertake to criticise him.

That a judge should not legislate, but should discover what his predecessors have done, and tread servilely in their footsteps, is a doctrine which we have no disposition

disposition to combat, at least so long as there is a legislature ready to amend the defects of the law. But when Lord Kenyon says "by these means (the trying actions or issues under the directions of a court of equity) the ends of justice are attained without making any of the stubborn rules of law stoop to what is supposed to be the substantial justice of each particular case, and it is wiser so to act than to leave it to the judges of the law to relax from those certain and established rules by which they are sworn to decide," it is not very easy to understand whether he speaks with reference to the wisdom of a judge, or to the wisdom of a legislator.

If he means only that the judges ought to decide as they are sworn to do, and that they are sworn to decide according to certain established rules of evidence, these are propositions which we are not called upon to dispute. We may remark, however, that the latter is scarcely a true proposition. It is scarcely true, seeing that the rules of evidence have almost all been made by the judges, and from time to time altered by them, to say that they are sworn to decide by those rules as they exist at any given time.

But by the expression "it is wiser so to act than to leave it to the judges of the law to relax from those certain and established rules by which they are sworn to decide," Lord Kenyon seems to mean, that it is wiser in the legislature so to act. Yet if we so understand him, the whole sentence will yield no consistent meaning; for admitting that the judges of the law are sworn to decide on such subjects according to established rules, still they are only sworn to decide according to such rules as are from time to time established by the legislature.

Upon the whole it may be said, that Lord Kenyon's judgment contains no argument which can help to decide the legislative question arising out of this case.

That legislative question does not exactly correspond with the judicial question presented for the decision of the court.

For it ought to be observed, that this case of Bauerman *v.* Radenius differs from the generality of the cases in which courts of law have been asked to relax the rigour of their rules. The real plaintiff against whom those rules operated, did not ask the court to do what good conscience required, or what a court of equity would have directed. He did not ask the court to examine the nominal plaintiff as a witness, but to exclude altogether the admission made by the nominal plaintiff in favour of the defendant, which would clearly be going beyond what good conscience requires; but which is a proceeding much more analogous to the practice of courts of English law. We admit therefore, not only that Lord Kenyon decided according to law, but also that for any thing that appears to the contrary, he adopted the most equitable of the only two courses presented to him.

But in delivering his judgment, so far as he considers the matter in a legislative point of view, he discusses it without reference to this circumstance. He discusses the matter as if the case had stood thus:—

A man has a good cause of action in the name of a third person in a court of law, according to the English system. The general rule is, that the plaintiff in an action at law cannot be examined. But there are acknowledged exceptions to the rule. The party aggrieved in the supposed case alleges that it is within the exception, and the question for a legislator is, shall such a party be allowed to prove to the court within whose cognizance the subject-matter lies, that the case is within the exception, and that the nominal plaintiff ought accordingly to be admitted to give evidence; or shall he be compelled to bring a distinct suit in a distinct court for the purpose of adducing this proof, and getting an order to have the nominal plaintiff admitted as a witness in the court which is to try the cause.

Lord Kenyon's judgment, as we have already remarked, contains no argument in favour of the side of this question to which he appears to lean, and argument appears to us to be superfluous on the other side.

Our opinion and our recommendation go a great deal farther, for we hold that every court should have the power to examine the real plaintiff and defendant, and of course à fortiori every court should have the power to examine a person who is placed in that situation, not on account of his interest in the subject-matter, but on account of some real or supposed convenience of form.

No. 1.
On Civil Judicature in the Presidency Towns.

In treating the last topic we purposely omitted Lord Kenyon's illustration drawn from the effects of suing at law for a legacy, in order that we might introduce it in the separate discussion of that subject on which we are now about to enter. This was Lord Kenyon's favourite instance of the danger of confounding legal and equitable jurisdiction. He refers to it as the most palpable illustration of that doctrine. He refused in the case of Deeks *v.* Strutt (5 T. R. 690) to exercise that jurisdiction in a court of law, stopping the counsel who was to have argued against the jurisdiction, and overruling Lord Mansfield's doctrine on the subject, and he congratulates himself on having made an impression upon Mr. Justice Buller by his arguments. Yet, when the doctrine which he maintained on the subject is considered attentively, it will be found, singularly enough, to be quite unanalogous to the system which Lord Kenyon so much admired. It has moreover been since overruled by his successor Lord Ellenborough, in the case of Doe *dem.* Lord Saye and Sele *v.* Guy (3 East's R. 120), for although one of the judges in that case endeavours so far to explain away Lord Kenyon's doctrine as to make it not inconsistent with Lord Ellenborough's decision, the attempt is eminently unsuccessful. We now proceed to prove all this.

In the case of Bauerman *v.* Radenius, Lord Kenyon says, "To mention only the single instance of legacies being left to women who may have married inadvertently, if a court of law could entertain an action for a legacy, the husband would recover it, and the wife might be left destitute; but if it be necessary in such a case to go into equity, that court will not suffer the husband alone to reap the fruits of the legacy given to the wife; for one of its rules is, that he who asks equity must do equity, and in such a case they will compel the husband to make a provision for the wife before they will suffer him to get the money."—7 T. R. 667.

In another case, The Mayor of Southampton *v.* Graves, he again illustrates the danger of confounding law and equity, by the same instance of an action for a legacy. "A similar mistake was, I think, made (he says), in this court, a few years before I sat here, on another question, where it was decided that an action at law might be maintained for a legacy, partly on the ground that the plaintiff would have recovered it as of course in a court of equity. On its being mentioned to me by the late Mr. Justice Buller, I took the liberty of asking him whether or not he was sure that the court had taken a view of the whole question before they had decided it, reminding him that it is a constant rule in courts of equity, when the husband files a bill for a legacy given to the wife, that (if I may use the expression) they stop it in transitu, if there be no provision for the wife; whereas, if a legacy could be recovered in an action at law, there would be no provision for the wife and family, as the husband would at once take the legacy; that learned judge, whose legal knowledge was universally allowed, immediately admitted the force of the observation. There was indeed a case in Cromwell's time, in which an action at law for a legacy was maintained, but the reason given for that decision was, that there would be a failure of justice if courts of law did not take cognizance of the question, the spiritual courts not being then open; but as soon as those courts resumed their functions, suits of the kind returned into their proper channel; and since I have sat in this place it has been determined that a legacy cannot be recovered in a court of law."—8 T. R. 593.

The case to which Lord Kenyon alludes in the last sentence is, that of Deeks *v.* Strutt, 5 T. R. 690. His judgment in that case is as follows: "The supporting of the present action would be attended with the most pernicious consequences; and I believe that no action till lately (except one in the time of the Commonwealth) for a legacy has been supported in a court of law. The arguments which have of late years been advanced in support of this action, are founded on the supposed justice of the case and the convenience of the parties; but when it is considered in what manner a court of equity interposes in suits for legacies, in taking care that provision is made for the different parties entitled, and what inconvenience, and even ruin, to private families would have ensued from determining that an action can be brought in a court of law for a legacy, I think, that those who have wished to support the action in a common-law court, would hesitate before they came to the conclusion that the action can be maintained. If an action will lie for a legacy, no terms can be imposed on the party who is entitled to recover; and therefore, when the legacy is given to a wife,

wife, the husband would recover at law, and no provision could be made for the wife or family; whereas a court of equity will take care to make some provision for the wife in such a case. But the whole of this admirable system, which has been founded in a court of equity, will fall to the ground if a court of law can enforce the payment of a legacy. I mention these as decisive reasons in my mind against the jurisdiction of the courts of law over this subject; and I know they have influenced those who once entertained an idea that this action could be supported. The only case that I know of where it was said that this action might be maintained, happened in the time of the Commonwealth, but the reason then given was to prevent a failure of justice, the Ecclesiastical Courts being at that time abolished, and the Court of Chancery not having then, nor indeed until the time of Lord C. Nottingham, entertained any jurisdiction over the question of legacies. Therefore, as the arguments of convenience and justice, on which alone it has been thought that this action is maintainable at law, bear strongly against it, and as I find only one case in which it has been supported, and which was decided contrary to all precedent, merely because then the party had no other remedy, I am clearly of opinion that the present action cannot be maintained."

Now this denial of jurisdiction over legacies to courts of law, whatever may be its merit with reference to convenience and utility, is certainly not recommended by any conformity to the English system in general. The mode in which the mischiefs produced by the defective constitution of common-law courts is remedied in the English system, is not by taking away from them jurisdiction which they may exercise mischievously, but by preventing the suitor from applying to them, or from taking advantage of their decisions, that is to say, by injunction from a court of equity.

In all the other cases we have examined, the complaint against the courts of law has been that they have undertaken to do complete justice, or to abstain from doing injustice, thus usurping the functions of equity; but here the complaint is, that they do incomplete justice or positive injustice, that they do something which requires to be set right in equity, which is just what in other cases they are applauded for doing by the admirers of the English system. If, indeed, they had not only exercised jurisdiction in cases of legacies, but had also undertaken to make a husband provide for his wife out of the legacy due to her for which he sues, or had undertaken (as Lord Mansfield seems to have intended) to make the legatee give security to refund upon a deficiency of assets, a case of usurpation on the courts of equity would be made out. But as long as they confine themselves to adjudging the legacy to the legatee, leaving it to the Court of Chancery to interfere by injunction in the case of a husband suing for his wife's legacy, and to make the legatee refund in case the assets are insufficient to pay creditors, they seem only to be acting the part usually assigned to them in that combined system of jurisprudence which, as Lord Kenyon thought, has never yet been equalled in any other country on earth.

Lord Kenyon therefore, in finding fault with the exercise by courts of law of this jurisdiction, appears to be arguing against his own general doctrines, and in favour of ours.

Lord Kenyon is here a witness against himself, and in favour of us. A tribunal with the limited powers of a court of law, cannot do complete justice in the case of a legacy; therefore, according to Lord Kenyon, it has no jurisdiction, or ought to have no jurisdiction over legacies. To this doctrine we entirely assent, only we do not stop there. We push this doctrine to the whole extent of its logical consequences, and hold that, as in all suits within its jurisdiction, a court of law may, from want of adequate powers, find itself compelled to do incomplete justice, or positive injustice, the whole jurisdiction of such courts ought to be taken away, or, in other words, that there ought to be no such courts. And if Lord Kenyon had, in the case of Bauerman v. Radenius, applied to the matter then in judgment the principles derived from his illustration, he would have found himself driven to the same conclusion. If, instead of contending that a party in a suit at law fearing to be defeated by an admission made by the nominal plaintiff, ought to go into equity to get that impediment removed, he had contended that courts of law ought not to exercise jurisdiction over any subject in which they might find themselves compelled to do injustice, but ought to leave all such subjects wholly to courts of equity; he would have in effect argued,

just as we argue, that there ought to be no courts of law which are not also courts of equity.

The doctrine therefore of his illustration in the case of Bauerman *v.* Radenius, of his illustration in the case of The Mayor of Southampton *v.* Graves, and of his main argument in the case of Deeks *v.* Strutt, though it appears to us to be excellent doctrine for the guidance of a legislator, sounds strangely in the mouth of an English lawyer, professing his devotion to English principles; and accordingly, the whole doctrine considered as a doctrine of English law, has been swept away by the subsequent case of Doe *dem.* Lord Saye and Sele *v.* Guy, 3 East's Reports, 120.

This last case is, indeed distinguishable from that of Deeks *v.* Strutt, because it was an action to recover a specific chattel against an executor, who had assented to the bequest; whereas in the former case the annuity which was the subject of the action, was payable out of the general funds of the testator. The former case therefore is not overruled by the latter, but the principle on which Lord Kenyon decided the former case, is completely overruled.

The counsel who argued for setting aside the verdict, and entering a nonsuit, "relied on the ground of the decision in Deeks *v.* Strutt, which applied as well to the case of a specific legacy as of a legacy payable out of the general fund; namely, that no action at law lay to recover it against the executor, because a court of law could not in many instances do that justice to the parties concerned as a court of equity were accustomed to do; for the latter would in the case of a legacy to a married woman oblige the husband to make a suitable provision for her, if she were not before sufficiently secured; whereas this court could not impose terms on one who was entitled to recover upon his legal title. The opinion of the judges in that case was delivered generally against supporting an action at law for a legacy, without the distinction now set up. The cases of Atkins *v.* Hill, and Hawkes *v.* Saunders, were indeed cases of express promises; but the reasoning there went the whole length of this case, if it had been well founded; but it was controverted, and considered to be overruled in Deeks *v.* Strutt."

This argument of the counsel for the defendant is absolutely conclusive and unanswerable, unless Lord Kenyon's doctrine is abandoned, and the courts of law would thus have been deprived of a jurisdiction which unquestionably belonged to them. The court, however, thought fit to preserve their jurisdiction, and to abandon Lord Kenyon's doctrine: they did it as tenderly as possible.

Lord Ellenborough says, "General language used by the court in giving their opinions in any case must always be understood with reference to the subject-matter then before them."

This undoubtedly is a sound principle of interpretation, but, unfortunately, Lord Kenyon's doctrine is not capable of being so restricted. Every word that he said against maintaining an action at law for legacies, though we should restrict it to actions for legacies payable out of the general fund, will remain equally applicable in its own nature to actions for specific legacies; and if he had in express terms so restricted his own expressions, he would have done neither more nor less than refute his own argument, by refusing to admit its logical consequences.

Lord Ellenborough, having thus quietly put on one side the doctrine on the excogitation of which Lord Kenyon had so prided himself, proceeds to show what, upon English principles, is the proper business of a court of law, and what of a court of equity, in regard to the subject-matter. "It never could be doubted," he says, "but that at law the interest in any specific thing bequeathed, vests in the legatee upon the assent of the executor. If it should afterwards appear that there is a deficiency of assets to pay creditors, the Court of Chancery will interfere, and make the legatee refund in the proportion required."

Le Blanc, J. said—"It is admitted that, upon the old authorities, there is no doubt of the plaintiffs' right to recover unless they have been overruled by the case of Deeks *v.* Strutt. But that never could have been in the contemplation of the judges there, because it formed a ground of objection with them to the action, that it was a novel attempt to contend that the law would raise an implied assumpsit against an executor, merely from the possession of assets. They thought that it would not; and in discussing that point, they showed the inconvenience which would result from extending the law in that respect further than it had been carried before."

This

This is a very correct account of what the court ought to have done in the case of Deeks *v.* Strutt; but far enough from a correct account of what they actually did. Mr. J. Grose, indeed, who sat in the court when both cases were decided, did take this line, and was perfectly consistent with himself in both decisions. His judgment in the latter case is as follows:—

"The only question in the case of Deeks *v.* Strutt was, whether the law would raise an implied assumpsit to pay the annuity, upon proof of the executor's acknowledgment of assets. I thought it would not," and it is quite true that this was the only question in the case, but the Chief Justice (and Mr. J. Ashurst supported him) chose to decide this question upon the broad ground, that a court of law is incapable of doing justice in anaction for a legacy. "They did not point out," as Le Blanc, J. says, "the inconvenience which would result from extending the law in that respect further than it had been carried before," but vehemently contended against the supposed law being endured to any extent at all. "The whole of this admirable system which has been founded in a court of equity, will fall to the ground, if a court of law can enforce the payment of a legacy." These, as has already been seen, are Lord Kenyon's words, and Mr. J. Ashurst's are not less strong. "Innumerable instances (he says) have occurred, in which the interposition of that court (a court of equity) has proved highly beneficial to private families, by compelling the husband to make an adequate settlement on the wife; but if we were now to determine that an action could be maintained for a legacy, wives and families, in many instances, would be left destitute of any provision."

That Lord Kenyon himself would have repudiated Mr. Justice Le Blanc's explanation and restriction of his doctrine, is placed beyond all doubt by the citation we have made from the case of The Mayor of Southampton *v.* Graves, where, after re-stating in all its breadth the doctrine he had laid down in the case of Deeks *v.* Strutt, he shows, with evident satisfaction, the unlimited conclusion to which that doctrine had led, "since I have sat in this place, it has been determined that a legacy cannot be recovered in a court of law."

This objection to courts of law exercising jurisdiction over legacies, because (to use Lord Kenyon's words) "ruin to private families would have ensued," or because (to use Mr. J. Ashurst's words), "wives and families, in many instances, would be left destitute of any provision," is so thoroughly un-English, that even if it had not been overturned by the case of Doe *dem.* Lord Saye and Sele *v.* Guy, it would have been easy to show its heterogencousness by comparing it with other parts of the English system. A spiritual court has no more power than a court of law to compel the husband to make a provision for his wife out of a legacy bequeathed to her, yet we never heard it contended that a spiritual court has no jurisdiction in cases of legacy. Ruin and destitution, indeed, might follow from the exercise of this jurisdiction, but they are to be prevented or remedied in the approved method, by a Chancery suit.

"The Court of Chancery will, on a bill filed, grant an injunction to the spiritual court, to stay the husband's proceedings in that court to obtain a legacy given to his wife, because that court cannot compel the husband to make an adequate provision or settlement on his wife, as the Court of Chancery will oblige him to do, before it will permit him to receive the legacy."—Maddock's Chancery, vol. I., 129, and see the cases there cited.

With respect to our new court, its jurisdiction over legacies will of course be limited for the present (as its jurisdiction is on other subjects), to that now exercised by courts of law; but wherever it does exercise jurisdiction, it will exercise all the powers necessary for complete justice.

This examination of the objection which has been made to the jurisdiction of a court of law over legacies, affords perhaps the true explanation of Mr. Justice Buller's recantation. His object and that of Lord Mansfield was to save parties the expense and delay of going into equity to obtain complete justice, wherever the powers of a court of law could be made to accomplish that purpose. He seems to have been satisfied by Lord Kenyon's argument, that this could not be done in the case of a legacy, and therefore yielded upon that point. He yielded, not because he admired that combined system of jurisprudence which Lord Kenyon thought had never been equalled, but precisely because he did not admire it. The moment it was pointed out to him, he felt all the force of the objection, that a court of law, by undertaking to decide upon claims to legacies, would frequently do that which the parties would be driven into equity to remedy.

There is no evidence, as far as we know, that his recantation went beyond the cases in which this sort of inconvenience would have arisen. The only specific instance of his recantation is this instance of an action for a legacy. It is true that in the case of Farquharson *v.* Pitcher, which we have discussed above, Lord Eldon says, "With respect to the common law authorities which have been cited, I may observe, that when I had the honour to sit on the same bench with Mr. Justice Buller, I had a great deal of conversation with him in respect to the equitable doctrines of the Court of King's Bench; and though he at an earlier period of his life, had had some share in introducing equity into law, yet I have his own authority for stating, that he was convinced latterly, that he had been exceedingly mistaken in his notions of the equitable jurisdiction of the courts of law."—Russell's Chancery Reports, II. 86.

These are very large expressions, but in order to judge how far they accurately represent the change in Mr. Justice Buller's mind, it is fit to advert to what Lord Eldon says in the case of Evans *v.* Bicknell, when he is protesting against the equitable doctrines of the Court of King's Bench.

"With regard (he says) to the second proposition of Mr. Justice Buller, that if this (the rule regarding mortgages) had become a rule of property in equity, therefore it ought to be adopted in a court of law, with great deference to the learning and memory of that judge, that appears to me a very hasty proposition." He then proceeds to argue against the proposition, but makes not the slightest allusion to Mr Justice Buller's recantation.

A little further on he says, "It seems to me rather surprising, if I may presume to say so, that Lord Mansfield, who concurred with Mr. Justice Buller in a great many of these equitable principles in a court of law, should not have attended to these distinctions, which perhaps will be found in the very principles on which this court exists."—6 Ves. 183. And again he goes on to illustrate what he has been saying, but still without any allusion to the recantation.

Now, Lord Eldon gave his judgment in the case of Evans *v.* Bicknell in the summer of 1801, very little more than a year after Mr. Justice Buller's death, and when the above-mentioned conversations in respect to the equitable doctrines of the Court of King's Bench, must have been quite fresh in his memory. For these conversations must all have taken place between the summer of 1799, when Lord Eldon was appointed Chief Justice of the Common Pleas, and the Easter vacation of 1800, when Mr. Justice Buller died. And these things being so, it is a moral impossibility, that, if Mr. Justice Buller's recantation of his equitable doctrines had been general, or had been large enough to be available for Lord Eldon's purpose, he should have omitted to take advantage of it. Surely, instead of saying "with great deference to the learning and memory of that judge," the proposition which he laid down, "appears to me a very hasty proposition;" Lord Eldon would have said (if he could have said so with truth) "It not only appears to me a very hasty proposition, but I have Mr. Justice Buller's own authority for stating, that he himself was latterly convinced it was so."

And again, instead of saying, "It seems to me rather surprising, if I may presume to say so, that Lord Mansfield, who concurred with Mr. Justice Buller in a great many of these equitable principles in a court of law, should not have attended to these distinctions;" Lord Eldon would have declared (if he could have done so with truth) that there could be no great presumption in expressing surprise that Lord Mansfield should have concurred with Mr. Justice Buller in neglecting the distinctions between courts of law and courts of equity, seeing that Mr. Justice Buller was latterly himself convinced that he had been exceedingly mistaken in adopting that course.

Lord Eldon gave his judgment in the case of Farquharson *v.* Pitcher in the year 1826, when more than a quarter of a century had elapsed from the date of his conversations with Mr. Justice Buller on law and equity; and we think it is sufficiently evident from what has been said, that he could not then have had an accurate recollection of the extent to which Mr. Justice Buller acknowledged he had been mistaken.

To what extent he did make that acknowledgment may, we think, be inferred from the specific instance of an action for a legacy, which instance was given by Lord Kenyon in the summer of 1800, immediately after Mr. Justice Buller's death, and without any intimation that Lord Kenyon had understood him to have abandoned generally the principles on which he and Lord Mansfield had so long acted.

If this be so, Mr. Justice Buller is an authority in our favour, not only when he endeavoured to extend the powers of courts of law, so as to enable them to do complete justice in the cases coming before them, but also when, yielding to Lord Kenyon's arguments, he repented of having endeavoured to extend their jurisdiction over cases in which, by the defect of their constitution, they cannot do complete justice. His recantation thus explained, is a most important authority in favour of the proposition, that no court should be suffered to meddle with subjects in which its meddling may produce mischiefs, which another court must be called in to remedy.

The last example we shall give of the attempts of Lord Mansfield and Mr. Justice Buller to introduce equity into suits at law, is their doctrine respecting the setting up of outstanding terms to defeat the lessor of the plaintiff in ejectment. Lord Eldon is here the great antagonist. The case which seems principally to have provoked his indignation is not one in which the court refused to allow an outstanding term to be set up; but one in which the court did allow the term to be set up, because the circumstances were such that a court of equity would have allowed it.

In the case of Goodtitle *v.* Morgan (1 Term Reports, 762), Mr. Justice Buller is reported to have expressed himself thus: "It is an established rule in a court of equity, that a second mortgagee, who has the title-deeds without notice of any prior incumbrance, shall be preferred; because, if a mortgagee lends money upon mortgage without taking the title-deeds, he enables the mortgagor to commit a fraud. If this has become a rule of property in a court of equity, it ought to be adopted in a court of law. Here the defendant took mortgages without inquiring after the title-deeds, the subsequent mortgagee is a purchaser without notice, and as he has taken the title-deeds, he has the better title."

It appears that, according to cases in equity decided after the case at law from which we have been quoting, the rule of equity is not now as stated by Mr. Justice Buller. "The doctrine at last is (so Lord Eldon says in the case of Evans *v.* Bicknell, 6 Ves. 174), that the mere circumstance of parting with the title-deeds, unless there is fraud, concealment, or some such purpose, or some concurrence in such purpose, or that gross negligence that amounts to evidence of a fraudulent intention, is not of itself a sufficient ground to postpone the first mortgagee."

Lord Eldon admits, however, that Mr. Justice Buller had sufficient grounds for supposing the rule to be as he stated it, and admits also, that if the cases of joint tenants, &c., in which, from the nature of the title, the deeds may be honestly out of the possession of the first mortgagee, are excepted, such a rule would avoid a great deal of fraud in mortgage titles.

But it is with Mr. J. Buller's second proposition that we are concerned, and it is against that Lord Eldon directs his attack.

"With regard to the second proposition of Mr. J. Buller, that if this had become a rule of property in equity, therefore it ought to be adopted in a court of law, with great deference to the learning and memory of that judge, that appears to me a very hasty proposition, and the converse undoubtedly will not hold; for it is impossible for this court, upon the principles upon which it acts, to say that whatever is a rule of proceeding at law is of course a rule of proceeding in equity. It may be asserted that it should be the case, but it is impossible it can. For instance: in the case of the mortgagee put in Pasley *v.* Freeman, if the man makes a false declaration, and an action can be maintained upon that, and the principle upon which it can be maintained is, that a court of equity will relieve, the converse ought to hold, that where an action can be maintained, equity should give relief. But is that so? A defendant in this court has the protection arising from his own conscience in a degree in which the law does not affect to give him protection. If he positively, plainly and precisely denies the assertion, and one witness only proves it as positively, clearly and precisely as it is denied, and there is no circumstance attaching credit to the assertion overbalancing the credit due to the denial as a positive denial, a court of equity will not act upon the testimony of that witness. Not so at law. There the defendant is not heard: one witness proves the case; and however strongly the defendant may be inclined to deny it upon oath, there must be a recovery against him.

"It seems to me rather surprising that Lord Mansfield, who concurred with

Mr. J. Buller in a great many of these equitable principles in a court of law, should not have attended to these distinctions, which perhaps will be found in the very principles upon which this court exists."

The objection here made by Lord Eldon to the attempts of courts of law to assume equitable jurisdiction is, we see, that the latter cannot possibly administer the same kind of justice as the former, because in a court of law the defendant has not the protection arising from his own conscience. As soon as it is enacted that a defendant shall have this benefit in a court of law, Lord Eldon's objection vanishes. But our proposed Act does better than this. The principles involved in Lord Eldon's objection have been themselves objected to, and with great reason; and our Act gives to the new court the power to examine the defendant, and to weigh his testimony, in a manner which obviates all objections.

We now resume our quotation from Lord Eldon, which we have interrupted for the sake of making this remark. He proceeds to apply what he has been saying to the case of a second mortgagee.

He first alludes to the doctrine of the Court of King's Bench as to satisfied terms; he shows the danger which he apprehended would result, and points out that courts of law could not guard against that danger in the same way that courts of equity can, for want of power to examine the defendant.

"Titles to property may possibly be found to be very considerably shaken by the doctrine of the Court of King's Bench as to satisfied terms. The law as to that here is, that a mortgagee having no notice of the first mortgage, if he can get in a satisfied term, would do that which is the true ground of the decision, though it is not put upon that by Mr. Justice Buller; he would, as in conscience he might, get the legal estate; and by virtue of that protect his estate against the first mortgagee, having got a prior title, the conscience being equal between the parties. When once it is said at law, that a satisfied term should not be set up in an ejectment, the whole security of that title is destroyed; and therefore, even with the modern correction which that doctrine has received in the late cases, which is, that you may set up the term though satisfied, and put it as a question to the jury whether an assignment is to be presumed, it seems to me very dangerous between purchasers; and the leaning of the court ought to be that it was not assigned; and I fully concur with Lord Kenyon, that it is not fit for a judge to tell a jury they are to presume a term assigned, because it is satisfied; but there ought to be some dealing upon it, or you take from a purchaser the effect of his diligence in having got in the legal estate, to the benefit of which he is entitled. Then suppose the law takes upon itself to decide the question between purchasers upon this subject, can it decide upon the same rules as courts of equity, as upon the question of notice? It will be said upon this doctrine, a court of equity does inquire into this, and it is a rule of property in equity; and therefore ought to be a rule of property at law. But how has it become a rule of property in equity? In equity the first mortgagee may ask the second whether he had notice. If that defendant positively denies notice, and one witness is only produced to the fact of notice, if the denial is as positive as the assertion, and there is nothing more in the case, a court of equity will not take the benefit of the term from the second mortgagee; placing as much reliance on the conscience of the defendant as on the testimony of a single witness, without some circumstance attaching a superior degree of credit to the latter. It is impossible, therefore, that the rule of property can be said to be the same as at law; and if it stands upon different principles, in fact it is perfectly different."

Be it so; but if you give to a court of law the power of examining the defendant, the whole impossibility vanishes. We entirely concur with Lord Eldon, that the want of power to examine the defendant is a great defect in the courts of common law, and prevents them from being fit instruments for doing complete justice in all cases. But we cannot go along with him in thinking, as he apparently did, that as much reliance ought to be placed upon the conscience of a party to the suit answering in writing written questions, with his attorney and counsel instructing him how far he may go towards deceiving the court without laying himself open to an indictment for perjury, as upon the oral testimony of a disinterested witness.

"This rule," says the learned reporter, Mr. Vesey, "considered simply as a general rule of evidence, seems open to observation, 1st, as preferring the evidence of a party; 2dly, upon the obvious defect of written compared with oral

oral testimony. It is difficult to determine the balance of inconvenience and danger on the one hand, from permitting in a commercial country the defendant to avail himself of his own oath to a degree in some respects beyond the old wager of law; and on the other, from deciding upon the evidence of a single witness in cases even requiring the utmost accuracy and precision in the proof."

It is no doubt difficult to determine this balance of inconvenience and danger; but it is a difficulty of which the solution ought to be a mere matter of curiosity, as there is not the least necessity for running into either extreme. Only let the legislature say to the judge, "Examine the parties vivâ voce and the one witness, when there happens to be only one; decide what weight is due to the oath, or rather to the testimony of the defendant, as well as to that of the single witness, not by any pre-established standard, but according to the sage advice of the Emperor Adrian, '*ex sententia animi tui:*'" only let the legislature say this, and the difficulty in question becomes of no more practical importance than those which exercised the ingenuity of the schoolmen.

We must now say a few words upon the nature of that protection to purchasers which Lord Eldon accuses the Court of King's Bench of destroying by its refusal to allow the lessor of the plaintiff in ejectment to be defeated by an outstanding satisfied term. Our own opinion on this subject coincides entirely with that expressed by the Commissioners for inquiring into the Law of Real Property, in their Second Report, pp. 10. et seq.

After showing, that the getting in an outstanding term causes expense, delay and difficulties, that the protection thus obtained is; for various reasons, precarious and inadequate; that although the term may protect the purchaser against secret incumbrances, it may yet not give him a marketable title; that the system of protection by terms is a source of danger to purchasers, and a cause of mischief which otherwise would not exist, the Commissioners conclude thus: "If the system of protection by the assignment of terms could be made available in every title, and were not productive of the other evils adverted to, it would still be open to the objection, that it is liable to work injustice; for whenever it comes into operation, its effect is simply to transfer the injurious consequences of fraud from one innocent party to another, and generally to postpone or exclude a person who had by priority in point of time, the best equitable claim.

"By this artifical system, legal rights are made to depend on matters foreign to the merits of the case, suits are occasioned by it, in which the question is not between the rightful and the wrongful party, but between two having equal merits; the point to be determined being which party shall be the victim of the fraud of a third party, or of mere misfortune, and the result of which suit depends on a sort of chance. To obtain the accidental advantage of the '*Tabula in naufragio*' (as it is called) very objectionable proceedings may be resorted to, which the law is forced to countenance, as where a man by climbing into an open window, to which he had no lawful access, obtained a deed, the possession of which entitled him to the benefit of the legal estate.

"The system has a tendency in some cases to promote fraud; it may enable a party who has made a settlement or mortgage to defeat it with greater facility; it appears too, that in some instances it induces a system of selfish caution, with an indifference to the just claims of other persons, since some respectable practitioners have avowed, that when an outstanding term can be obtained, they advise their clients to omit the usual inquiries, by which the existence of intermediate incumbrances might be discovered, and to rely upon the legal estate to defeat them."

After this it will perhaps not be thought, that the destruction of the system of protection by outstanding terms would have been an evil so great as to outweigh the general beneficial effects of Lord Mansfield's refusal to permit an equitable title to be defeated by them in ejectment. But it is not quite clear to us, that Lord Mansfield intended to carry his doctrine to the length of destroying that sort of protection, such as it is, which purchasers may derive from outstanding terms. We do not doubt that Lord Mansfield thought, as the Real Property Commissioners think, that the sort of protection in question is open to objection, because "its effect is simply to transfer the injurious consequences of fraud from one innocent party to another, and generally to postpone or exclude a person who had, by priority in point of time, the best equitable claim." We are quite sure that he must have thought that unlawfully climbing into an open

window, is not a sort of diligence which the law ought to reward, and it is therefore not impossible that he wished to go the whole length imputed to him in his career of judicial legislation; that he wished to prevent the setting up of an outstanding term in ejectment, as well when the object of setting it up is to take away the fair advantage which one equitable title ought to have over another by priority in point of time, as when the object of setting it up is to defeat an equitable title.

It rather appears to us, however (but upon such a matter we wish to speak with great diffidence), that Lord Mansfield meant to do no more in this than, as in the other reforms which he meditated, to give to the suitors in his court the same measure of justice which they would obtain in a court of equity. In the cases which we have before examined, many expressions of his will have been observed, showing that such was the object which principally occupied his mind. From the judgment in the case of Goodtitle *v.* Morgan, it is clear that Mr. Justice Buller did not intend to destroy the protection of outstanding terms; that he only intended to give as good equity, without aspiring to give better equity, than those courts which in the English system claim the monopoly of that article.

And if this was all that Mr. Justice Buller intended, we may reasonably infer, from the general agreement of his opinions with those of his great master, that Lord Mansfield intended no more. Yet one of the highest equity authorities now living, speaks of him as if his object had been to alter at his pleasure the substantive law of England, instead of to bring about the uniform administration of that substantive law in all courts which are empowered to administer it at all.

The authority we speak of is Sir Edward Sugden. In his "Vendors and Purchasers," he says, "In the same case of Doe *v.* Pegge, Lord Mansfield observed, that 'trusts are a mode of conveyance peculiar to this country. In 'all other countries the person entitled has the right and possession in himself; 'but in England, estates are vested in trustees, on whose death it becomes diffi- 'cult to find out their representatives, and the owner cannot get a complete title. 'If it were necessary to take assignments of satisfied terms, terrible inconveni- 'ences would ensue from the representatives of the trustees not being to be 'found. Sir Edward Northey's clerk was trustee of near half of the great estates 'in the kingdom. On his death, it was not known who was his heir or repre- 'sentative; so that, where a trust-term is a mere matter of form, and the deeds 'mere muniments of another's estate, it shall not be set up against the real 'owner.' It must excite suprise, that Lord Mansfield should have imagined that any rule, whose tendency it was to subvert what was peculiar to this country could long subsist, while the peculiarity itself was allowed to exist. As well might you admit the rule which excludes the half-blood, and yet in the face of contrary evidence, presume that a brother of the half-blood proceeded from the same couple of ancestors as the person last seised. Is the whole system of trusts to be subverted, because sometimes an obscure trustee dies without relations? Or is the legal estate to subsist or not, according to the expense which a re-conveyance may occasion in any given case? This doctrine never could stand the test of an accurate investigation, and has long since been overruled. They, who have best understood the doctrines of equity, have powerfully deprecated their adoption by courts of law."—pp. 421-2.

Lord Mansfield's object was (as our object now is) to make the administration of English law consistent, by assimilating the irrational to the rational portion of it. Yet he is here studiously represented as intent upon altering the law itself, and assuming a dominion over it which no Chancellor ever arrogated to himself.

"As well," says Sir Edward Sugden, "might you admit the rule which excludes the half-blood, and yet, in the face of contrary evidence, presume that a brother of the half-blood proceeded from the same couple of ancestors as the person last seised."

We venture to say there is no similarity between the illustration and the thing illustrated. If the Chancellor would grant an injunction to prevent the more-distant relation of the whole blood from depriving the nearer relation of the half blood of the inheritance, or would decree a conveyance from the former to the latter, then, no doubt, Lord Mansfield would have lamented that he should be called upon in a court of law to make a decision against the half-blood, "merely

"merely for the sake of giving the Court of Chancery an opportunity to undo all again," and would perhaps have refused to do so. But no Chancellor ever did grant such an injunction, or decree such a conveyance.

With respect to the concluding sentence of our quotation from Sir Edward Sugden, "They who have best understood the doctrines of equity, have powerfully deprecated their adoption by courts of law," we presume to remark that, if by "powerfully" is meant "vehemently," and even "passionately," the assertion is undeniable; but if by powerfully is meant "with great force of argument," the assertion seems to us to be disproved by the numerous examples to which we have had occasion to refer in the course of this discussion.

That there is, however, some force of argument in these instances, we have not denied. In the instance now under consideration we have not denied that there is force in Lord Eldon's objection, that "at law the defendant is not heard, one witness proves the case, and however strongly the defendant may be inclined to deny it upon oath, there must be a recovery against him." But this objection does not lie against our scheme, for our new court, as we have already pointed out, is armed with more effectual powers of investigation than any existing court whether of law or equity.

As the effect of setting up an outstanding term in ejectment is to prevent a court of law from exercising jurisdiction over a subject over which it would otherwise have jurisdiction, it will be necessary to add to the draft Act which we have sent up to Government, a proviso, to the effect that whenever a suit in the nature of an action of ejectment is brought in the subordinate civil court, and an outstanding term is set up against equity and good conscience, the court shall give judgment according to equity and good conscience, as if such outstanding term had not been set up.

The only other case we shall adduce is that of Gladstone v. Hadwen. In that case it will be seen that four very eminent English judges, Lord Ellenborough, C. J.; Grose J.; Le Blanc J., and Bayley J., distinctly admit the value of the principles for which we are contending, and, feeling themselves in that case unfettered by technical rules, decided upon those principles.

We are almost ashamed to appeal to the authority of great names in support of a doctrine which seems so capable of standing upon its own merits, as that one set of courts should not be compelled to make work for another set by giving decisions which they know that other set will immediately render of no effect. But, as the truth of the doctrine is denied, and great names are cited against it, we have not thought ourselves justified in neglecting that kind of support.

"Lord Ellenborough, C. J., delivered the judgment of the Court. After stating the facts of the case, his Lordship said: The question is whether Sill & Co. had such a property in the bills of exchange, &c. as passed to their assignees. We are of opinion that they had not. In this case bills were obtained by the bankrupt (Sill) under a false pretence of giving the defendant an ample security, by delegating to him a right to hold coffee; whereas the coffee (which was the security pretended to be given) was the property of another person, over which Sill had no control or lien, or if he had, had before pledged it in favour of another creditor. The bills therefore appear to have been obtained by a criminal fraud. It has been argued, indeed, on behalf of the assignees, that the property vested in them under the commission, and in support of the argument it is supposed that, by analogy to cases in the criminal law, the property may be considered as having passed from the defendant to Sill & Co., but if it did, it was under such circumstances as a court of equity, on a bill filed, would have directed the property to be restored. If that be so, we think it would be useless for a court of law to permit that to be recovered which could not be detained one moment. In Scott v. Surman* Willes, C. J., says, 'My 'notion is (and that opinion is confirmed by many authorities cited by Mr. Durn- 'ford in a note), that assignees under a commission of bankrupt are not to be 'considered as general assignees of all the real and personal estate of which the 'bankrupt was seised and possessed, as heirs and executors are of the estate 'of their ancestors and testators; but that nothing vests in these assignees, even 'at law, but such real and personal estate of the bankrupt in which he had 'the equitable as well as legal interest, and which is to be applied to the pay- 'ment of the bankrupt's debts. And I found this opinion both on the reason 'and justice of the case, and likewise on the several statutes made concerning

* Willes, 402.

No. 1. On Civil Judicature in the Presidency Towns.

'bankrupts which relate to this point. As to the reason of the case, I rely 'upon the rule concerning circuity of action. For I think it would be absurd 'to say that any thing shall vest in the assignees, for no other purpose but in 'order that there may be a bill in equity brought against them, by which they 'will be obliged to refund and account; and, according to the case of Burdett *v.* 'Willett, will likewise have costs decreed against them; and so the effects of the 'bankrupt, which ought to be applied to the discharge of his debts, will be wasted 'to no purpose whatever.' On these principles, and on the authority of the cases cited, we are of opinion, that the assignees are not entitled to recover this property, which, if they were to recover, a court of equity would compel them to restore; but that the defendant is entitled to retain it."—1 M. and S. 525.

We shall conclude this report by quoting, from Reeves's History of the English Law, an anecdote of Sir Thomas More, which rests upon the excellent authority of Roper.

"Sir Thomas More being informed that the judges had expressed their disapprobation of the injunctions he had granted, caused a docket to be made of every injunction, and the cause of it, which he had granted while he was Chancellor; and inviting all the judges to dine with him in the Council Chamber at Westminster, he introduced the subject after dinner, when, upon full discussion of every one of them, the judges confessed that he could have acted no otherwise. He then offered, that if the judges of every court, to whom it more especially belonged, from their office, to reform the rigour of the law, would upon reasonable consideration, by their discretion, and as he thought, they were in conscience bound, mitigate and temper the rigour of the law, no more injunctions should be granted by him. To this they would make no engagement; upon which he told them, that as they themselves forced him of necessity to issue injunctions to relieve the people's injuries, they could no longer blame him."—Roper's Life of Sir Thomas More, 58, cit. Reeves, 4, 376.

Upon the perusal of this anecdote, the somewhat melancholy reflection naturally suggests itself to the mind, that if the great Chief Justice whose doctrines we have been endeavouring to rescue from unmerited obloquy, and to bring into practice under the sanction of legislative authority, had been contemporary with the great Chancellor, of whom the anecdote is related, and his fellow labourer in the formation of our judicial system, the boasted antagonism of law and equity, which is peculiar to it, would at this day have been altogether forgotten, or would have been remembered only as an antiquated barbarism, scarcely to be explained by the rudeness of the times in which it had its origin.

We submit this our Report for the consideration of your Honour in Council.

(signed) *C. H. Cameron.*
F. Millett.
D. Eliott.
H. Borradaile.

Indian Law Commission,
15 February 1844.

P. S.—While we were writing this Report, we received a minute from Sir Erskine Perry, and shortly after, a letter from Sir Henry Roper. And just as we had finished the Report, we received a joint letter from Sir Lawrence Peel, Sir John Peter Grant and Sir Henry Wilmot Seton, with a minute of Sir Lawrence Peel annexed.

We have printed these documents, all of which relate to the subject of our Report, in an Appendix; and we beg most earnestly to call the attention of the Supreme Government to them.

We have read them ourselves with extreme satisfaction.

We must not conceal, however, that there is an important difference between the judges of the Supreme Court at this Presidency and ourselves, on the subject of bringing the parties into the presence of the judge at the beginning of the suit, and settling the issues of law and fact, by means of an oral discussion between the parties, assisted by their legal advisers (when they have any), under the superintendence and control of the court.

With this important exception, there is, we believe, no substantial difference between the judges of the Calcutta Court and ourselves.

On the main subject of our Report, the union of equity jurisdiction with common-law jurisdiction, there is certainly no substantial difference, though the

the means by which we have proposed to attain our common object are not exactly the same.

On the logical principles of pleading, considered without reference to the question whether it should be oral or written, we agree with the judges of this Presidency and with Sir Henry Roper. But we are quite of Sir Erskine Perry's opinion as to the superiority of oral over written pleading.

It is scarcely necessary for us to remark, that we concur in what he has said upon the joint administration of law and equity.

We have mentioned in our Report, that we considered anxiously whether it would be better to treat the topic of the incorporation of equity jurisdiction with common-law jurisdiction abstractedly, or by a critical examination of the principal English cases which bear upon the subject, and that we decided upon the latter course.

Perhaps, for the sake of completeness, the topic ought to have been treated in both ways, and what was thus wanting to the completeness of our Report, has here been supplied by Sir Erskine Perry.

In like manner we considered (though we have not mentioned it in our Report) whether we should expose what appear to us to be the inherent defects of the English system, or confine ourselves to that copy of it which we are endeavouring to reform, and in which the unreasonable and extravagant features are exaggerated in consequence of the different jurisdictions known in the English system, being here conferred upon one and the same body of judges.

We adopted the former plan because we desired to go to the very root of the evil, and because in our Report upon a lex loci for British India, we had pointed out that, "in the modification of that system (the English system) which has been introduced into the Indian Presidencies, the anomalous and extravagant features are exaggerated beyond those of the parent institutions.

"That the Chancellor (we observed) should order a man not to apply to the courts of law for his legal rights; that the courts of law should be bound neither to know nor care whether the Chancellor has done so or not; that the Chancellor should not be permitted to hear vivâ voce evidence, but should be obliged to send his suitors to ask the courts of law to do it for him; that the courts of law in their turn should not be permitted to order witnesses to be examined by Commission, but should be obliged to send their suitors to ask the Chancellor to do it for them; these and other things of the same stamp do not look like the productions of political wisdom. We know, in fact, that the only explanation which can be given of them is not to be sought in jurisprudence, but in history.

"But the copy of these things (we added), which has been established in the Presidencies of India, bears still fewer marks of design."

We then went on to show what consequences might result, and do actually result from the system as it exists here, how loudly they call for a remedy, and how easy the remedy is.

We are extremely glad to find the proposition that, "in a court constituted like the Supreme Court, where the same judges preside on all sides of the court, much may be done in the simplification and improvement of a system of equity, which it has not hitherto been found practicable to effect in England," laid down and illustrated by Sir Lawrence Peel in a way which leaves nothing to be desired, and thus supplies what might be thought an omission in our present treatment of the subject.

AN ACT for establishing a Court of Subordinate Civil Jurisdiction in the City of Calcutta. (Revised Draft.)

Legis. Cons. 11 May 1844. No. 6.

N. B.—What is new is printed in Italics. Clauses of the former Draft omitted in this, are printed within brackets in the margin.

WHEREAS it is expedient that as soon as the necessary arrangements can be made, a College of Justice, consisting of the Judges of the Supreme Court at Fort William in Bengal, and of the Judges of the Sudder Dewanny Adawlut, should be erected, for the ultimate decision, as regards India, of appeals from all

No. 1.
On Civil Judicature in the Presidency Towns.

courts as well in the city of Calcutta as in the other parts of the Presidency of Bengal, and it is expedient that some new provision should be made for the trial of original suits within the local jurisdiction of the said Supreme Court:

And whereas Her Majesty's Supreme Court of Judicature at Fort William in Bengal is not authorized in civil actions at law to examine the parties to such actions, by reason whereof the truth of the case must sometimes be concealed from the said court, or can only become known to it by means of a bill in equity for a discovery, which is a proceeding unnecessarily dilatory and expensive, and much less efficacious for the manifestation of the truth of the case than examination and cross-examination vivâ voce in open court:

And whereas the procedure in civil actions in the said court is more dilatory and expensive than is necessary for the ends of justice:

[And whereas the jurisdiction of the court of requests for the recovery of small debts in and for the settlement of Fort William, is limited to suits brought for the recovery of such debts.]

And whereas it is expedient that the court which has jurisdiction over the subject-matters of actions at law should have power to make decrees upon such subject-matters, according to equity and good conscience following the law:

[And whereas it is inexpedient that the jurisdiction of the said court of requests should be extended.]

And whereas when a new court, free from the defects above-mentioned, has been established, it will be unnecessary to have any separate jurisdiction for the recovery of small debts;

It is hereby enacted, that from and after the day of the court of requests for the recovery of small debts in and for the settlement of Fort William in Bengal shall be abolished, and that on the said day a court for the exercise of original civil jurisdiction in the city of Calcutta shall be established, and shall be called the Subordinate Civil Court for the City of Calcutta.

II. And it is enacted, that the said Subordinate Civil Court shall consist of as many Commissioners as to the Governor of Bengal shall from time to time seem meet, and that each of the Commissioners sitting separately shall exercise all the jurisdiction and powers herein conferred upon the said Subordinate Civil Court: Provided always, that at least one of the said Commissioners shall be a barrister of not less than five years' standing.

III. And it is enacted, that one of the Commissioners, being a barrister of five years' standing, shall be the Chief Commissioner.

IV. And it is enacted, that each of the Commissioners shall receive such salary as to the Governor-general in Council shall seem meet, respect being had to the qualifications of each.

V. And it is enacted, that the jurisdiction of the said Subordinate Civil Court shall, both as regards the nature of the matter in dispute and the local situation thereof, extend to all matters for which a civil action at law may be brought in Her Majesty's Supreme Court of Judicature: *Provided that whenever a suit in the nature of an action of ejectment is brought in the said Subordinate Civil Court, and an outstanding term is set up against equity and good conscience, the court shall give judgment according to equity and good conscience, as if such outstanding term had not been set up.*

VI. *And it is enacted, that the jurisdiction of the said Subordinate Civil Court* shall, as regards the persons to be subject thereto, extend to all persons inhabiting or seeking a livelihood within the city of Calcutta; and that it shall be lawful for the Governor-general in Council from time to time to extend the local limits of the said jurisdiction, by proclamation to be issued for that purpose.

Former Section VI.

VII. And it is enacted, that the said Subordinate Civil Court shall in every case make such decrees as may be agreeable to equity and good conscience, following such law as the said Supreme Court would have administered, if the matter had been brought before it in an action at law.*

Former Section VII.

VIII. And whereas it is conducive to the good administration of justice, that the respectable part of the public should be associated therein: It is hereby enacted, that the Governor-general in Council may by proclamation order that every or any Commissioner of the said Subordinate Civil Court, shall, in all suits,

* We believe this to be a correct legal description of the decrees which the Supreme Court makes when sitting in equity.

No. 1.
On Civil Judicature in the Presidency Towns.

suits, or in any particular class of suits, and in all proceedings therein, or in any particular proceeding therein, sit with one or more jurors.

Former Section VIII.

IX. Provided always, and it is hereby enacted, that the verdict of such juror or jurors shall be only for the information of the conscience of the court.

Former Section IX.

X. And it is enacted, that the manner of commencing a suit in the said Subordinate Civil Court shall be as follows:

1. Each of the Commissioners of the said Subordinate Civil Court shall sit at stated hours for the purpose of receiving plaints.

2. Every plaintiff bringing a suit in the said Subordinate Civil Court shall, except as hereinafter excepted, appear in person before one of the Commissioners, and shall, orally or in writing, lay before such Commissioner the facts which constitute his claim.

3. The excepted cases in which the plaintiff shall be excused from appearing in person for the purpose of making the statement of facts mentioned in the last clause, are the same as the excepted cases specified in clause 15 of this section, but the plaintiff shall in all cases be permitted to make the statement of facts by an agent, provided he deposit in court the sum of rupees.

4. The sum so deposited shall be held as a security for any thing which may be, or which may become due to the defendant, or to the Government, in respect of the matter of the suit, or in respect of the mode of conducting it: if nothing shall so be or become due, the sum shall be repaid to the plaintiff.

5. If the plaintiff lays the facts before the Commissioner orally, the facts, whether stated of his own accord or elicited by examination, shall be reduced into form and written down by the Commissioner, or by an officer of the court under his direction, and shall constitute the plaint.

6. If the plaintiff lays the facts before the Commissioner in writing, the written statement shall be corrected in form by the Commissioner, or by an officer of the court under his direction, if it requires such correction, and in substance, if it in any respect disagrees with the statement of facts elicited by the examination of the plaintiff: subject to such correction the written statement shall constitute the plaint.

7. When the statement of facts constituting the plaint has been made, the Commissioner, if he is of opinion that the plaint does not contain any cause of action against the defendant, or that the defendant, or the matter of the suit, is not within the jurisdiction of the Subordinate Civil Court, shall make a decree accordingly.

8. If the Commissioner is of opinion that the plaint contains a cause of action against the defendant, and that the defendant and the matter of the suit are within the jurisdiction of the Subordinate Civil Court, he shall direct a writ of summons to be issued to the defendant.

9. The writ of summons shall contain a copy of the plaint, and an order to the defendant to appear before the court on a specified day, and to bring with him any documents which he may have in his possession, of which the plaintiff, with the consent of the Commissioner, demands inspection, or which he the defendant may think conducive to his defence, and a list of such witnesses as he supposes may be necessary for his defence.

10. If the plaintiff satisfies the Commissioner that the defendant is likely to withdraw himself from the jurisdiction of the Subordinate Civil Court, the Commissioner may direct a warrant of arrest against the defendant to be issued, together with the writ of summons.

11. If the defendant is arrested on the warrant, he shall be brought with all convenient speed before the Commissioner, who may discharge him from custody if he gives sufficient security for his appearance, or if he deposits a sum which the Commissioner considers under all the circumstances of the case sufficient, or if he satisfies the Commissioner that he does not intend to withdraw himself from the jurisdiction.

12. On every day on which any of the Commissioners shall sit for the purpose of receiving plaints, all the plaints received shall be laid before the chief Commissioner, who will distribute them among all the Commissioners, including himself.

13. In distributing the plaints the chief Commissioner will endeavour to give to all the Commissioners a share of business which will occupy an equal portion

No. 1. On Civil Judicature in the Presidency Towns.

of the time of each, and to give to each Commissioner those kinds of suits which he thinks each best qualified to decide.

14. Every plaintiff and defendant in the said Subordinate Civil Court shall appear, except as hereinafter excepted, in person, on the day specified in the writ of summons, and on every other day fixed for their appearance by the Commissioner.

15. A plantiff or defendant may be excused from appearing in person, if ill; if absent from Calcutta; if engaged in the public service; if exempted on account of rank by the regulations from appearing in the courts of the East India Company; if of advanced age; if of the female sex; if there is a co-plaintiff who appears in person; if there is a co-defendant, defending jointly; if not personally cognizant of the matter in dispute.

16. But in all these cases the Commissioner may refuse to hold the party excused from appearing in person, if he is not satisfied that the excuse is made in good faith, and that the matter of the excuse exists in a sufficient degree to justify him in admitting it.

17. Whenever an agent has been admitted in place of a party, such agent shall be permitted to do all the party might have done had he appeared, and shall be liable to be examined and cross-examined in the same manner.

18. And the Commissioner may, if he thinks fit, order that the party excused shall be examined in any way in which a witness may be examined.

19. When the Commissioner has refused to hold any party excused, he may order the agent who makes the excuse to summon the party on whose behalf it is made on a specified day, and adjourn the proceedings to that day, or he may make a decree against such party after examining his agent.

Former Section X.

XI. And it is hereby enacted, that as soon as the plaintiff and defendant are together before the Commissioner to whom the suit has been assigned, he shall proceed to take the pleadings, and settle the demurrers and issues of fact.

Former Section XI.

XII. And it is hereby enacted, that the manner of pleading shall be as follows:

1. The defendant, in answer to questions put by the Commissioner, shall confess or deny each of the material allegations contained in the plaint, and shall state any matter whereby he proposes to avoid the plaintiff's right to a decree arising out of such allegations contained in the plaint, as he has confessed.

2. The defendant may demur if he thinks the plaint states a case insufficient to entitle the plaintiff to a decree.

3. The defendant shall not be precluded from demurring to any matter in the plaint because he has pleaded to it, nor shall he be precluded from pleading to any matter in the plaint because he has demurred to it.

4. The defendant shall not be precluded from denying as many of the allegations in the plaint as he disbelieves.

5. The defendant shall not be preclude from avoiding the plaintiff's right to a decree arising out of any allegations in the plaint which the defendant has confessed, by the statement of as many matters as he believes to be true.

6. The Commissioner, in taking down the pleadings in writing, will take care that pleas shall be kept distinct from demurrers, and that no pleas shall be double.

7. The Commissioner will also take care that the pleadings shall not be argumentative, and shall state matters of fact only, and not evidence of matters of fact, and shall in other respects be such as to lead directly to distinct issues of law or fact, and that each issue shall have as much particularity as conveniently may be.

8. All the above rules of pleading shall be applied, as far as they are capable of such application, to the subsequent stages of the pleadings.

9. If after the demurrers and issues of fact have been settled, a decree can be properly made without further evidence than that of the parties, and without argument on the law or equity and good conscience of the case, the Commissioner will make his decree immediately.

10. The plaintiff and defendant may, through the medium of the Commissioner, cross-examine each other as to any matter affirmed or denied on either side in pleading.

11. If any demurrer results from the pleadings which the Commissioner thinks

thinks fit for argument, he will, after consultation with the parties, fix a day for the argument on it.

12. If any issue of facts results from the pleadings upon which it is necessary to hear evidence, the Commissioner will make a note of the names of the witnesses on both sides, and of the facts which each of them is expected to prove, and the documents which each of them is expected to produce, and will grant such subpœnas and subpœnas duces tecum as appear to him to be necessary for the purposes of justice, and will, after consultation with the parties, fix a day for the taking of evidence.

XIII. And it is hereby enacted, that if any Commissioner, not being a barrister, perceives, while he is receiving a plaint, or while he is taking the pleadings, or in any subsequent stage, that the suit is one which in his opinion ought not to proceed before a Commissioner who is not a barrister, he may hand over the suit to the Chief Commissioner, and direct the parties to go before the said Chief Commissioner, who shall proceed with the suit. Former Section XII.

XIV. And it is hereby enacted, that if it shall appear to the Commissioner at any stage of the suit, that justice cannot be done without the presence and concurrence of some person not a party to the suit, the Commissioner may summon such person to appear, and may make a decree which shall be binding upon such person, making such order regarding the costs as shall be agreeable to justice. Former Section XIII.

XV. And it is hereby enacted, that if in the course of a suit the parties shall disagree as to the balance of an account, the Commissioner may direct that the account be referred to an arbitrator nominated by the parties, or, in default of such nomination, to an officer of the court; and such arbitrator or officer will report the amount due on either side, subject to any exceptions, which the Commissioner will hear and decide. Former Section XIV.

XVI. And it is hereby enacted, that in all suits for the breach of a contract, if it shall be made to appear to the Commissioner that the contract may be performed without prejudice to the plaintiff, and that the defendant is able to perform it, the Commissioner may direct a specific performance of the contract, and enforce it by attachment. Former Section XV.

XVII. And it is hereby enacted, that the Commissioner in his decree shall order how much of the amount of any fees which may have been paid or be payable to any attorney or barrister, shall be reckoned as costs between party and party; and what other expenses incurred by the parties in prosecuting or defending the suit shall be reckoned as costs between party and party, and shall order in his decree which party shall pay costs to the other, and to what amount. Former Section XVI.

XVIII. Provided that no fees which may have been paid or be payable to any attorney or barrister shall be reckoned as costs between party and party, unless the Commissioner shall be satisfied that the assistance of such attorney or barrister was reasonably required. Former Section XVII.

XIX. And whereas it is expedient that inconsiderate litigation should be discouraged, and that those who sue or defend inconsiderately should contribute towards the expenses of the judicial establishment: It is hereby enacted, that in every suit in the said Subordinate Civil Court, the party or parties against whom the decree is made shall, if plaintiff or plaintiffs, pay a fee equal to of the value claimed in the plaint; and if defendant or defendants, a fee equal to of the value decreed. Former Section XVIII.

XX. Provided that the Commissioner may remit such fee if he shall be satisfied that the party or parties against whom the decree is made had reasonable ground for suing or defending. Former Section XIX.

XXI. And whereas it is expedient that parties to suits who prevaricate or wilfully make false statements should be punished: It is hereby enacted, that whenever the Commissioner is satisfied that any party to a suit in the said Subordinate Civil Court has, by himself or his agent, prevaricated or wilfully made a false statement, he may in his decree impose upon such party a fine not exceeding and in default of payment may order such party to be imprisoned for a period not exceeding Former Section XX.

Former Section XXI. XXII. And it is hereby enacted, that the amount of the fees and fines aforesaid shall be paid monthly into the treasury.

Former Section XXII. XXIII. And it is enacted, that the members of the College of Justice, or the majority of them, may from time to time make such rules for the regulation of the proceedings of the said Subordinate Civil Court as to them may seem meet, and as are not inconsistent with any thing in this Act contained; which rules shall be in force from their date, and shall continue in force unless they shall be disallowed by the Governor-general in Council within the space of from their date: provided that such rules shall be laid before the Governor-general in Council within the space of from their date.

Former Section XXIII. XXIV. And it is enacted, that the sheriff of Calcutta shall execute the process of the said Subordinate Civil Court, and shall, in respect to the execution of such process, be subject to the authority of the said Subordinate Civil Court, and shall for his trouble in executing such process receive from the public treasury such remuneration as to the Governor-general in Council shall seem meet.

Former Section XXIV. XXV. Provided that such remuneration shall be proportioned to the quantity of labour imposed upon the said sheriff in each month in the execution of the said process.

Former Section XXV. [Section XXVII.] XXVI. And it is enacted, that any suitor in the said Subordinate Civil Court who shall feel himself aggrieved by any decree thereof, except decrees in such suits as are otherwise provided for in section XXVIII. of this Act, may appeal from such decree to the College of Justice for the Presidencies of Bengal and Agra, established by the Act of the Council of India, No. , subject to such rules as are contained in that Act; or, subject to such rules, may move the said College of Justice for an order to the Subordinate Civil Court to reconsider its decree, or for an order to the said Subordinate Civil Court for a new trial of the facts on which its decree is founded.

Former Section XXVI. XXVII. And it is hereby enacted, that the said College of Justice shall not alter or reverse any decree of the said Subordinate Civil Court, nor grant an order to reconsider any decree of the said Subordinate Civil Court, nor grant an order for a new trial of the facts on which any decree of the said Subordinate Civil Court is founded, if the decree be consistent with the justice, conscience and equity of the case.

Former Section XXVII. [Section XXV.] [Section XXVI.] XXVIII. And it is hereby enacted, that any suitor in the said Subordinate Civil Court who shall feel himself aggrieved by any decree thereof which has been made by a Commissioner who is not a barrister, in a suit for goods sold and delivered, for money lent, for money due for the hire of any personal property, or for wages, in which the value in dispute shall not exceed the sum of 400 rupees, may appeal from such decree to the Chief Commissioner of the said Subordinate Civil Court, subject to the same rules, as nearly as may be, as the parties appealing to the College of Justice under section XXVI. and that the said Chief Commissioner shall in such cases deal with the decree as the said College is directed to deal with the decrees by section XXVII. of this Act.

Former Section XXVIII. XXIX. And whereas, although the several provisions hereinbefore contained for the constitution of the said Subordinate Civil Court are all copied, more or less exactly, from the provisions for the constitution of the several sorts of courts used in the administration of English law and equity, yet the combination of the said several provisions in one court is new and experimental; and it may happen that a people accustomed to the administration of justice by civil action at law in Her Majesty's Supreme Court, may feel aggrieved if they are deprived thereof; it is hereby declared and enacted, that nothing in this Act contained, shall be construed to affect the jurisdiction now exercised by the said Supreme Court in civil actions at law.

No. 1.
On Civil Judicature in the Presidency Towns.

APPENDIX.

MINUTE on the Supreme Court, Bombay, by Sir *Erskine Perry*, Puisne Justice.

Legis. Cons. 11 May 1844. No. 7.

1. The question upon which the judges have been requested to deliver their opinion by the Law Commissioners, in the 7th and 8th paras. of their letter dated 6th May 1843, may be stated thus: "What number of officers and what amount of salaries would be required to render the Supreme Court efficient in every department, if it were now to be established for the first time?" for the queries as to consolidation of offices, in para. 7, seem all incorporated in the above general inquiry.

2. If the examination of this subject is to be made with reference to the existing procedure of the court, it may be very easily disposed of; for, with the exception of one or two slight consolidations which may, I think, be effected, though with more nominal than real benefit, I conceive that very few beneficial alterations can be made. But as the inquiry touches upon a subject to which I have paid a good deal of attention, and as I feel a strong conviction that the working system of the court, with respect to its efficiency to the public, is by no means well adapted to its purpose; that it is grievously costly both to Government and to suitors; that the expenditure it occasions to the latter is ordinarily so great as to shut out from the court a large portion of bonâ fide claims; that this costliness of procedure is unattended with any corresponding advantage in bringing cases clearly and fully before the judge; and as I believe that these defects are nowise inherent in the system, but are easily removable by the Legislature, I venture to put before the Law Commission, at some length, the grounds on which I have adopted the above conclusions, and the remedies which I conceive are applicable. It will be found that the latter involve a complete answer to the question in the first paragraph.

3. It may be well to commence with a slight sketch of the legal wants of the suitors amenable to the Supreme Court at Bombay, and of the amount of business transacted in it. The population of the island of Bombay is said to consist of above 300,000 souls, and these, with the few hundred Europeans scattered over the Presidency, are all that the court has any jurisdiction over. But it is impossible to measure the amount of law business which may be calculated to arise in a population of this number, by any data which may be furnished from the statistics of a European community of equal extent. In Europe, the great bulk of the population are hewers of wood and drawers of water, day labourers living on their daily hire, and possessed of no funds on which civil controversies can arise; the commercial classes, on the other hand, are composed comparatively of very few individuals. In an Indian trading community, however, and especially in Bombay, it is difficult to conceive, till witnessed, the extent to which mercantile adventures and all kinds of speculation are diffused throughout the masses. Hence arises an infinitude of disputes, and with them an urgent necessity for a simple tribunal, which shall baffle dishonesty and adjust unavoidable controversies.

4. Notwithstanding, however, that these fertile elements of litigation in a Hindoo community are always in operation, the total amount of business in the Supreme Court is very small, as will be seen from the following Tables, which I have drawn up from the books of the court for the last three years.

No. 1.—Number of Causes tried on the Plea Side during the Years 1840, 1841, 1842.

	1840.	1841.	1842.
Defended Causes - - - - - -	27	23	42
Undefended ditto - - - - - -	7	9	13
TOTAL - - -	34	32	55

No. 2.—Number of Causes tried in the Small Cause Court (Debts under 360 Rupees) during the same Period.

	1840.	1841.	1842.
Defended Causes - - - - - -	116	98	87
Undefended ditto - - - - - -	527	555	560
TOTAL - - -	643	653	647

No. 1. On Civil Judicature in the Presidency Towns.

No. 3.—Number of Decrees made in Equity Suits during the same Period.

	1840.	1841.	1842.
Decrees on Argument - - - -	7	18	15
Ditto by Consent - - - -	6	- -	3
TOTAL - - -	13	18	18

5. The whole of the above business, with the exception of the small causes, which occupy from two to three hours every Thursday, is transacted in term time, and consumes about 52 days.*

6. It will be seen, therefore, that the amount of business transacted is exceedingly small, and although the number of suits in the mofussil courts is annually increasing, those in the Supreme Court appear to decline in a like ratio.† If this result were the consequence of an improved state of morality, or of a growing conviction that a speedy remedy could always be insured against injustice, it would be matter for sincere congratulation; but no such Utopian view can be entertained by any one who knows Bombay, or the Indian character generally.

7. The explanation therefore is to be sought elsewhere; and it is to be found, I conceive, in the extreme costliness of proceedings in the court, and in the uncertainty which waits upon decision from the complicated codes of practice in operation; both of these causes being in fact resolvable into one, viz. the defective procedure of the court.

8. The expenses of suing on the plea side of the court are given in the two following Tables, which I have framed from the taxing officer's books on bills taxed during the last three years.

No. 1.—Taxed Costs in Defended Causes.

	1840.	1841.	1842.
	Rs.	*Rs.*	*Rs.*
Plaintiff's Costs - - - - -	733	592	564
Defendant's ditto - - - - -	635	430	612
TOTAL - - - *Rs.*	1,368	1,022	1,176

No. 2.—Plaintiff's Taxed Costs in Undefended Causes.

	1840.	1841.	1842.
Ex parte - - - - - *Rs.*	494	451	400
Cognovits - - - - - *Rs.*	159	175	233

9. It thus appears that a defended cause in the Supreme Court costs the losing party about 1,200 rupees; that an undefended cause costs about 450 rupees, and that even in causes

* The sittings of each Judge throughout the year amount to about 114 days, thus—

	Days.
Four terms, of 19 days each, but excluding Sundays, Thursdays, alternate Mondays, and Hindoo holidays, amounting to about 13 each - - -	52
Four criminal sessions, of about eight days each, gives to each Judge - -	16
Two days in chambers per week for small causes, and for Insolvent Court, gives to each, say - - - - - - - - - - - - -	46
Total - - - -	114

and the total number of sitting days for the public by both Judges conjointly, is 176.

† The number of plaints filed on the common law side of the court have fallen off 20 per cent. during the last three years, as taken on an average of the preceding 10 years.

causes when the defendant confesses the claim, or gives a cognovit on the first opportunity he has to do so, the expenses amount to no less than 189 rupees.*

10. No one I think can look at these sums total without perceiving that they are enormously high, whether taken absolutely or in relation to the costs of litigation in England. For although law proceedings are very expensive there, and so much dreaded, that, as Lord Brougham stated in a debate during the present Session, a wise man sits down under any loss not exceeding 150 *l.* rather than bring his case into court, still the great bulk of the expenses in England consists in the expenses of conveying witnesses to distant courts, and of subsisting them till the trial is over; whereas in India no such item ever enters into a bill of costs, and I think I may safely say, that with the exception of briefs to counsel, nine-tenths of the items in the bills alluded to are referrible to mere useless procedure and needless fees.

11. I offer, as an illustration of the last remark, the bill of costs on suing in the Small Cause Court, which, as I have before observed, entertains a jurisdiction over claims not exceeding 350 rupees; and in order to obviate an objection that lies on the surface, I have no hesitation in stating, that so far as my experience goes, the immense expenditure which attends a trial in the full court, is not rewarded by bringing the case to be tried a whit more satisfactorily before the judges; and, for reasons which I will state hereafter, I believe that the materials for a correct judgment are more frequently supplied in the court of simpler procedure.

Average Costs of Trial on Defended Causes in the Small Cause Court.

	Rs.
Plaintiff's Costs - - - - - -	37
Defendant's ditto - - - - - -	13
TOTAL - - -	*Rs.* 50

Costs in Undefended Causes.

	Rs.
Ex parte Causes - - - - - -	41
Cognovits given - - - - - -	12

12. But if the expenses of suing on the common law side are thus high, they are trifling when compared with those on the equity side; and it is perhaps sufficient to say, that as the length of an equity suit when compared with a common law cause may be reckoned by years almost instead of months, so the costs of such suits may be counted in thousands instead of hundreds of rupees, as in the other case.

13. Having thus shown how costly litigation is, and having stated my opinion that it is in great part referrible to defective procedure, I will now proceed to show what that procedure is.

14. When Sir Elijah Impey had the task before him of framing a judicial establishment for Calcutta, as the object was to afford a tribunal for every question that might arise, whether civil or criminal, legal or equitable, of ecclesiastical or admiralty cognizance, the course which he adopted of attributing to the court to be established the different jurisdictions which he had seen parcelled out amongst different tribunals in England, as it was the most obvious, so possibly was the most unobjectionable which he could have pursued. But as the object to be attained in every different department of the court was precisely the same, namely, to bring forward the case in controversy in the clearest and least vexatious manner possible, it might have been imagined that a uniform code of practice directed to that end would have been devised, preserving all the good portions of the methods in operation in the different courts for discovery of the facts, and rejecting all the bad, so as to form one rational simple system, which would have been as satisfactory to the judge to administer, as to the public whom it would have benefited. When it is seen, on the other hand, that the whole of the contradictory complicated, expensive codes of practice of all the different courts in England have been imported bodily into the one Supreme Court of India; that on this side of the court facts may be only elicited by vivâ voce examination, that on another they cannot be brought before the court except in writing; that a party to the cause may not be examined in the case in one instance (at law), that he may be in the same case (in equity); that the decision of the court on the plea side will give a matter in dispute to one party, that the decision of a court of equity will give it to another (in case there are funds sufficient to keep up the litigation); and that all these varying results and perplexing operations are only to be got at by vast expense and vexation; with these facts before our eyes, I say, it is not, I think, an uncharitable conclusion to arrive at, that the temptation of forming a costly establishment, with the number of offices to which these different codes of practice were to afford fees, and of

* These Tables do not, in point of fact, represent the total average cost of litigation, because they are founded upon those bills only which are taxed (probably not more than half of the total number of bills), and the bills of larger amount are not brought into the Master's office at all for taxation, as the attornies are contented to make a small reduction to the party, and so to avoid the taxation. It is impossible, therefore, even for the judge, when he sets about the inquiry, to ascertain what the actual average cost of suing in his own court amounts to.

of which the founders were to have the patronage, must have completely kept out of view the interests of suitors and of the public.

15. To descend, however, a little more into detail, and show how the practice of the court works. In equity, as is well known, the plaintiff brings his case before the court in what is called a bill, which first of all states his grievance, and then proceeds to charge the defendant with any pretence for resisting the claim which his ingenuity may suggest (for plaintiffs are not limited to the truth of what they advance, and many equity draftsmen defend the introduction of falsehood into this part of the case), and it then proceeds to interrogate the defendant minutely on every species of knowledge which he may have of the matter under dispute. It may be easily conceived, that a document of this nature may run to any length, especially as the fees and costs of those who prepare it depend upon the number of words which can be heaped into it.

16. The first consequence of this mode of commencing the suit is, that the defendant who, fortunately, is bound to make his answer upon oath, requires a long period to answer each interrogatory in the bill, and as his object, even when a bonâ fide litigant, is to tell as little as possible that may injure himself, it usually happens, that when his answer is forthcoming, it evades to give the very information which the plaintiff has sought. Hence arises the necessity for further questioning on the part of the plaintiff, always, be it observed, in writing (amended bill); further fencing on the part of the defendant in answer, and so on backwards and forwards for many months or years, till so much time, trouble and money are expended, that even on the best administration of the system, as in England, it is in evidence* that nine cases out of ten are driven to a compromise.†

17. It follows from this procedure, that even when a party is honestly contesting a suit, from 14 to 18 months are consumed before the case is ripe to be brought before the court (an operation which, in most instances, is merely ancillary to putting the cause into a train for inquiry in the Master's office); but if the defendant is dishonest as well as adverse, there is scarcely any period which can be assigned as a limit to his power of harassing his opponent. An illustration of this may be afforded by the minutes of proceedings in the following case, which fell to my lot to dispose of finally last year, after a litigation of ten years and a half, and which I had to analyse carefully, in order to ascertain where the costs should fall.

Poonja Conja v. *Abdul Rahim Khan.*

18. In 1830 a horsedealer at Bombay died, having left a will, by which he constituted the defendant his executor, who entered upon the testator's property and collected his assets. The plaintiff having a claim against the testator of between 2,000 and 3,000 rupees, applied to the defendant for payment of his debt, and at all events for an account of the testator's assets; but the defendant refused both one and the other. The plaintiff was, therefore, forced to file his bill against the defendant in the Supreme Court for an account and for payment. Three months afterwards the defendant put in his answer, and admitting the plaintiff's claim, alleged that he had no assets of the testator, &c. &c.

This answer, which was clearly insufficient, in withholding important information, was excepted to; and, on argument, a further answer was ordered. On the second answer being put in with the information in question, a clue was given to the plaintiff of facts, by which he was enabled to draw an amended bill, putting further inquiries to the defendant "for the purpose of scraping his conscience," to quote the language of an old equity draftsman before the House of Lords; and at the end of more than a year from the commencement of the suit, an answer to the amended bill was put in. This answer enabled the plaintiff to scrape the defendant's conscience once more; and then with further answer, replication, &c. the cause became at issue in about 21 months from the commencement of suit.

Witnesses had then to be examined on each side, and in about two years more the cause was brought into court, when a decree was made referring it to the Master's office to take an account of the estate of the testator come to the hands of the executor, and of the amount due to the plaintiff.

A long litigation of nearly four years took place on these points, in the Master's office, when a report was presented altogether against the defendant. This report was excepted to by the defendant; but all his objections were overruled, and the cause, on further directions, was again referred to the Master for an additional inquiry.

Another long litigation in the Master's office again took place, of nearly three years, when another report was presented, alike adverse to the defendant, who again excepted to it, and again had all his objections overruled; and, finally, in June 1842, a decree on all points raised by the defendant was made against him, when a further controversy was raised by him as to his non-liability to costs, on the ground of being an executor.‡

19. The

* Report of Committee of the House of Lords on additional Vice Chancellors, 1841.

† That is to say, the party having a good case and undoubted claim, is induced to sacrifice a portion, in order to buy off the vexatious opposition of his opponent.

‡ Justinian lays down in one of his edicts, Cod., III. 1. De Judiciis. tit. XIII. that the blame of suits "pene immortales" lies with the Judge, "hoc etenim judicialis magis esse potestatis, nemo est qui ignoret; nam si ipsi noluerint, nullus tam audax invenitur, qui possit invito judice litem protelare." But the only power which a judge has, in the present English system, of repressing dishonest litigation, consists in the infliction of costs, which often, as in the case in the text, turns out mere "brutum fulmen."

19. The course of procedure in the above case may perhaps be more readily understood by the following list of dates:

Dec.	1830	-	Claim for payment.
4 Jan.	1832	-	Bill filed.
21 April	1832	-	Defendant's answer.
17 May	1832	-	A better answer.
10 Oct.	1832	-	Amended bill.
1 Feb.	1833	-	Defendant's answer.
30 May	1833	-	Amended bill.
20 Aug.	1833	-	Defendant's answer.
25 Sept.	1833	-	Replication.
5 Oct.	1833	-	Rejoinder.
14 Nov.	1835	-	Cause argued, and reference to Master decreed.
24 July	1839	-	Master's report made.
8 Aug.	1839	-	Exceptions by defendant.
23 Sept.	1839	-	Exceptions overruled, and further reference to Master decreed.
30 May	1842	-	Master's second report.
10 June	1842	-	Exceptions by defendant.
27 June	1842	-	Exceptions overruled.
30 June	1842	-	Final decree for plaintiff, and defendant cast in costs of suit.

20. If the case above cited had any extraordinary circumstances connected with it, it might be safely passed over as anomalous; but it is not so, it was a mere debtor and creditor controversy, and under a simple well-regulated system of procedure, it ought not to have lasted more than six months, If the plaintiff and defendant had appeared in court on the first day of the suit, it would have been evident that a decree referring to the Master must be made, and three years and a half of litigation would have been saved at once; and if the witnesses had been produced in court on any day or days after the first six months, all the facts on which the case subsequently turned might have been proved, and the same decree made, which it cost ten additional years, under the present practice, to obtain.

21. As I am discussing now merely the initiatory proceedings of a suit which tend to bring the case before the court, I will not touch upon the Master's office, where the cause in its further progress so constantly becomes engulphed; but I have already stated enough to make it apparent, that the ordinary procedure of a court of equity even between bonâ fide litigants, with its machinery of written pleadings and written evidence, necessarily involves an enormous expenditure both of time and money; and that when either of the parties is dishonest or vindictive, he has the power of harassing his opponent, and protracting the suit almost without bounds.

22. In reprobating equity practice, however, so strongly as I do, I by no means wish to have it supposed that I desire to supersede it by that of common law, or to make special pleading the channel for bringing controversies before the court. On the contrary, I think it wholly unsuited to the country. A creature of English lawyers, and arising out of the simple vivâ voce pleadings of suitors at the bar, it has shaped itself at home into perhaps not an ineligible mode of trying certain questions, but wholly with reference to the peculiarity of the tribunal before which it is employed. All the rules of special pleading which have been framed with reference to any definite object, have had in view the separation of the law from the facts, so as to enable the former to be disposed of by a tribunal sitting in one place, and the latter by a different tribunal sitting in another. The facts having to be tried by a jury, who are collected at some trouble and expense from different parts of the country, and who can only be held together for a limited period of time, it naturally became an object to reduce the issues to be tried to the narrowest possible point on which the parties could be content to fight the question. Juries also, being composed of men caught at random, and in whom the accomplishment of reading even was not considered a *sine quâ non*, it became further desirable not to complicate the record, or to bother their brains with more than a single question. Hence the various rules having these objects in view. But it is needless to observe on the total inapplicability of any one of them to a court which combines the provinces of judge and jury, to a court permanently fixed, which has no duties to call it away to private business at a distance, and which therefore may sit *de die in diem*, to dispose of every question that may fairly arise in the case, to a court finally composed of educated lawyers, who, it may be taken for granted, would not object to a party bringing forward his case in a double aspect, *i. e.* in two different forms, when such a course is legitimately founded on the facts. The application of special pleading to the trial of facts in this country, I believe, to be in its results as follows: that often the true point in dispute is not elicited at all; that often the law and the facts are so jumbled up together, that a hasty decision is called for from the judges on the former, and which, after being pronounced, it is too much to expect from the fallibility of human nature, can be easily made to appear wrong to the tribunal who pronounced it. Lastly, that when it does enable cases to be tried on the merits, it condemns the losing party to 1,200 rupees costs; and that even when he does not defend the action at all, it condemns him to 450.

23. I will dismiss this part of the subject, by observing, that an artificial system, like special pleading, when much cultivated by a learned profession, naturally grows up into a soil of science, to which the cultivators of it, both on the bench and at the bar, become attached in all its ramifications and subtleties, so that, in their anxiety to see the system logically carried out, they will be constantly found losing sight of and sacrificing the merits of the case to mere discussions on the forms.

24. The same remarks are almost equally applicable to pleadings in equity; but this natural tendency in the legal mind to aberrations from the main matter of judicial controversy, is peculiarly dangerous in India, when it is impossible that any member of the profession

No. 1.
On Civil Judicature in the Presidency Towns.

fession can attain the same technical dexterity in mere form work as is possessed by special practitioners in the particular calling at home. Every English lawyer in India has to learn the practice of at least one, and very often of three different courts, on his arrival in this country. The common lawyer knows nothing of equity practice, or of that of the spiritual courts. The equity lawyer knows nothing of the latter either, nor of the common law courts, civil or criminal, yet the common law and equity bars furnish exclusively both judges and advocates. It is dangerous, therefore, for such a bench and such a bar to allow themselves to be led into astute reasonings on what possibly may be the practice at home; and the desirableness of having a simple code of their own, so that all their faculties may be directed to the great principles of jurisprudence, becomes more than ever apparent.

25. The question then presents itself, as to what system can be suggested to replace the cumbrous one now existing in the Supreme Court, and which is here alleged to be so vexatious? It appears to me that there are two, both of which, in comparison with the existing system, stand highly recommended by principles of common sense, and by what is of more value in the eyes of many, common experience. The first is that adopted by the Supreme Court at Gibraltar, which, under the late charter of 1830, giving all judicial functions to the establishment there, and referring, like the Indian charter, to the existence of English law, have adopted one simple system of procedure on all sides of the court, ordering that on civil questions, whether legal or equitable, the proceedings shall be by petition, answer or demurrer, that the examination of all witnesses shall be vivâ voce, and that the law proceedings shall go on throughout the year, the terms including a space of eight months.

26. The second system capable of adoption has, by some, been termed the natural system. By it, the pleadings of the parties are, in the first instance, oral, and the task of reducing them to form belongs to the officer of the court. The parties themselves are present before the judge, and are amenable to examination at any stage of the inquiry. This system is, in some degree, the old practice of the common law courts in England, is mainly adopted in all courts erected for the poor who have no money to dispose of in fees, of many modern courts erected in the colonies, of which West Australia may be cited as an instance, and has been acted upon in the Small Cause Court at Bombay for upwards of forty years.

27. Between these two systems, the preference to be given to the latter is based on so many solid reasons, that I do not think they can stand in competition with one another for a moment.

28. The petition and answer system of Gibraltar has uniformity and simplicity to recommend it. Any one can draw a petition. No inveterate forms oppose themselves as obstacles to prevent the judge from finding his way to the facts in the case. Still, it must not be concealed, that this mode of procedure contains within itself all the inherent defects of special and equity pleading. The suitor's story is not told by himself, but by his legal adviser. Hence arises all that large expenditure which we have seen is created before the case is brought into court; an expenditure, in the great majority of cases (those where the defendant does not intend to contest the claim), altogether useless. Hence also arises the imperfect statement of the case, filtering, as it must do, through different channels and languages. Hence the delay and power of vexation which so temptingly offer themselves to defendants, by their ability to call in legal astuteness to assist them; and thus, without a perpetual watchfulness on the part of the judge, all the abuses might spring up which have been shown to occur in the existing systems.

29. On the other hand, none of these objections can be raised against oral pleadings, where the parties come into court in the first instance, and mutually state their case and defence under all the sanctions that publicity, mutual confrontation, and the presence of the judge can inspire.

30. This system was pursued by that very able judge, the late Sir Benjamin Malkin, at Singapore, as described by him in his letter on the Government Records (dated 16th September 1837), and has been already alluded to in some of the Reports of the Law Commission as desirable to introduce into the mofusil courts. The approximation towards it in the practice of the Small Cause Court at this Presidency, in the adoption of the two main features, examination of the parties, and references of all technical errors in the pleadings to the jeofail or error of the clerk, is so signal in reducing expenses, and bringing the facts of each case to light, that I have no hesitation in pronouncing it by far the most useful portion of the court; and, I believe I am corroborated in this view, by the opinions of the ablest judges who have sat here, as well as by the popularity with which it has always been regarded by the public.

31. As the elements of the suggested new procedure exist, therefore, at Bombay, nothing would be more easy than for the Legislative Council to bring all civil litigation within it. A few enactments, like the following, would, probably, be sufficient to launch the system:

1. All suits shall commence on the personal application of the party to the judge, on oath, if required, and a summons or capias shall thereupon issue.

2. On summons, &c. being served, the parties shall attend before the judge in open court, and if any matter shall appear to be in dispute, a day shall be fixed for the hearing, and the proceedings in the suit regulated.

3. All evidence shall be given vivâ voce, and the parties to the suit shall be examinable, on oath, at any stage of it; but, in certain cases, to be regulated by the judges, the presence of witnesses and parties may be dispensed with, and evidence may be received in a written form.

4. In

4. In every case the court shall decide on the principles of law or equity arising out of the facts, without reference to the form of suit.

5. All cases shall be decided on the merits, or adjourned till further facts can be procured to enable such decision.

32. I am unwilling to take up the time of the Law Commission, by extending this already long paper with details as to how this system could be made applicable to all the civil controversies which come before the Supreme Court, or by pointing out the rules which would have to be framed by the judges, so as to secure—

1. Authentic records of proceedings when necessary.
2. The safe conduct of causes which require length of time for investigation.
3. Application of the machinery of the court, so as to secure the interests of parties during the progress of the suit.
4. Arrangements by which the expense and dilatoriness of the Master's office may be avoided.

33. These important points require great length for discussion, and I only mention them here, to prevent the supposition that I have failed to consider them in recommending the above simple forms of procedure.

34. Having thus given my opinion as to what the practice of the court ought to be, I am now able, satisfactorily to myself, to answer the queries of the Law Commissioners. It will be seen that, according to the plan proposed, more work is thrown upon the judges than has hitherto fallen to their lot, and undoubtedly it enters into my scheme that one of the judges should sit at least four days a week throughout the year. But, as I have shown, that at present not one-third of the judge's time is occupied, and as I can safely say for myself, that a life of idleness in this country has no charms to recommend it, I do not anticipate any objections on this score.

35. These frequent judicial sittings, however, would dispense with a great portion of the work that is now done out of court by the Master, the prothonotary, the examiner and the clerk of the small causes. Whatever judicial business is done by these officers (and they all at present have some to perform) would be much better done, more cheaply done, and more satisfactorily done by the judges in open court; and what is done by these officers in mere routine business would be, for the most part, abrogated by the simple procedure proposed. I conceive therefore that these four different offices might be abolished, or rather coalesced into one.

36. The business of such an officer, who may be called a registrar, would chiefly consist in recording proceedings and in taxing the costs of parties. In court his business would be to attend all the sittings of the judge, to enter in a book the appearances of parties, and to fill up in printed forms their statements and answers, to swear witnesses, to take down evidence, when required, and to note the judgment of the court. Out of court his business would consist of little else than keeping his books in good order, in taxing the costs of parties and practitioners, and occasionally in hearing references from the court that might require privacy, or the leisure and quiet of a private room. I do not rate the attributes for such an office at any high standard; but I think a legal education would be a most desirable qualification, and that the rate of pay should range from 1,600 to 1,800 rupees a month. For such a salary, I conceive, that efficient services for the work required could be obtained.

37. But another standing officer connected with the courts in India is required, not so much for the sake of the court itself, as for the interests of the public which the Government have thought fit, by a very wise institution, to protect; I mean by the functions attributed to the ecclesiastical registrar of taking out administration to the estates of parties who may die in India without relations or friends.

38. The services required from this officer do not necessarily demand a legal education, and the holder of the office has frequently been a layman. But I think it very desirable, that both this office and the preceding one should be held by barristers, and that they should be held conjointly, like the masterships in the Court of Chancery and Queen's Bench, for the following reasons. The duties of an ecclesiastical registrar by no means take up the whole of his time, yet as he holds a very responsible post, demanding pecuniary security, it is expedient that the emoluments should be liberal, so as to secure trustworthiness. But as his time is not fully occupied, his post is one that may be well consolidated with some other. The registrar or master mentioned in para. 36, on the other hand, would have a greater portion of his time fully engaged, and as there is nothing disparate in the duties required from each officer, they might well be appointed as Masters or registrars generally, and arrange between themselves for the discharge of all the duties coming into the office.

39. This last suggestion seems to be corroborated by another view of the case. From the circumstances of this country where health so frequently fails, and change of air becomes necessary, it is certain that the holders of these two offices, however distinct they might be, would often be called upon to assist and act for one another mutually, but the disadvantages of having an acting officer in a post, who comes in merely as a volunteer and without even professing any knowledge of the duties, need not be enlarged upon. On the other hand, if the two offices are consolidated, a degree of responsibility is ensured from both, and also something of emulation to obtain credit in the profession and from the public for an able discharge of duties, which, as may be seen in the case of the Masters in Chancery, is by no means a motive to action to be undervalued.

40. The appointment of two such officers would enable the following offices to be abolished, now held by four gentlemen.

1. Master in Equity.
2. Prothonotary, and Equity and Admiralty Registrar, and Examiner in Insolvent Court.
3. Clerk of the Small Causes.
4. Ecclesiastical Registrar and Examiner in Equity.

41. Another officer is still required by the court to discharge the functions now performed by the clerk of the Crown, the clerk to the Insolvent Court, and the pauper's attorney, and as these offices are all filled by gentlemen in practice, I think that they may be consolidated into one office, which it might be made worth a practitioner's while to accept on giving up any extraneous practice. The work in each of the offices mentioned is appropriately attorney's work; for although the clerkship of the Crown has been usually filled by a barrister at Bombay, it is generally held by an attorney at home; and I think that an able man from that branch of the profession is better adapted to the office. The office might be termed the clerkship of the court, and I do not think that an efficient occupant of it could be ensured under 1,500 rupees per month.

42. The establishment of the court, therefore, according to the plan proposed, would stand thus:—

Two masters or registrars at 1,800 rupees each	3,600
Clerk of the court	1,500
	Rs. 5,100
Amounting per annum to	*Rs.* 61,200
To which has to be added for the sheriff's salary	4,200
TOTAL	*Rs.* 65,400

43. But as the present salaries payable by Government to the officers of the court only amount to 36,840 rupees, if this long paper is to end by a recommendation of further drains on the treasury in support of the court, I fear that it would meet with but little favour, and it is necessary for me to show that direct advantages would accrue to Government from its adoption, as well as the indirect ones which they would experience in the lessened charges to the public on law proceedings and litigation.

44. It will be seen that the fees payable to the officers of the court amount at present to 84,143 rupees, but this item is probably insignificant when compared with the costs paid by suitors to their attornies for useless procedure; the greater portion of these amounts will be saved by the plan suggested, and on a comparison with the costs of suing by a simple method, such as is used in the Small Cause Court, I conceive that the expenses of litigation will be reduced to one-tenth of the present amount.

45. But although this great benefit to suitors seems attainable, there seems no reason whatever why a portion of the expenses of the court should not be thrown upon them. In countries like England, when the taxation is ramified so as to reach every individual, the support of judicial establishments is the service rendered by Government as the equivalent *quid pro quo*. But, in Bombay, the mass of the population is scarcely taxed at all, a money-making, money-saving community, but, unconnected with land, they can scarcely allege that a single pie of theirs finds its way into the Government coffers. In all fairness, therefore, an amount may be levied from suitors as for the article law, as much as for any other article of which they might stand in need. But a fee of only 10 rupees each on the institution of a suit, would, on the number of causes entered last year, produce 14,400 rupees, and the fee might be raised to 50 rupees without its burden being sensibly felt.

46. In addition to such fund as a means of supporting the court, there would have to be added the commission now levied on the estates of deceased parties, and which finds its way into the pockets of the ecclesiastical registrar and private administrators. If the latter officer is to be paid by Government, such commission would of course be rightly payable to the Government treasury; and if all private commission as now allowed were abolished, I am convinced that the total amount now received by the registrar would accrue to the Government chest, even if the commission were reduced by one-half.

47. The funds applicable to the court would stand thus: therefore,

Salaries now payable	*Rs.* 36,840
Institution fee on suits	14,400
Commission on estates of deceased parties	18,957
	Rs. 70,197
Salaries proposed to be paid	65,400
Balance in favour of Goverment	*Rs.* 4,797

48. Whilst upon this subject, I would venture to suggest, that there is another fund which appears to me to be largely applicable to the maintenance of the court, I mean the unclaimed estates, to the amount of eight lacs of rupees, in the hands of the ecclesiastical registrar.

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A great portion of this fund is of long standing, and may with certainty be predicated as never likely to find a claimant. An Act of the Government, dedicating the interest on the fund to the support of that court which has created and preserved it, seems to be founded on the clearest principles of justice and expedience.

49. I cannot close this long paper without first of all apologizing for the great extent to which it has run, and, secondly, a frank disclosure of the feelings with which I have gone into the inquiry. I beg to assure the Commission then, that I have looked at the question proposed without any reference to the existing interests of the judges, or of the present officers of the court. The former are not indeed likely to be affected by any change, except so far as a little additional work may be thrown upon them, but the latter stand in a different position, I have therefore treated the question unreservedly, and entirely as *res integra*, but I have done so under the firm conviction, that in any change to be made, existing interests will be fully protected by the justice of the Government of the present day. On this point, and on such an inquiry, the duties of the judge are so well and so feelingly expressed by Lord Stowell, that I make no apology for transcribing the passage, which I have had in my mind throughout the whole discussion.

" I trust I need not profess to bring to this discussion at least the dispositions which ought to meet it, an anxiety to attend, on the one hand, to those considerations of public utility, in which the real honour of the court is so deeply involved (for it can have no honour independent of its subservience to public utility); and, on the other hand, to those sentiments of a liberal and even kind justice, which it is bound to feel towards those immediately employed in exercising its functions It would be a gross dishonesty to lose sight of the public utility from an undue partiality to individuals; but it would be a dishonesty not less base, nor less detestable in the motive, to sacrifice rights which the court is bound to protect, to any pursuit of an unjust, and, therefore, transient popularity."*

Bombay, 3 June 1843. (signed) *E. Perry.*

To the Honourable *C. H. Cameron*, Esq., and the Members of the Law Commission, &c. &c. &c.

Legis. Cons. 11 May 1844. No. 8.

Honourable Sirs, Bombay, 4 August 1843.

I REGRET that ill health and an unusual pressure of business have delayed my reply to your letter respecting the officers of the Supreme Court at Bombay, their fees and emoluments. Sir Erskine Perry, however, has already sent to you an abstract, briefly showing the average annual amount of emoluments received by each officer of the court. We think you should also be furnished with the returns from which that abstract was made out, and accordingly I have the honour to forward them, together with the " contrasted statement of fees" which we received from you, and which has been filled up by the officers of the court here in the manner you requested.

It will be observed, that there are many fees receivable at Calcutta which have no existence at Bombay. In some instances the fees charged at Bombay are higher than at Calcutta, but such fees appear in general to relate to services which, at Bombay, are seldom called for, and considering that the folio at Calcutta contains but 72 words, whilst at Bombay it contains 90 words, it appears to me that, on the whole, the fees at Bombay are much lower than those at Calcutta. In the few instances in which fees of officers of court for particular services are higher at Bombay than at Calcutta, the fees established at the former place may well be reduced. The fees of attornies at Bombay, it seems to me, are in some respects too high, and it is not improbable that Sir Erskine Perry and I may cause them to be reduced without delay.

I am not aware how any consolidation of offices can be effected. Giving a plurality of appointments to one individual can scarcely be called consolidation. Such a measure is sometimes expedient, in order to remunerate a party for devoting his services exclusively to offices in the court; and occasionally two or more appointments are given to one person, or after having been held conjointly, are again severed, with a view to suit the abilities of individuals, and otherwise to promote the public service. Perhaps, by giving the custody of the seal to the prothonotary or some other officer, a reduction in the sealer's fees might be attainable.

Sir Erskine Perry and I perfectly concur in the opinions expressed in his letter to you of the 29th of June, respecting the office of sheriff. I would add, however, that although the high sheriff in this country appears to me to be almost wholly useless, the services rendered by the petty sheriff are obviously indispensable. They could not be obtained from the description of person generally appointed to be high sheriff, but might well be discharged by a person of the same rank in life as that from which the deputy sheriff is usually selected, and such officer might be denominated the sheriff.

I would gladly agree with Sir Erskine Perry in all the particulars contained in the minute which accompanied his letter of the 29th of June, and am fully convinced that the expense of litigation is very great, and ought to be diminished. That expense, Sir Erskine Perry thinks, has occasioned a decrease of business in the Supreme Court, whilst the amount of business in the courts of the East India Company has increased. The supposed decrease of business in the Supreme Court is scarcely established by the schedule of cases heard and actions tried during the years 1840, 1841 and 1842, transmitted to you along with

* Case of Rendsberg, 6 Rob. Adm. Rep. 145.

No. 1.
On Civil Judicature in the Presidency Towns.

with the minute, for according to such schedule the amount of business in the last-mentioned year exceeded the amount of business in either of two preceding years; and it may be added, that during the two terms which have already occurred in the present year, 34 actions have been tried.

I cannot assent to the commonly received doctrine, that the natives of India are of a more litigious character than the rest of mankind, and I believe they are not more litigious than the Irish or Welsh. Where the administration of justice is comparatively certain and equable, rights will be resisted or withheld less frequently than under a more imperfect judicial system, and thus, without having recourse to the difference of expense attendant on litigation in the respective courts, I can well understand why there should be comparatively less business in the Supreme Court than in the courts of the East India Company, if such be indeed the case, and why there should be more litigation in India than in England. My own conviction is, that there is now nearly as much business in the Supreme Court at Bombay, as there has been at any time during the last ten years, and the opinion is upheld by the annexed Schedules, marked (A.) and (B.) which I have received from the prothonotary of the court.

From the records of the court and other documents it may be collected, that on the arrival of Sir Edward West in this country, and at the establishment of the Supreme Court at Bombay, an arrear of supposed wrongs and abuses was brought forward, and in his efforts to right the former and correct the latter, Sir Edward West raised, as was to be expected, a hornet's nest, and his own feelings and those of other judges in turn became excited. The court took cognizance of one or two matters respecting which it had no jurisdiction; but between suits in which the Government was interested, and suits amongst private individuals, the business of the court has never been so great as it was from the time when the court was first established up to the year 1825. And yet at no period was the cost of litigation so great as during that abundance of business. There were then only three or four barristers, and the number of attornies was likewise much too small. The bar thus had a monopoly; every member of it had employment, and I have been assured, and believe, that immediate fees, if not exacted, were necessarily given. At the same time, as the records of the court show, amendments, applications for time, insufficient answers, exceptions and other dilatory and expensive proceedings were multiplied, and the cost of litigation proportionally enhanced. At length a greater number of barristers obtained licenses to practise. There was a struggle for subsistence. The rate of fees fell considerably, and, to the advantage of clients, professional jealousy arose. Thus the expense of litigation was decreased, and yet the amount of business was diminished. This may be accounted for by considering that much of the original arrears may by that time have been disposed of; that the Insolvent Act came into force; that Sir John Grant had for a period shut up the court, and that it was reopened under peculiar circumstances; and latterly, the stagnation in the China trade, and in mercantile affairs in general, must have had considerable effect. Still, as already observed, I believe there is now nearly or quite as much business in the Supreme Court as there has been on an average during the last ten years; and disputes between petty traders and money lenders on a small scale, are, or ought to be, disposed of in that branch of the Supreme Court called the small cause court, and in the court of requests.

But the expense of proceedings in the Supreme Court, properly so called, is great, and should, as far as is practicable, be diminished. The cost of litigation in a great measure arises from its being for the interest of professional men to protract the pleadings, and to multiply incidental proceedings. I have often thought this evil might, in some degree, be remedied by entrusting the framing of pleadings to an officer of the court. Such is the practice, though, in my opinion, very imperfect, in the small cause court at Bombay, but the system might be considerably improved.

It might be advisable to give to parties the option of preparing their own pleadings, providing, perhaps, that no greater costs should thence accrue between party and party than if the pleadings had been framed by the officer, and that professional men should be paid, not in proportion to the seeming work and labour done, or the length and number of the pleadings, but by a fixed sum for each stage of the business. Special pleading, so far as its abuses are concerned, might be discarded, but retained so far as it is essential to conducting logically the altercations of the parties. It seems to me that thus far special pleading is as much suited to this as to any other country; that thus far the rules of pleading are merely conformable to the operations of the mind in the logical management of a dispute, and that, by following any effectual rules for that purpose, law and fact would be necessarily evolved and separated. Unless where the pleadings were very special and unusual, it should be unnecessary for the officer to do more than make a minute or entry in the terms of the marginal notes annexed to pleadings in the books now in the hands of the profession. At present, even on a trial for murder, the officer enters the plea and replication by the mere words "Non cul.," "Culprit." Such notes or minutes might afterwards be expanded into the formal pleading at full length if necessary, though it appears to me that such formality should seldom be required, and that even in making up the record, a brief statement of the declaration, bill or libel, concluding with a taliter processum fuit, and the judgment, should in most cases be sufficient.

I greatly doubt whether a judge should be permitted to interfere in the conduct of the suit before it becomes ripe for trial or hearing, otherwise or with any further or other intent than his interposition is at present allowed. Any more extensive interference on his part might tend to bias his mind in an early stage of the suit. Were he to preside at the oral wranglings of the parties, and to superintend the making entries or minutes accordingly by

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way of pleadings, his authoritative position would indeed invest him with coercive power; but through excess of zeal or infirmity of temper, when provoked by tricks and stratagems of suitors, he might have recourse to measures of a severe character, or admissions might in effect be extorted. Any impatience or indolence on his part might also produce much mischief. With respect to all such matters he might exercise due restraint over another, a subordinate officer, more easily than over himself; and a professional officer of the court, possessing ordinary skill and experience, could hardly fail to conduct the allegations, pleadings and other interlocutory proceedings in an efficient manner, especially as he would be subjected to superintendence and control,—important checks, from which the judge in this country would be comparatively or wholly free.

Measures for similar objects, adapted to the conduct of suits in equity, or respecting matters of ecclesiastical or admiralty jurisdiction, might be devised. The interrogating part of the bill might be omitted in the first instance; and if the defendant's answer were to be taken by an officer of the court (the defendant not availing himself of an option to put in his answer by the aid of solicitor and counsel, as under the present system), the officer might orally interrogate the defendant, consistently with the scope and spirit of the bill, and the replies being committed to writing would form the answer. Omissions or defects might be supplied by additions to or amendments of the bill, and by interrogatories, oral or otherwise.

It seems to me that witnesses in suits in equity should be examined orally in court, as in a trial at law. I am aware, however, that opinions of great weight are to the contrary.

Where, in an action at law, a point in equity arises upon the pleadings or evidence, without any surprise to either of the parties, it appears obvious that the court should be empowered to decide it at once.

The above are some of the speculative notions I have at different times entertained upon these subjects. I only enter upon or allude to them now, because these topics have been fully dwelt upon in the copious and able minute of Sir Erskine Perry, and were I wholly silent regarding them, it might appear that he and I differ more widely than is really the case. If it should be intended to effect any radical change in the mode of administering justice in the Supreme Courts in India, it may be expedient to consider such matters more fully, and to enter into details suitable to a new system. At present I am not aware that any such complete innovation is contemplated; and as some persons might consider sweeping alterations of the long established practice in the Supreme Courts equivalent to an abolition of such practice, and as amounting in spirit to a partial abolition of those courts, and to the establishment of new tribunals, it may be doubted whether the Legislative Council can be competent to effect such alterations under 3 & 4 Will. 4, c. 85, ss. 43 and 46, without the sanction of the authorities in England.

The result of such measures as Sir Erskine Perry advocates, and as I have alluded to in this letter, would be, I fear, the annihilation of the bar at each Presidency. At all events, counsel would seldom be employed in any case. Consequently, judges might become arbitrary, and by degrees, perhaps, professionally ignorant; and the due administration of justice would depend much more than even at present is the case in this country, upon the personal characters of those placed upon the bench.

I have, &c.
(signed) *H. Roper.*

To the Honourable *C. H. Cameron*, Honourable *F. Millett*, Honourable *D. Eliott*, and Honourable *H. Borradaile*, Esqrs., Law Commissioners.

Honourable Sirs,

We have the honour to state, in answer to your letter addressed to us, No. 13, of the 27th May 1843, that our opinions on the consolidation of offices in the Supreme Court at this Presidency, and the amount of salaries, are contained in the minute of the Chief Justice, which is annexed to this letter, and that his minute may be considered as embodying the opinions of the judges of this Presidency upon the changes which it would be desirable to introduce in the administration of justice here, which on the equity, ecclesiastical and admiralty sides admits, we think, of great improvement, and is also susceptible of improvement on the plea or common law side. The consideration of these subjects appeared to us to be so intimately connected with the proposed revision of the establishment of the courts, that we need offer no apology for entering upon it in our answer to the letter which you did us the honour to address us. We regret that the absence of the Chief Justice in the spring and summer of last year, and the subsequent pressure of business in the court, have delayed for so long a time our reply to your communication.

We have, &c.
(signed) *Laurence Peel.*
J. P. Grant.
H. W. Seton.

Court House,
13 February 1844.

No. 1.
On Civil Judicature in the Presidency Towns.

MINUTE of the Chief Justice.

THE amount of the emoluments of the principal officers of the court has been fixed with reference to the emoluments derived from practice at the bar here, which are much higher than at the other Presidencies. A barrister in the Supreme Court here, who has made any advance in his profession, naturally looks to the receipt of a large professional income at an early period. It has been thought of late years by the judges to be desirable, if not essential to the due administration of justice, to obtain in the two principal offices of the court as at present constituted, viz. those of Master in Equity and Registrar, the assistance of gentlemen of the bar in practice, and the salaries and emoluments of these higher officers were fixed in the scheme contained in the letter of the 14th September 1842, from the judges of the Supreme Court at this Presidency to the honourable the President of the Council of India in Council, on a liberal though a reduced scale, proportionate to the emoluments of practising barristers in the court. The emoluments of one of these officers, the registrar, are now wholly derived from his commission as administrator of intestate estates, for which, as it has been before noticed in the judges' letter, the court was not at any time responsible. These are not a burthen on the estate, and the charge on the parties interested is precisely the same as that which falls upon them under non-official administrations. It is, however, desirable, in my opinion, to lessen this charge in both classes of administrations. Upon the present plan of administering equity, the Master is in some mode a judge, and his office is one at once of great importance and of some dignity. If a vacancy occurred in my time whilst this office was on its present footing, I should be very desirous of selecting for it amongst the barristers in practice, the best qualified for such an office of those who would consent to take it. It was with this feeling that a salary so high as 4,000 Company's rupees per month was named in the scheme in conjunction with that office. But it is to be observed, that that was meant as the maximum which the judges should be empowered to offer, and that it would be their duty to propose a smaller salary, if the smaller salary would secure the services of a barrister in practice well qualified for the office. Upon reconsideration of this subject, I am disposed to think that a salary somewhat less than the one proposed in the scheme referred to would enable the court to secure the services of one so qualified. It is difficult to say beforehand what salary would suffice; but I think that a salary of 3,500 Company's rupees per month, or perhaps 3,000, would be sufficient to induce the relinquishment, not of the first practice, but of a moderate practice at the bar. In the scheme before referred to, the union of the taxing office with that of Master was proposed. The judges were not at that time apprized of the objections to this union which were entertained by the profession. The taxation of costs, if delayed by the Master's attention to the proper duties of the Master's office, which would frequently happen, would delay the issuing of execution, to the serious injury of the suitor; and, therefore, this particular change was considered by the judges as not desirable to be adopted. On the death of Mr. Vaughan, the late taxing officer, the judges, with a view to accelerate the abolition of the office of sworn clerk, would have urged Mr. O'Dowda to accept the offices vacant by Mr. Vaughan's death, but for the objection that the appointment of Mr. O'Dowda would have excluded the attornies wholly from the offices of the court. The judges were reluctant to establish such a precedent; and the Chief Justice waited upon the honourable the President of the Council for the purpose of laying before the Government the alteration in their views, and, in a personal communication with him, stated the course which the judges were desirous of pursuing, and informed him of the reasons by which they were influenced. The President of the Council suggested, that the gentleman to be appointed Mr. Vaughan's successor in the taxing office, should be informed that his office was to be held subject to any arrangements that might be effected for consolidating offices and reducing the establishment of the court, and that proposal was acquiesced in; and Mr. Ryan, who being properly qualified for the office, was selected for it amongst the attorneys of the court, in consequence of his loss of the office of sealer, which was abolished on Sir Edward Ryan's resignation of the office of Chief Justice, accepted the office on this distinct understanding. The reduction effected upon his appointment was to the extent of 9,000 Company's rupees per annum. This is the only instance in which any vacancy has occurred since the date of the letter of September 1842, and although the judges then effected a less reduction than they had hoped to do when they addressed that letter to the Government, it must not thence be inferred, that their desire to effect all practicable reductions of the cost of the establishment at the earliest period, has suffered any abatement. The judges have made no further effort to reduce the fees of court, in consequence of the letter referred to not having been replied to by the Government. They are not officially acquainted with the views of the Government relative to the proposal that the Government should permit the reduction of some part of the fees of court of which the Government are now the recipients.

Having given this answer to the general inquiries contained in the letter of the Law Commissioners concerning the further reductions, or steps to further reductions, effected or taken since the date of the letter of September 1842, I proceed to consider some of the proposals in that letter as to changes in the establishment of the court.

I am not sufficiently acquainted with the mode of transacting business in the office of the Accountant-general of the East India Company, to form any opinion whether inconvenience would result here from adopting the practice prevalent at Madras and Bombay. The amount of business in the Supreme Courts at those Presidencies, and the amount of monies in the hands of the accountant-general of those courts is, I believe, considerably less than

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in the Supreme Court of this Presidency. The double machinery now in use seems to be objectionable. The court must have an accountant: the Accountant-general of the Company, if he were the accountant of the court, would be subject to the general jurisdiction of the court over him as its officer. This might be deemed inconvenient. It has been suggested by the Master of our court, that the simplest course would be to retain the office of accountant on its present footing, and to make the Bank of Bengal the bank of the court, in like manner as the Bank of England is the bank of the Court of Chancery. Upon this subject, I expect to receive shortly a report of the Master, which shall be forwarded to you as soon as it reaches me. I think there is no necessity for retaining the offices both of sheriff and deputy sheriff, and that the sheriff's office should be filled by a permanent officer. That officer, though subject to the court, is not, strictly speaking, an officer of the court; and I know not to what office of the court the duties of the sheriff could be assigned. I see no reason why the office of sheriff should not be united to that of coroner. The present coroner is not a lawyer by profession, but he is not by any means uninformed on the subject of law; and I had lately submitted to me some observations of his on his own court, and its legal functions, which showed that he had mastered that branch of the law; and I have no doubt that a person of his intelligence and habits of study would readily qualify himself to discharge the duties of sheriff. In general, however, I think it would be preferable to select a lawyer for the office. If this arrangement took effect, I think that all process out of all courts within the local jurisdiction should be executed under one and the same officer, and issue from one and the same office. Fewer abuses would prevail, and it would be the cheapest mode of executing process. The charges of the office would, probably, be covered by a moderate poundage or fees.

It is necessary that I should preface my plan of reduction, as contained in this letter, by a few remarks on establishments of officers in courts, when confined to their proper functions, and on the union of judicial functions, or of functions the exercise of which has no necessary connection with a court, with the proper functions of such officers. The establishment needed for a court is that of officers having duties of a ministerial character to discharge in the various stages of a suit, as issuing the first process, seeing that it is in the legal form, and has the proper vouchers of its genuineness, and issues under the prescribed checks against abuse, recording its return, filing the proceedings as they go on, attending at the hearing or trial, taking the evidence when essential, entering in proper form the proceedings of the court, taking accounts and conducting inquiries of a protracted nature, which would otherwise unnecessarily occupy the time of the court; and, if taken in court, would materially enhance the expenses of a suit. When the forms of courts are simple, these duties require no great degree of professional learning. Where duties of a judicial or quasi judicial character are assigned to such officers, it is a defect in the system of administration of justice, which is generally owing to the necessity of some such delegation, in consequence of the pressure of business in courts. It seems to me that some of the matters usually referred to the Master might either be decided in court without a reference, or be decided by one of its own members sitting as a judge in chambers. It would make this minute of undue length, if I were now to go into details. I have, however, annexed to this minute some observations on the general improvements of the judicial system here which will serve to illustrate my plan. Next, as to the delegation to the officers of the court of duties not necessarily connected with a court. Of this kind in our court are, first, the official administration of the estates of intestates conferred by command of the Legislature of Great Britain on an officer of the court, the ecclesiastical registrar. Next, the receivership, which commonly falls on an officer of the court by the consent of the parties in a suit; but it is not of compulsory obligation on the parties to select an officer of the court for such purpose; and, lastly, the official trusteeship lately created by an Act of the Indian Legislature. All the duties of these various officers are those of ordinary administrators, ordinary receivers and ordinary trustees, and they have no necessary reference to any suit whatever. In my opinion, it would be the better course to retain the offices, but to disconnect the person discharging them from the court, and to transfer the appointment of him to the Government, and to confine the court establishment to the officers really necessary for the discharge of the ministerial duties before mentioned. I think it is of importance that no offices should exist as connected with the court which are of an administrative character, and have no necessary connection with proceedings in court. It creates false impressions, that officers are superintended in the discharge of such duties by the court, when they are not, and cannot, from the very nature of the case, be so superintended. Should breaches of trust or duty arise in the discharge of such administrative duties, censure would fall upon the court for that which it could not by any vigilance prevent; and, in short, in cases where the court could not judicially interfere, even if it had knowledge of errors committed in the discharge of such duties. I proceed now to state my views as to the establishment of the court, on the assumption that a uniform and simple form of procedure were adopted in the Supreme Court on its Plea, Ecclesiastical and Admiralty sides, and that the business on the Equity side were conducted upon the principles contained in this minute, and in the accompanying observations on the general reformation of the system of equity as here administered.

The office of Master could not be abolished, but its duties would be reduced in importance and difficulty. The Master would have leisure for other duties, and, I think, the best course to adopt would be to assign duties which would interfere as little as possible with his attendance on inquiries in his own office. This officer then would be Master, Accountant and Equity Registrar, executing also the duties now performed by the sworn clerk and ecclesiastical

No. 1.
On Civil Judicature in the Presidency Towns.

ecclesiastical and admiralty registrars, at a salary of 3,000 Company's rupees per month, or thereabouts.

The Prothonotary to be also Clerk of the Papers, Clerk of the Crown, Sealer and Keeper of Records - - - - - - - - 2,000 per month.

Taxing Officer, Chief Clerk and sole officer of Insolvent Court, and to be also Attorney for Paupers (this office should be filled always by an attorney) salary - - - - - Company's rupees 1,800 per month.

It is possible that some other union than that suggested here might be found more convenient; but, I think, that all the necessary duties of the court, on all its sides, and of the Insolvent Court, may be done by three principal officers, but not by less. The minor establishments of clerks to the judges, interpreters and swearing officers do not, I think, admit of reduction, except that, I think, the salaries of the judges' clerks might be reduced to 500 Company's rupees per month on future vacancies.

The duties of an official administrator are arduous, and it is an office of considerable pecuniary responsibility. Such an officer should either be a lawyer, or he should have ready access to professional advice; the administration of one estate, or of a few, may be conducted, possibly, without a resort to legal aid; but in a multitude of such administrations, a multitude of difficult and embarrassing questions will arise. The charge of the office is properly imposed on the estate, and the extent of it must, of course, be measured by the difficulties and responsibilities of the office. In many countries, the state, by some officer or officers, administers the estates of intestates. If it be deemed preferable that the official administration of assets, the receivership and the official trusteeship, should remain connected with the court, it would be necessary to have one more officer than those named; but as his emoluments would be wholly derived from commissions, the charge to the state would be the same as in the plan now proposed by me, but a reduction of commissions might take place to some extent. The result, in round numbers, of the reductions thus proposed, would be about 60,000 Company's rupees per annum in salaries; and by a lower commission, in the case of the administration of assets, the emoluments of that officer might be reduced, probably, to the extent of 20,000 Company's rupees per annum; but the benefit of this reduction would accrue to the parties whose estates are under the official administration.

The Judges, Sir Edward Ryan, Sir John Peter Grant and Sir Benjamin Malkin, fixed upon four officers in their plan of the final arrangement of the principal offices of the court, as the smallest number consistently with the efficiency of the court on its present system of judicature. By disannexing the official administration, trusteeship and receivership from the court, I think three principal officers would suffice, but not fewer under any system which I consider practicable. I have read Sir Erskine Perry's plan attentively, with a view to the rectification of my own views if erroneous. That plan proceeds upon the supposition, that the judges at Bombay have not more than one-third of their time occupied. This may be the case at Bombay, but here it is not the case. At Calcutta, the terms are four of 28 days each, the sittings four of 14 days each at least, the criminal sessions out of term are three of usually about 10 days each; it frequently happens here that the term business is not concluded within the term, and that the sittings are not sufficient for the despatch of causes set down; in that case the sittings are prolonged, and arguments are taken out of term, and it must be remembered, that there are sittings in chambers out of term throughout the year, twice a week; in addition, there is the work in chambers in preparing judgments, and considering questions that have occupied the attention of the court in term. I am as little favourable to a life of idleness any where as any one can be; the weak state of my health unfortunately sometimes disables me from attending to my business, but unless when attacked and disabled by illness, I give at present every portion of my time to the duties of my office.

The judges have frequently matters referred to them by the Government, who do them the honour to take their opinions on legislative changes, and the Law Commissioners communicate with them on such questions. The judges, as in duty bound, give their first attention to the business of the court, and it too frequently happens that they are forced to delay answering the communications made to them in consequence of the pressure of business. Any plan that assumes that the judges here have time to transact any portion of the duties performed by the officers of the court, except the judicial duties of the Master, which would not, when rightly managed and coming on in the course of the suit, take up much more of their time than is given to the suit at present, would fail in its operation. It is always to be lamented when a judge is forced to give his whole time to sitting in court. It is his duty to render himself as well qualified for the discharge of his duties as his powers will permit; it is his duty to perfect himself in knowledge as far as he can. The eminent men who are appointed to fill the highest judicial offices at home, frequently regret their want of time to keep up their reading. How much more necessity is there here for some continuation of studies, when it is considered that the judges here have to administer ecclesiastical, admiralty, equity and common law, and the law of the Mahomedans and Hindoos, a more extensive range of jurisdiction than falls to any one court in England, except the courts of appellate jurisdiction perhaps, and that they are not, and cannot be selected from the highest ranks in the profession. For my own part, I regret that I have not more time for reading; I am in the habit of reading all the reports of all the courts in England, but I am unable to keep pace with the publication of them. When the judges of this court were applied to, to take part in the decisions of the small cause court, they readily consented, and expressed

expressed no other fear than that they should not have time to despatch that portion of the business which it was desirable that a professional man should despatch. In the vacation, the time of one of the judges they thought might be constantly given, in term and sittings they thought it would rarely be practicable, and this is still my settled opinion.

To work efficiently the plan suggested by Sir Erskine Perry, a judge should be a man of the very highest powers, and possess a very rare union of good qualities. This is essential, but even this would not ensure its success. It gives the judge a degree of power which I think no judge ought to possess: even the power of saying whether a suit shall be instituted in the first instance or not, since he is to say "whether any matter appears to be in dispute;" and unless a judge were of the highest order of merit, the greatest errors would prevail in the administration of justice. The proposal, that "in every case the judge should decide on the principles of law or equity arising out of facts, without reference to the form of suit," however specious and captivating, would often be found to work great injustice. He must be quite certain that he has all the facts before him, otherwise he would administer equity blindly and often erroneously; facts not before him would probably show that his decision was partial and unjust. The party would come to meet one demand, and the decision would go against him because he had not prepared himself for a case not made known to him; but if to avoid these evils, the cause be adjourned for the purpose of trying in fact a new cause, little is gained, perhaps nothing, and the natural consequence of the adoption of the principle recommended, which has been often recommended, and as often upon consideration rejected, would be uncertainty in the law, and a multiplication of suits. Having practised at the bar here, and having had a large share of chamber practice, I know how often causes are kept out of court by the opinions of counsel, and it is often lost sight of in considering the advantage of an efficient bar in the administration of justice, that a great deal of litigation is checked by the opinions of counsel which would otherwise flow in upon a court. The consequence of mixing systems of law and equity, of allowing a suit to be decided on notions of natural justice or equity, and not upon the adopted system of municipal law, of delegating large and discretionary powers to judges, and of suffering a suit to be brought in one form, and with one aspect and object, and a decree to pass in it upon some other state of facts, or on the same facts, but to a different end, would be to introduce great uncertainty, and to increase litigation, and it would be particularly objectionable in a place like Calcutta, a commercial community, with ramified interests closely connected with the maritime and commercial interests of England, and between which it has hitherto been the policy and object of the Government to keep to as close a similarity of laws as the different state of circumstances admits of. The system proposed by Sir Erskine Perry would work a sudden and violent change. It does not admit of gradual introduction. Surely the preferable course, especially in a country like India, is to proceed by steps, retaining as far as it can be done established systems, purging them of their defects, and establishing on existing foundations a reasonable and cheap and effective system, which may be worked by men, such as they are, and which does not depend for its successful working on the union of qualities and powers which are rarely found united.

Sir Erskine Perry proposes, that in the first stage of a suit the party bringing it should appear before the judge. This could not be done in a multitude of cases where the parties bringing the suit were not within the local jurisdiction of the court, and in many where it could be done it would be most inconvenient. If it should be said they may appear by deputy, by agent or attorney, it should be remembered that the agent or attorney is often but imperfectly acquainted, at the institution of the suit, with the facts of it. He is often wholly unacquainted with the grounds of defence even in an after stage of the suit, and the principals, some inadvertently, and some by design, conceal material facts from the knowledge of the attorney or agent. It may be requisite to file a plaint against a party at a time when it may be impossible to obtain a full knowledge of the case, even of the plaintiff, still less of that of the parties sued. To require the appearance, therefore, of the plaintiff or his agent before the judge at this early stage of the cause for the purpose of settling the suit, would be in general ineffectual. If the appearance be merely to enable the judge, acting as officer of the court, to act the part of professional adviser, and to record the proceedings in a technical or legal form, for some such form there must be, though of a simple character, it must be remembered that the judge will then become mixed up with the party at an early stage of the suit; may mistake the statements of the party, or form an erroneous opinion of their legal bearing, he may content himself with such statement as the party gives, and take no steps to elicit a further statement; if he do more than this, he must sift and put searching questions, and either excite the jealousy and dislike of the suitor in that early stage, or inspire an equally unfortunate feeling, the feeling that the judge is his friend, and has formed a favourable opinion of his case, and thus raise the suspicion and jealousy of the opponent. The case will either be prejudged in the mind of the judge, or will be thought to be so. The system is to be applied not to simple demands of small amount; but to every case of complexity and difficulty which may be brought before a court. What judge can possibly be expected in such a case to form at once a tolerably correct judgment of the parties to be brought before the court, and of the mode most favourable to the suitor in prosecuting his case; this is the business of the professional adviser, and requires care and frequent conferences with the client, and is the subject of anxious consideration. Every failure will be imputed to the judge, and every suitor who brings a demand and fails, will turn upon his judge and say, "You misunderstood me; you did not frame my case as it should have been framed; my case was never properly brought before the tribunal, and it ought to be heard anew."

No. 1.
On Civil Judicature in the Presidency Towns.

anew." A timid judge will yield to the demand; and if he have courage to refuse, it will be said he has denied justice to cover his own blunders.

Where an officer is interposed between the judge and the party, these mischiefs to a great degree are averted. There is no system so good as that which enables a party who imagines he has a well founded claim, to prefer it without the previous sanction of a court, selecting his own professional adviser, in whom he has confidence, and to whom he may make disclosures he would be slow to make to an officer of the court or a judge, which enables him to select an advocate of integrity and skill; and no judgments are so likely to be correct as those which are formed upon reflection after the case has been fully argued.

In the administration of justice, freedom from every restraint not imposed by the law, is as necessary to the suitor and to his advisers as to the judge.

It is on this principle that privileges are allowed to the advocate which would otherwise be inadmissible.

It applies to the suitor not only in the choice of his advisers, but in the mode of prosecuting his suit.

Any interference of the court in these matters would destroy all confidence in it.

If the power of assigning an advocate to the party by the judge, not only without but against his request, would create suspicion, what would be the effect of assigning his attorney? of his becoming the attorney himself? of his calling for disclosures that the suitor was unwilling to make, and rejecting those upon which he relied?

Could it have any other effect than to throw upon the judge all the accumulated responsibilities of the professional character in all its grades, with all the invidiousness which is attached to each?

Ignorant parties in all countries, and in none more commonly than in this, are prone to attribute the failure of their suits to the treachery of their professional advisers.

Their council is in the opposite interest. Their attorney has received a bribe.

The complaints of the corruption and partiality of the arbitrators, from their being brought into more immediate contact with the parties, though judges of their own choosing, is proverbial.

Similar charges and suspicions would be heaped upon the judge, who would have nothing to oppose to them.

He would thus be deprived of all respect and authority beyond what the process of his court could command.

Such a system could only be tolerated in an infant community, and not in one like this, allied in all its interests with one in the highest state of civilization.

It is only by the conflict of independent views before an independent tribunal, that truth or justice can be elicited.

It is only by an intermediate agency between the court and the suitor that these benefits can be secured, and this agency cannot be complete unless it combines the exertions of those most competent to the investigation of facts, and those best qualified to enforce their legal consequences.

This has been the system adopted in most civilized countries, and is the only one which has been devised by the ingenuity of men, by which, in spite of natural inequalities, the powerful and the weak, the intelligent and the ignorant, the bold and the timid, are enabled to meet on equal terms, on the arena of justice.

That it is not equally successful in removing the inequalites of fortune, is an infirmity common to all human institutions, and no exemption from which can be presumed in favour of that which is opposed to it.

It is true, that every intermediate agency between the suitor and the court, is not only attended with expense, but with the introduction of a separate interest, not always in conformity with that of the suitor. But this is, to a certain extent, unavoidable, and is the necessary price by which alone any approach to freedom and equality can be secured to opposite litigants, and as such, wherever that object can be obtained, will be willingly paid. It does not appear that Sir Erskine Perry contemplates that the judge should, in fact, become the sole professional adviser of the suitor; but it appears that Sir Henry Roper anticipates that such would be the result at Bombay of the adoption of Sir Erskine Perry's plan, in consequence of the effect which Sir Henry Roper supposes that it would have there on the interests of the bar and attorneys. In my opinion, the adoption of Sir Erskine Perry's plan would not produce that consequence at this Presidency. I will, however, consider the probable working of the system under either supposition. I will take my examples from cases that have actually come before courts for decision. I will first select the case of Few v. Guppy, a case of no particular complexity. In that case, a vendor filed his bill in the Court of Chancery in England for a specific performance of a contract of sale of real estate. The vendee had been let into possession, and being in partnership with others, they had dealt with the property in the affairs of their partnership in a manner which it was said was injurious to the estate, and permanently diminished its saleable value; this was relied on by the plaintiff, not as the ground for compensation in case it should appear that no title to the premises could be made by the vendor, but as evidence of a waiver of good title, and the acceptance of the title such as it was. Now I will assume, that the plaintiff in such a case had no means of resort to professional aid, and that the judge alone could furnish him with the aid necessary to the institution of his suit in its most advantageous form. The plaintiff would have but an imperfect notion of his rights, but would resort, in the first instance, to the court. The judge, supposing him to be

be quick at ascertaining facts, and able to evolve them from the confused statement which would probably be made to him, with his faculties alive to guess at facts either studiously concealed or omitted from inadvertence, and above all, having leisure to conduct this investigation, would at length become acquainted with all or the most material of the facts of the plaintiff's case. Upon that, he would have to consider, first, whether a good title had been waived, if not, whether a good title could be made, a question often of very considerable difficulty; upon that he must either decide rapidly, and, perhaps, erroneously, or he must take time to consider it, but decide it he must, in his own mind, in that early stage of the cause, and ex parte, before the suit can be instituted. Let us suppose that he thinks a title can be made, and the suit proceeds on that supposition being prepared under his directions in the proper form. At the hearing the defendant being like the plaintiff, *inops consilii*, would not have the means of showing that the judge had mistaken the law, that he had overlooked this authority or misunderstood that, but still he might, if he were an intelligent person, bring certain facts to the judge's knowledge or to his attention, which had been either unknown or not sufficiently attended to before. The judge, whom we will suppose to be honest enough to correct his error, which I believe to be no violent supposition, would dismiss the suit prepared under his own advice, and in the mode in which he had prepared it. Would this be likely to inspire confidence in a court, or to give satisfaction to the public and the suitor? But suppose him to decide in favour of the plaintiff's claim, would not the defendant declare that his case was prejudged before it was heard; and that the plaintiff having first gained the ear of the judge, had irrecoverably biassed his mind against the defendant. Let us suppose, on the other hand, that the judge had thought that no case of title could be made. Would the plaintiff be contented? He would himself be unable to bring the question properly before the judge for want of legal knowledge; would he be confident of the infallibility of the judge? He might have bought, under legal advice whilst he had resort to it, that, as a good title, which the judge thought a bad one. Whatever his dissatisfaction he must acquiesce; there would be no appeal, and his suit would then be instituted as for a compensation, and in that suit other parties would have to be included, and its termination would be protracted by questions in which he would be unconcerned. But, above all, it would not be the species of redress at which he aimed, and to which he thought himself entitled. In like manner, as in the preceding instance, new facts or new views of them might, even under this aspect of the suit, bar his recovery or limit it. The decision would be subject to the same reflections as in the preceding instance. Again, in such an aspect of the suit, not only would the plaintiff's claim for compensation have to be considered with the deductions, but the claims of the parties liable to the plaintiff, to be adjusted inter se with all the various questions arising out of partnership transactions, and to a certain extent these must be determined on in an early stage of the suit. I will next consider the same case on the supposition, that the plaintiff had the means of access to professional aid in like manner as he has at present. His attorney would collect the facts from him, would elicit those not originally communicated, and would then lay his case before counsel, who would, after looking into the authorities, and anxiously considering the case on his own responsibility, advise a particular course of procedure. The resort would then be to the judge. Now, in such a case, what would be his functions? Is he to be the mere scribe or entering clerk, to put in a legal form what the counsel directs to be done? Is that likely to degrade the judge or not? But the barrister would insist on seeing that the suit was rightly instituted, and that his directions had been complied with, and his demand would be reasonable and just. The judge then would be subordinate to the barrister. But if the judge is to exercise a judgment he must then examine into the case, and review the opinion of counsel. Let us suppose that he differs from the barrister. Does it follow that the barrister is wrong? The putting on of judicial robes works no miracle; if the man were ignorant, or but little learned, or rash and precipitate in judgment, though learned, or of an over-subtle and refining habit of thought, these defects would not be lessened by the mere assumption of the character of judge. Many barristers have justly a higher professional character than some judges. The suitor would probably be told by his attorney that his suit was likely to be prejudiced by the fault of the judge. He would withdraw his suit, and he would practically be denied access to the tribunal of justice. But supposing the suit to proceed, though instituted in a mode not approved of by the suitor and his professional advisers, if success attends it, the party who succeeds is not satisfied. It is not the remedy he sought, and to which he considers himself entitled. On the other hand, the unsuccessful party considers his case prejudged. But what if the defendant convinces the judge that the plaintiff is not entitled to relief, or though entitled to some relief, is not entitled to the specific relief claimed? What then would be thought? In what a position would the judge be placed who had insisted on the suit being framed upon his view, and had resisted the remonstrances of the suitor and his professional advisers. What benefit is there to counterbalance all these serious evils? In the case now under consideration, the saving of a trifling part of the cost of a suit at the risk of increased litigation, and larger expense in its subsequent stages.

I will now select a case lately under the consideration of this court. On a settlement upon a marriage treaty, the mother of the intended husband, having a considerable real and personal estate, conveys, by one deed, to which the intended husband and wife are parties, the real estate to trustees in trust for herself until the marriage in fee; upon the marriage to herself for life, remainder to the husband for life, or until he should be adjudged insolvent, and after the death of the husband or that adjudication, to the wife for life, using words of limitation of a singular and ambiguous character; with other limitations over. The personalty was conveyed by another deed to the same trustees upon nearly similar trusts, but with

No. 1.
Of Civil Judicature in the Presidency Towns.

with a variation of language. Both these deeds were very unskilfully framed, and the meaning of the limitations to the wife was by no means clear. The marriage took effect. The husband was adjudged insolvent in the mother's life-time. A divorce *a mensâ et thoro* took place between husband and wife. The mother died. She left property to her son, who paid to the assignee under his insolvency the amount of all the debts, and claimed back the estate which the assignee had claimed. The wife insisted that the estates were her's under the shifting clauses. Her claim was resisted by the husband. She filed her bill. The questions that arose were, did the settler mean an insolvency after her own death, or an insolvency at any time? What effect had the cesser of the insolvency? Did the wife take any estate in possession immediately on the cesser, or was there a resulting use and trust to the settler, and if so, in whom was the present interest? If she took a present interest, was that subject to the *jus mariti*, and so the property of the assignees? and if so, had she a claim for a settlement, and to what amount? Now let us suppose the parties stripped of professional aid. Let us suppose the woman to become acquainted with her rights; she would necessarily be ignorant of the extent and actual state of them. The assignees and husband would scarcely be wiser. They all, or some one or more of them, resort to the judge. In such a case how hazardous would be the position of the parties. A judge unaided, would not, probably, on the mere view of the facts, unless he were singularly gifted with knowledge, diligence and patient investigation, discover on the first resort the points on which the decision of the cause should turn. It is too much to say that he might never discern them. It is the consequence of an argument at the bar sometimes to direct the attention of the court to points which may have escaped the attention even of counsel. A case clear on the first view of it, and in which the difficulties are concealed from view, would, in such a tribunal as that which Sir Erskine Perry recommends, be almost invariably decided on first impressions. A judge with no criticizing public, and few, save professional men, are competent critics of the decisions of a judge, would be in the greatest danger of falling into a careless and hasty decision of causes; and I should fear that few could be found whom it would be safe to entrust, especially in a country like India, under a system such as that which I am considering, with the discretionary and irresponsible powers with which it would entrust them.

PRESENT ESTABLISHMENT OF THE SUPREME COURT.

	Company's Rupees.
Master, Accountant-general and Examiner in Equity of the Supreme Court, and Accountant-general of the Insolvent Court, Mr. Grant, per annum	48,000
Prothonotary, Clerk of the Papers, Clerk of the Crown and Sealer, Mr. Holroyd	36,000
Taxing Officer, Chief Clerk of the Insolvent Court and Record Keeper, Mr. Ryan	19,200
Sworn Clerk and Receiver, Mr. O'Dowda	27,600
Examiner in the Insolvent Court, Common Assignee and Commissioner for taking affidavits in Gaol, Mr. O'Hanlon	9,000
Attorney for Paupers	4,800
Three Judges' Clerks, at 700 rs. each	25,200
1st Interpreter, Mr. Blaquiere	9,800
2d Interpreter, Mr. Smith	11,100
And 50 rs. monthly for Office Rent	600
Interpreter of Foreign European Languages and Tipstaff, Mr. Siret	2,160
Cryer, Mr. Hilder	3,600
Allowance for Chopdars	1,176
Two Interpreters to the Judges, at 3,600 each	7,200
Clerk to the Grand Jury, Mr. R. Swinhoe	800
Mouloyee	2,400
Pundits	4,800
Moollahs	528
Brahmins	528
Company's Rs.	2,14,492

OBSERVATIONS on the system of Procedure in the Supreme Court of Judicature.

THE expenses of a contested suit on the plea side of the Supreme Court of Judicature at this Presidency, properly conducted without needless outlay, and without errors in the progress of it, do not materially, if they at all exceed the average cost of the trial of a cause in the Superior Courts at Westminster, even where the witnesses are all resident in the vicinity of those courts. Occasionally, the costs of a suit here will be found to be very high, but when that occurs, it has been either owing to some blunder committed in the management of the cause in its early stages, or to the expense of executing process at a distance,

distance, or to the necessity of having commissions to examine witnesses, or to the expense of translations, or to the union of one or more of these causes of expense. These latter special causes of expense occur here to a greater extent and with more frequency than in England. Where they do not occur, and there is no extravagance incurred (which when it occurs is commonly by the direction of the parties) either in retaining an unnecessary number of counsel, or in having unnecessary conferences with them, or in paying them unnecessary heavy fees, the cost of a contested suit on the plea side will, on an average, be found, I believe, to be much about the same as that of an ordinary cause in the Superior Courts at Westminster. It occasionally happens, especially where natives are parties, and the amount in dispute is large, that there is extravagance in the conduct of the suit in the instances before enumerated, at the suggestion of the parties, on whom, of course, this unnecessary outlay falls, whatever be the result of the cause. The fees to counsel and the expense of employing an attorney, constitute the principal portion of the expense of a suit. I do not concur with Sir Erskine Perry in his objections to the system of special pleading. I do not think that that system is peculiarly appropriate to the mixed tribunal of judge and jury, and I think that the substance of the system of special pleading is well calculated for a court constituted like the Supreme Court of Judicature. It throws off the admitted facts, brings prominently forward the disputed facts, prevents any uncertainty in either side of the facts on which either side relies, and tends to produce speediness and certainty of decision and cheapness of trial. It is very much the mode in which any sensible man in any domestic forum would apply himself to the settlement of any dispute referred to him by the litigants, and has its origin in simple times, when a simple and natural mode of procedure was not unlikely to prevail. The technicalities are of after growth, and not many of them are necessary to be retained. The nicety of construction of the language of written pleadings is the cause of frequent embarrassment and expense, and may be remedied; and it seems to be practicable to retain all the substantial part of the system of special pleading with all its acknowledged advantages, and at the same time to discard the material inconveniences to which it has become subject. The most obvious defect, the expense of litigation on points foreign to the merits of the case, has its origin frequently in the nicety, not to say subtlety, of the construction of language. Without meaning the slightest reflection on the bar of this Presidency, to whose talents, learning and honourable conduct I am glad to bear an honest and a willing testimony, I must observe, that less attention is paid here than in England to precision of statement in pleadings; from this cause occasionally arises expense to the suitor, and a special demurrer is occasionally filed which has no tendency to advance the real interests of the client. The court, however, has, I hope, effectually remedied this evil by a late expression of its intention for the future with regard to the costs of special demurrers of this character. The expenses of an equity suit here, as in England, are very heavy; I know not that they are heavier here, but undoubtedly the expense is in many instances oppressive; they may be reduced in some degree, and I trust that we shall succeed in effecting soon some reduction of them; but it seems to me that the defect is mainly in the system, and that an equity suit aims at too much, and that it is scarcely possible to reduce within moderate limits of expense, or a moderate compass of time, the conduct and duration of a regular suit in equity under the present system, which suit aims at settling all the rights between all parties interested to any extent in the subject-matter concerning which the present litigation arises. In a court constituted like the Supreme Court, where the same judges preside on all the sides of the court, much may be done in the simplification and improvement of a system of equity which it has not hitherto been found practicable to effect in England. Here the same judges who decide all questions of common law, are also the judges in equity, and there can exist no desire to retain jurisdiction on one side of the court in preference to the other; whereas in England there is naturally a struggle for the retention of jurisdiction wherever it has once attached. It would be difficult to show that any peculiar mode of procedure is essential to the decision of any questions that may arise under any of the various heads of jurisdiction possessed by the Supreme Court, and it would be obviously a great improvement to introduce in them a uniform mode of procedure which might easily be made to adapt itself to the particular system of laws to which it was applied.

To illustrate this by an example. A man sues for a divorce from his wife on the ground of her adultery: and he sues the adulterer for damages. As far as the proof of the adultery is concerned, the evidence will probably be the same, and is often supported by the very same witnesses. On the plea side of the court, the witnesses are produced; give their evidence vivâ voce; the judges observe their manner, and are alive to any thing that may detract from the credit of their testimony. On the ecclesiastical side, before the very same judges, the whole course is changed; they do not see the witnesses; their evidence is pleaded; if objections are made, these objections are by act in court; and a less satisfactory and more expensive mode of procedure is substituted, merely because the court is sitting as a Court Christian, and not a common law court. A suit for adultery no doubt is a suit of a wider range than one for satisfaction in damages against the adulterer; but it seems to me that one and the same suit seeking the double remedy, a divorce against the wife, and damages against the adulterer, could in most instances be decided without inconvenience by a court like the one under consideration. Let us select another instance; a suit on the Admiralty side on a maritime contract, exempli gratiâ a suit for wages by mariners. The joinder of many plaintiffs having not technically a joint cause of action, but a common claim in respect of the same subject-matter against the same party or parties, would be in my opinion an improvement in the system of common law; the remedies *in rem*, as the detention

No. 1.
On Civil Judicature in the Presidency Towns.

tion of the ship, and its release on security, are easy of introduction into a suit at law; why, then, should any difference exist between the trial of this claim and a claim for wages by an ordinary servant? These instances are merely specimens, and are amongst the first that occur to me, and I use them merely as illustrations of my proposition, that a uniform course of procedure is perfectly consistent with the administration of different systems of law. In considering the question of reform in the system of equity, it is requisite to bear in mind that a considerable part of its jurisdiction arises from defects of the common law, as from imperfect powers in courts of law, or from narrow and technical rules of law frequently working injustice, and as the jurisdiction has sprung up from defect in the law, an amelioration of the law supplies a remedy, and justifies the extinction of the jurisdiction. In some few instances equitable remedies are engrafted by statutes in the common law; in some few instances the courts of law have made the rigour of the system of law bend to the system of equitable principles, and where this has been fully done, the jurisdiction of equity in such instances has rarely been resorted to subsequently. In some few instances, powers once exercised by courts of law have gone out of use. In all cases which fall under any of these heads, the remedy is plain, correct the law; enlarge the powers of the court on its plea or law side, the jurisdiction of the equity side becomes then unnecessary, and may be abolished. For example. A chose in action is not assignable at law, except in special cases; make it assignable, and give the assignee his remedy at law. The like observation applies to all possibilities and contingent interests; and sales of expectancies and reversions should be permitted without the interference of the court of equity, save in cases of actual fraud. A court of equity on equitable grounds restrains the parties from proceeding to a trial, or from taking out execution, or stays waste to prevent irreparable damage, and so forth. In none of those instances is there really any necessity for a resort to the court on its equity side in the nature of the thing. That the judges are not conversant with equity cannot be predicated, for they are the equity judges on the equity side of the court. A court of law anciently restrained waste; and an account, now disused in courts of law, may be rendered as complete a remedy there as in equity, with proper machinery.

By an alteration, effected on these principles, the resort of suitors to the equity side of the court would become much less frequent than it is at present; but whatever scope is allowed to the operation of these principles, a large portion of matters will still remain subject to equitable jurisdiction, and therefore it is necessary to consider how far the practice may be simplified, so as to relieve it from its principal burthens.

The jurisdiction in equity may be divided into—

1st. Purely equitable.
2dly. Concurrent.
3dly. Legal, but administered in equity.

With respect to the first, where the principles of equity are ascertained, and have in effect become a species of law, there is no reason why they should be administered by a separate tribunal, and why they should not be transferred to a court of law. Then the anomaly of the same rights being enforced by one tribunal, and defeated by another, would be got rid of, and courts of equity would be relieved from a variety of matters, in which they in effect exercise a legal jurisdiction under another name.

2dly. Where the jurisdiction is concurrent, each would in some cases admit of improvement by a mutual transfer of their powers, so as to render each independent of the other. This has been done in a few instances, as for instance, by enabling a court of law to issue commissions to examine witnesses, and to entertain questions of interpleader. Another mode in which it might be done, would be by enabling courts of equity to try issues; and at law to give a discovery by directing the examination of the parties. If, however, evidence were to be received viva voce in all cases on all sides of the court, this larger improvement would render it unnecessary to introduce the partial amendment before referred to.

3dly. Where the jurisdiction is legal, but administered in equity, as is the case with account, administration of assets, &c. it is of little consequence whether it be retained or not, as the machinery must be retained, whatever be its denomination; this, however, might admit of some simplification. To pursue the above subjects more in detail under different heads of jurisdiction in equity.

Accident and Mistake.

Relief on these grounds might be given at law, as for instance, an action on a lost bill of exchange, giving indemnity. This principle has been applied by admitting an action on a lost bond or deed with an excuse for profert. The relief against forfeitures and penalties might also be extended, as in the case of arrears of rent.

Mistakes in instruments might be corrected at law as in equity.

Specific Performance.

This might, to a considerable extent, be effected at law. The principle is applied when a verdict for damages is given, reducible upon performance.

There seems to be no objection upon principle to the prosecution of an action at law upon an agreement for the purchase of real estate, claiming in the alternative a performance of the agreement or damages, and to a conditional assessment of damages with an option in the plaintiff to claim the specific performance. If a question arise as to title, it seems to me

that

No. 1. On Civil Judicature in the Presidency Towns.

that the court should itself determine the question of title without any reference to the Master, unless the investigation were one of a protracted character. The examination of parties at law would be the substitute for a discovery in aid of a suit at law, where a ground was laid for a discovery on summary application to the law court.

Trusts

Should remain subject to the jurisdiction in equity. A summary process would, in most instances, suffice, whether the object were simply an account, or the construction of an instrument.

Dower and Partition.

The jurisdiction in equity being grounded on imperfection of powers in courts of law, there seems to be no ground for its retention. If retained, however, the process should be summary, as it is in partition in the Supreme Court by one of its rules.

Account.

Unless the question involved the execution of a trust, there is no reason why resort should be had to equity, the machinery on any side of the court being capable of application on all its sides.

Infants and Lunatics.

The jurisdiction should be summary, and in the latter case without the expense of a commission, and the court itself summoning before it all necessary witnesses.

Summary Jurisdiction.

The institution of a regular suit is the great expense in equity as in the ecclesiastical courts. I think that a summary procedure might in most cases be instituted, as it has in some intances in the ecclesiastical and admiralty courts. It is already exercised in bankruptcy without inconvenience; it is given by several statutes, as in the case of infant trustees. By substituting summary proceeding for full proceeding and a regular suit, by the substitution of vivâ voce evidence for written testimony, by rendering a cross bill unnecessary by the examination of parties, now resorted to in some instances after decree, by adopting with extensions the practice lately introduced at law of calling for admissions, and by other modes of simplification, the burthensome character of a suit in equity might be destroyed, and the resort to that branch of jurisdiction, when necessary, would not be impeded, if not prevented altogether by a dread of the expense and protracted litigation to which an equity suit now gives rise. I will conclude these observations by observing that for a considerable part, and I doubt not the most valuable part of those relating to equity, I am indebted to Sir Henry Seton, between whose views as to the reform of the system of equity and my own, I am glad to observe no material difference.

13 February 1844. (signed) *Lawrence Peel.*

From *T. R. Davidson*, Esq. Officiating Secretary to the Government of India, to Secretaries to the Governments of Bengal (No. 29); Fort St. George (No. 44); and Bombay (No. 45); dated 22 June 1844.

Legis. Cons. 22 June 1844. No. 9.

Sir,

I am directed by the Governor-general in Council to forward to you the accompanying printed copies of a Report by the Indian Law Commissioners, dated the 15th February last, with its enclosures, on the Civil Judicature in the Presidency towns, and to request that, with permission of the ———— you will distribute the same among the authorities of the ———— Presidency, and forward, for the consideration of the Supreme Government, the opinions they may form, in particular those of the Judges of the Supreme Court, with the sentiments of his ———— in Council on the several recommendations of the Law Commissioners.

Home Department. Legislative.

I have, &c.

(signed) *T. R. Davidson,*
Officiating Secretary to the Government of India.

Fort William,
22 June 1844.

No. 1.
On Civil Judicature in the Presidency Towns.

(No 15.)

From the Indian Law Commissioners to the Right Honourable the Governor-general of India in Council; dated 25 July 1844.

Right honourable Sir,

Legis. Cons. 3 August 1844. No. 1.

With reference to our Report dated the 15th February 1844, upon Judicature in the Presidency Towns, and to the papers printed in the Appendix thereto, we have the honour to submit to you a Supplement to the Appendix, containing a minute laid before the Governor in Council of Bombay, by Sir Erskine Perry, Puisne Justice of the Supreme Court at that Presidency. As this paper is supplementary to the minute of Sir Erskine Perry, contained in the Appendix, and refers to the other papers in the Appendix in which that minute is discussed, and ably vindicates the system of judicial procedure recommended in our Report, we have thought it proper to print it in its present form, to complete the subject.

We have, &c.

(signed) *C. H. Cameron.*
D. Eliott.

Indian Law Commission,
25 July 1844.

SUPPLEMENT TO APPENDIX.

From Sir *Erskine Perry*, Puisne Justice of the Supreme Court, Bombay, to the Honourable the Governor in Council, &c. &c. &c.; dated Malcompait, 22 May 1844.

Honourable Sir,

I have the honour to call your attention to a late Report of the Law Commission, dated 15 February 1844, and to the discussion contained in the Appendix thereto, with the view of raising the question as to the expediency of establishing in Bombay a civil court on the principles indicated by the Law Commissioners.

2. It has been long felt and acknowledged by those who have paid most attention to the interests of British India, that one of the most valuable boons which it lies within the competence of Government to confer upon this vast country, consists in the establishment of a rational intelligible system of law, founded upon the fixed principles which enter more or less distinctly into every scheme of jurisprudence, and adapted to the habits and customs of the different classes of the community. Such a system to be administered on simple rules of procedure, and with all the sanctions which experience has pointed out as appropriate for securing judicial purity and aptitude, may be safely affirmed to be the most potent instrument which a conquering nation possesses for securing the confidence and preserving the allegiance of its conquered subjects.

3. Nevertheless exceedingly little has been done hitherto towards this desirable end; and in the two systems of law dispensed by the British in India, namely, by the Supreme Courts at the Presidencies, and by the Company's courts in the mofussil, there appear to be defects of such magnitude and importance, as to render either of them incapable of rendering that service to the community which is predicable of a rational well-constructed code.

4. The chief defect in the mofussil system appears to be, the absence of any established law sources, from which a clear rule can be deduced on any occasion that may arise. Except in the simple cases that are provided for by the Regulations, I cannot well conceive what course a mofussil judge adopts towards ascertaining the rule to be applied in any doubtful question. The few treatises which are translated into English will carry a law student but a very little way, and the published reports would appear to show that on every intricate point a mass of conflicting opinions is sure to be elicited from the Shastries. The Regulations express that, in the cases not there provided for, the decision is to be according to equity and good conscience alone.

5. But what is equity when used in this vague sense? It is the notion of right, of just, of propriety, which the judge, upon hearing the facts, adopts. It is a notion that, in the absence of any standard to refer it to or authority to correct it by, must necessarily vary with every judge, just as much as the length of their respective feet, to avail myself of the illustration of Selden. An educated Englishman may study the principles of jurisprudence either in an English law library, or in the literature of the Roman and Rome-derived systems, and undoubtedly a well-grounded knowledge in one or other of the only two systems that have prevailed in civilized Europe, may render the dispensation of law according to equity and good conscience an easier task; but still, as neither of these systems is of authority in the mofussil, they neither of them contain the norma or standard to which a mutual reference can be made.

6. For these reasons, and from the received opinion that prevails (owing very much, I believe, to the high authority from whom it emanated, Sir Thomas Munro), that eminent judicial

judicial qualities are much less needed from civil servants than zeal and ability in revenue matters, the legal system of the mofussil would seem to contain no germs from which a rational scientific corpus of law can be eliminated.

7. English law, on the other hand, presents an immense arsenal from which the legal inquirer can furnish himself with weapons. The careful record of cases upon every doubtful point, which some hundreds of years have accumulated, affords a "precedent on the file," or a rule to be deduced by analogy, in every case that arises; and the judge in delivering such a rule is seen, not to be following the dictates or caprices of an arbitrary will, but to be administering the language of the law as ordained by a superior authority. The mode in which this system is applied however, the delay, vexation and expense which have to be encountered before the decision of the court is obtainable, the technicalities which so often interpose to prevent that decision proceeding on the merits of the case, and the impossibility of making the rationale of such results (if rationale there be) intelligible to a nation of foreigners, all these combined make the English system of law in its present form, even less capable than the mofussil system of rendering those services to the community which, as above indicated, a sound corpus juris is capable of affording.

8. But it should be observed, that, between the defects noted in the Supreme Court and mofussil systems, there is an essential or necessary distinction; for, whereas in the latter the defect indicated is inherent, and not capable of remedy, except by the institution of a body of positive law, in the former the evil is merely accidental, and is capable of extirpation without injury to the substantial fabric. In other words, the mofussil courts may be said to dispense a system of law deficient in substantive enactments, and as to which neither judge nor suitor knows where to seek for an authoritative exposition of the rule; but the law, such as it is, is dispensed for the most part in a simple and expeditious manner. The Supreme Courts, on the other hand, are the organs of a complete body of jurisprudence, and their decisions proceed on vouchable and vouched authorities, which are open to all to consult; but the mode of administering the law is as costly, complicated and dilatory, as the natural system of the mofussil is otherwise.

9. Now it is obvious, that if these evils of procedure were obviated, and simple rules of practice adopted in the Supreme Court, a complete system of jurisprudence would be at work approaching to the character of a science, containing full information and discussions as to every title of the law, the principles of which would be easily intelligible to the world at large, and which would be capable of easy extension beyond the limits of the Presidency, whenever the Legislature should think fit to add to the body of actual law prevailing in the mofussil.

10. Such seems to be the view entertained by the Law Commission, as evinced in their late and in preceding Reports. The simplification of English procedure, therefore, is the problem to which all those should address themselves who seek to benefit the Indian community in their legal relations and exigencies.

11. The Law Commission have addressed themselves to this subject, by treating of the fundamental distinction in English practice between the administration of law and equity, and as the rigid distinction between these two is a favourite "idol of the tribe" with English lawyers, the Commission have shown at considerable length, and, as I conceive, with complete success, that this peculiarity* in the administration of justice, fraught as it is with so much of the delay and expense alluded to above, is most easily to be abolished in the case of the Supreme Courts in India. Sir Lawrence Peel has carried out these views still further (App. p. 70) by indicating in detail how several of the distinct branches of equity could at once be placed within the jurisdiction of a court of law.

12. The Law Commission having thus got rid of one fruitful branch of vexation and expense in English procedure, go on to point out a uniform mode in which all facts in dispute between litigant parties should be brought before the court. "Rules of property," says Sir William Blackstone, "rules of evidence and rules of interpretation, in both courts, are or should be exactly the same; both ought to adopt the best, or both must cease to be courts of justice."—3 Comm. 434. But if this canon is applicable to courts of law and equity when sitting apart and composed of different individuals, how much more forcibly must it apply to a tribunal to which, by an effort of the mind, four or five different characters must be attributed at every sitting of the court, and in all of which characters different rules of law, different rules of evidence, and different modes of seeking out the truth are recognized as the governing doctrine. The mode proposed by the Law Commission to elicit the matter in controversy in every suit is to bring the litigant parties into the presence of the judge at the earliest possible period, and to take down from their lips, assisted by their legal advisers, the matters of fact on which the dispute in law arises, or the matters of fact on which the parties are at issue amongst themselves.

13. In a communication which I had the honour of making to the Law Commission in June 1843, I had previously urged the adoption of a similar system, induced thereto by observing, on the one hand, the extreme expense and delay of the prevailing procedure, by which, on the common law side, a disputed claim of above 350 rupees cannot be decided without

* The administration of law and equity by different courts is peculiar to England, for although a similar distinction existed at Rome under the terms "jus civile" and "jus honorarium," these branches of the law were not administered by different judges. The Prætor both gave (dabat) actions which were of the civil law, and decreed (dicebat) interdicts and other equitable remedies.

No. 1.
On Civil Judicature in the Presidency Towns.

without an expenditure of 1,200 rupees to the parties, and by which, on the equity side, a dishonest or vindictive opponent may protract the suit for 10 or 15 years; and, on the other hand, by observing the facility, the cheapness and satisfaction to suitors with which claims under 350 rupees were disposed of in the small cause court by a procedure similar in its main features to the system proposed.

14. The plan of procedure thus alluded to has been subjected to a minute and elaborate criticism by Sir Lawrence Peel, and has received from that distinguished person (expressing at the same time the sentiments of the other two judges at Calcutta) unqualified disapprobation. It is evident, therefore, that the arguments alleged by him deserve the most careful attention, not only on account of the high authority from which they emanate, but because they will be seen to be entertained by men to whom the reproach so often urged against our common profession of reluctance to aid the cause of law reform, which none but lawyers are ordinarily competent to meddle with, can in no respect be made.

15. But before I proceed to notice in detail Sir Lawrence Peel's objections, I will, for the purpose of simplifying the point under discussion, advert to a confusion with which the question is complicated respecting the meaning of the ambiguous term "equity," and I will then recapitulate very shortly the system of procedure proposed.

16. According to the cloudy notion which prevails in the world at large as to the meaning of equity in its technical application, a notion from which even lawyers are not always free, the term denotes something higher and better than law, transcending it in its range, and founded, not like law generally, on the commands of the supreme authority in the State, but on the *non obstante* power attributed to some particular functionary of deciding cases according to his views of *qæuum et bonum*. It is true that equity, on its first appearance in the only two countries (Rome and England) where it has been known of as something distinguished from law, assumed a form in great degree corresponding to the above notion, and the same historical ground can be discovered for its origin in either country. The *jus civile* of Rome, with its limited range of ideas, its cumbrous machinery for the transfer of property, and its superstitious adherence to symbolic forms, although all-sufficient for a young and half barbarous horde, was found wholly incommensurate with the wants and exigencies of a growing civilized people, and hence the power assumed by the Prætor of breaking through and remedying the harsh enactments of the civil law was forced upon him, and gladly submitted to, from the crying necessity of the case. The very same inaptitude of the common law of England, with its rugged feudal provisions, to meet the more complicated relations engendered by commerce and the progress of social life, is equally to be exemplified in our own history; and the stubbornness of our common law professors, in resisting the attempts to break through their narrow formulas, is pithily illustrated by the anecdote of Sir Thomas More, so aptly cited in the Report of the Law Commission, p. 44.

17. But those who conceive that the dispensing power which the *jus honorarium* and equity first assumed in Rome and England, continued to be the distinguishing attribute of each system, most grievously err. In the former country, it was soon found to be intolerable that the Prætor should lay down a special rule for each particular case, according to the whim or caprice of the moment, and accordingly a distinct body of equity or honorary law was soon established by the perpetual edict, into which new institutes were from time to time introduced as any other new law. So also in England, the common sense of mankind (well condensed in the above sarcasm of Selden) soon put a check on the arbitrary power assumed of overriding the law, and a body of equity law came to be established just as precise and positive in its principles as common law itself. The subjects it deals with are, for the most part, different, being those which the common law, from its narrow principles or the defective machinery of its courts, was unable to cope with. But in the cases brought before a court of equity, the equity judge proceeds as little upon arbitrary discretion as the common law judge in those cases peculiar to his court; each of them consults his books, and applies his powers of ratiocination to discover the rule applied in similar cases by his predecessors, and each holds himself equally stringently bound by such rules when discovered. It is true that equity law has entirely grown out of the decisions of equity judges; and therefore it follows, that new rules are from time to time laid down by them as the occasion arises; but the same remark is almost equally applicable to the common law. Such is the system of English jurisprudence. Lord Holt, by a single decision, introduced as it were and established the whole law of bailments. Lord Mansfield, by a series of decisions, may be said to have created the commercial law of England. Lords Nottingham and Hardwicke did no more for equity than the above great judges for common law. The most complete similitude exists, therefore, between the two systems, and, except for the uncouth phraseology, the department of civil law, which is now divided by law and equity, might be much better distinguished into common-law law and equity law.

18. It may be expedient in a highly populous and civilized community, to parcel out between different tribunals the various subjects on which litigation is likely to arise: thus, the exposition of wills and enforcement of the marriage contract or domestic relations may be committed to one court; trusts, accounts and questions on partnership to another; breaches of contract and enforcement of simple jura in personam to a third; and this is what occurs in England. On the other hand, all these different jurisdictions may be concentrated in one court, having appropriate machinery and requisite powers for discharging all its various functions effectually; and this is the case with the Supreme Courts in India. But what is contended for and maintained, is, that in either of these cases, the rule which is pronounced by the court, whether it be a court of law or a court of equity, or a Doctors' Commons' Court (in which not even the nominal distinction exists), or whether it be one

Supreme

Supreme Court, the rule, I repeat, to be laid down, is, the substantive law of the land irrespective of any nominal distinction into common-law law or equity law.

19. The above is conceived to be a true though a succinct explanation of the relative meanings of law and equity, but whether it be theoretically correct or not, it is undoubtedly the practical account of the mode in which questions, whether of law or equity, are disposed of by the judge, by which it will be seen that the same definite attributes and fixed character may be predicated of each, and are recognized as belonging to each respectively.

20. This being so, it is submitted, that in all cases, but more especially in those where the functions of law and equity are centred in one court, the mode of bringing the facts in controversy before the court should be the same. Whatever has been seen in experience to be an effectual instrument towards eliciting the truth, should be adopted in all cases where the truth is a matter of research. If, therefore, the vivâ voce examination of parties in open court has been found more effectual than examination upon interrogatories in a close room, and in the absence of the judge and of the parties, there is no doubt as to which of these two should be adopted as the general rule. If, again, the advantages which equity practice presents, by subjecting the parties in the suit to full disclosure and discovery of all they know, are so great as almost wholly to counterbalance the defective mode of eliciting the truth by interrogatories, experience and reasoning evidently suggest that these two potent modes of ascertaining the facts should be combined, and that the inferior and contradictory processes should be abandoned. If, lastly, it has been found by experience that the great portion of the delay, vexation and expense, which attend litigation in the technical procedures devised by practitioners under the English and Rome-bred systems,* are owing to the mass of written pleadings and various agencies which are interposed between the suitors and the court, it seems most desirable that a recurrence to first principles should be made, and that every facility should be afforded to suitors of communicating with the judge in open court, without the intervention of legal agency, except when the assistance of professional learning and acuteness is required.

21. The following three articles therefore form the basis of the system of procedure which I ventured to propose, and which the Law Commission also adopt as the rules of practice for their proposed new court.

1st. Vivâ voce examination of witnesses as the general rule.
2d. Examination of parties to the suit.
3d. Appearance of parties before the judge in the first instance, and oral pleadings under the authority of the Court.†

22. I now apply myself to Sir Lawrence Peel's objections. To the two first propositions I do not understand that any objection is made. It would seem, therefore, that all the judges of the Supreme Court at Calcutta concur in recommending these great improvements in procedure. Sir Henry Roper is also of opinion (App. p. 61.), that the first rule should be adopted, and I do not conceive that he objects to the second; he also thinks it feasible, that the pleadings should be framed under the supervisance of an officer of the court.

23. The objections of Sir Lawrence Peel, therefore, apply to the third point only; viz. to oral pleadings, and the appearance of the parties before the judge. Neither of these propositions is very distinctly combated in terms, but I take them to be tacitly involved in the

* It seems to be conceived by some, that by adopting what is termed "summary procedure," a great portion of the existing evils of equity practice may be got rid of; Sir Lawrence Peel appears to incline to this view.—App. p. 71. But it must not be forgotten, that summary procedure is also technical, and that all the same causes are at work to make it just as dilatory, expensive and counter to the interests of suitors, as so-called regular procedure. In the continental systems, from which summary procedure has been taken, a form of proceeding exists, called "summariissimum," intended to provide for cases of pressing emergency, but it seems that practitioners contrive to make this most summary proceeding occasionally last 20 years.—*See* Von Savigny's Necht des Besitzes, p. 653, 6 ed.

I see by a late Athenæum, that the King of Prussia is proposing to introduce oral pleadings into the German courts, in order to correct the same evils which we are encountering in English procedure.

† The Law Commission, in reference to the views expressed in my minute on special pleading, have stated a stronger dissent of opinion than I conceive to exist between us. In that minute, I described the course of pleading in equity, and pointed out and objected to the necessary delay and expense which it occasioned. But in order to prevent it being supposed that these objections grew out of a bigotted preference for the system in which I had been myself educated, I went on to deprecate special pleading equally strongly, as the general form of procedure. But, unquestionably, I do not at all dissent from the use which the Law Commission propose to make of certain of the rules of special pleading, which have been found effective in practice, and undoubtedly, so far as the "rules of pleading are conformable to the logical operations of the mind in the logical management of a dispute," (*see* Sir H. Roper's Minute), they not only should not be, but cannot be departed from in any scientific system. I conceive, however, that if written pleadings are abolished, and, with them, the greater part of the technicalities with which written pleadings are accompanied, it is a misnomer to apply the designation of special pleading to a new system, in which only a few of its rules are adopted. The system of special pleading, properly so called, I continue to think wholly inapplicable to India; it is almost impossible, from the circumstances of the country, that a race of men like special pleaders, whose natural habitat seems the temple, should flourish in this country, and from the remarks of Sir L. Peel, I should gather that the Statute of Pleapleader is as much a dead letter at Calcutta as it is at Bombay.

No. 1.
On Civil Judicature in the Presidency Towns.

the following propositions, which I conceive to be the pith of the objections urged by Sir L. Peel.

1st. The plan proposed is not applicable to Calcutta, because it throws additional duties upon the judges, and their time is already fully occupied.—p. 64.

2d. The plan requires a judge of higher qualities than can be found, and even the highest qualifications would not be sufficient to ensure success, because such judge would have too much power.—p. 65.

3d. Equity would be administered blindly and erroneously, because the judge would not be certain that all the facts were before him.—Ibid.

4th. Decisions would go against one of the parties by surprise, or if adjournment were made to enable him to meet the facts of the case brought against him, nothing would be gained by the new plan.—Ibid.

5th. Uncertainty would be introduced into the law, and, consequently, increase of litigation.—Ibid.

6th. The latter result would also flow from the abolition of opinion business.

7th. Both the latter results conjointly from decisions proceeding "on notions of natural justice or equity, and not upon the adopted system of municipal law."—p. 65.

8th. Variance would be introduced between the law of England, and that prevailing at Calcutta.—Ibid.

9th. The system introduces a violent change, and does not enable the preferable course of introducing improvements by steps.—Ibid.

10th. Various objections to the appearance of parties before the judge in the first instance, founded on the difficulty of the operations to be performed by him, and the odium he will be exposed to.—p. 65, et seq.

24. Now, undoubtedly, a formidable list of specious objections is here presented, and if only one-half of them is well founded, it were undoubtedly wiser "*stare super antiquas vias*," and to reject the proposal at once. But upon examination, I think it will be found that the greater and substantial portion of these objections may be resolved into two propositions; First, the proposed plan will introduce misdecision, and consequently uncertainty into the law. Second, the plan gives the judge too much power. Of these in their order:

25. First, as to misdecision. This class of objections proceeds upon two assumptions; 1st, That the proposed procedure will not bring the facts in each case to the notice of the court; 2d, That upon the facts so brought, the judge will decide on arbitrary notions of justice and equity, and not on the substantive law of the land. Now, the first assumption is a fair hypothesis to be made; the question is as to a new system of procedure, and it is a complete answer to it if it can be shown that it will fail in eliciting the facts necessary for a decision, all that can be required in such an hypothesis is to bring forward sufficient arguments to support it. But the second assumption is altogether untenable and gratuitous. No change is proposed to be made in the substantive law of the land, but only in the mode in which the controversies of suitors are to be brought forward, in order to have that law applied to them. There is nothing, therefore, whatever in the premises to warrant the conclusion, that judges will decide more erroneously in one mode than in the other; indeed, it is clear to demonstration that the decision will proceed in every case according to the particular judge's knowledge of the English law, and his powers of applying it to the facts laid before him. It is difficult, therefore, to account for the appearance of this argument in the discussion, except by supposing a momentary confusion of the rules of procedure with the substantive law of the land, and by referring to the equivocal meaning of the term equity, both of which points have been discussed above.

26. The first assumption, therefore, is all that needs to be noticed, viz. that natural procedure will not bring out the facts. But what arguments have been brought forward by Sir L. Peel to warrant this assumption? Not one; and it is evident that, in a speculative inquiry, the authority of no man (and I have much pleasure in seizing the opportunity to state how highly I esteem the authority of Sir Lawrence Peel), can establish a proposition, except so far as it is supported by solid argument. To me it appears that the great advantages of the scheme consist in its aptitude to admit of all facts in issue between the parties being readily brought before the court, and that it is directly calculated to obviate those evils in the existing system, by which essential facts are so often shut out, and by which so many decisions pass irrespective of the merits of the case. Every practitioner's memory will furnish him with innumerable cases at the assizes, where the parties, through a mistake of their pleader, or negligence of their attorney, have been what is called "turned round on the pleadings," or put out of court by a failure to prove a notice or signature, and the volumes of reported cases are equally full of decisions where the interest of the suitors have been concluded for ever on some blunder or other of their legal advisers, and wholly irrespective of merits.

27. But specific instances are brought forward to show how ill the personal appearance of the parties before the court, and oral pleadings, would work in practice; and as such instances, ordinarily, take more hold of the mind than abstract reasoning, it is well to examine them somewhat minutely. The cases referred to are Few *v.* Guppy, and an anonymous case decided at Calcutta. The first was a question of specific performance of a contract respecting real estate; in the latter a construction had to be put on an ill-worded marriage settlement.

28. Now it may be observed generally of cases of this description, that they form but a small minority of the total number of the legal controversies which arise in the community. In the majority of cases, say five out of six (*see* App. p. 51), in which recourse is had to courts

courts of law, the resistance of the defendant is founded, either on want of means, or in the desire to stave off the claim for a time by reliance on "the law's delay." With respect to such cases, I apprehend that it can hardly be disputed that too great facility cannot be afforded to plaintiffs to enforce their legal claims, and that no evil can be incurred; but, on the contrary, great advantages to public morality, by withdrawing from dishonest or tricksy defendants, all opportunity of defeating their opponents by chicanery. This class of cases, therefore, presents no difficulty as to their being disposed of in the first instance, by the appearance of the parties before the judge, without any preliminary expense; so far, therefore, a great advantage is gained for the majority of cases, and of honest suitors. There remains the remaining portion of cases above noted; namely, that portion in which some disputed question of law or fact requires to be decided by the court.

29. Now it is evident that this class of cases is divisible into those where the parties are wealthy enough to avail themselves of the assistance of counsel, and into those where they are not. In the latter of these cases, according to the system proposed, the onus would, undoubtedly, be thrown upon the judge of lending its assistance to the quasi-pauper parties (for if actual paupers, they would have the assistance of Government), and of eliciting from them the actual question. This might be a disagreeable office for the judge, but I cannot see in it any thing but a benefit to the public. It is true, that in such cases the court, in the absence of any forensic advocacy on either side, would often fail in discovering points material to the issue, points which the parties themselves might be blind to, and the law delivered would be frequently inferior in quality to what it would have been, after hearing all that legal acuteness and industry could suggest. But the same observation is equally true of every system that exists, or that can be conceived. Proof of all the facts relating to a given case, and bringing to bear all the law applicable to such facts through the organs of the greatest intellects which the legal profession can afford, are two operations necessarily demanding great time and expense. And to expect that two paupers, contending for a hovel on the common, will have their case equally solemnly and well decided with a case like that of Lord Scarborough *v.* Lumley, where many thousands a year was depending, were to expect an impossibility. An approximation to this result is attained by every approach made towards simplifying and generalizing the substantive body of the law itself; but in the meantime, and indeed at all times, the most important desideratum for poor suitors is, that their legal disputes should be determined by the judges of the land as speedily as possible, and with as little destruction as may be of their only capital, time, even at the risk of the occasional misdecision which summary procedure necessarily, but not exclusively, involves.

30. With respect to the class of cases where a doubtful question arises, and where the parties are in a condition to avail themselves of legal assistance, very little need be said. The eminent advantage of such assistance is so obvious, that no one would fail to avail himself of it when within his reach, if his rights or possessions became the subject of legal discussion. Sir Lawrence Peel is not at issue with me on this point. He does not conceive that the adoption of a simple system of procedure would supersede the employment of counsel, at all events at Calcutta, but it is evident that what is true of Calcutta in this respect is true of all the world, for the principles at work are those of human nature. Although, therefore, Sir Lawrence Peel argues the question in one view, as if counsel would not be employed in difficult cases, as that view is neither his nor mine, I need not consider it further in this place.*.

31. To apply the above observations to the cases, Few *v.* Guppy, and the anonymous one at Calcutta. If they belonged to the pauper class, which apparently they did not, they would have to be placed by the judge in a train for decision, and to be decided according to the best lights of his legal information and natural capacity. That they would be occasionally ill-decided, is to say no more than that man is fallible; but that they would receive a less share of attention, or of anxiety on the part of the judge to be right, than similar cases now meet with in England or in India, there seems no reason whatever for supposing. If, on the contrary, the cases were such as enabled the employment of counsel, the conduct of the suit, or litis-contestation would be accompanied with all the assistance, which professional advocacy is now capable of affording to suitors, with the additional advantage of securing to the latter an indemnity against any damage, which, under the present system, he is so frequently exposed to by mistakes fallen into during the interlocutory proceedings in the suit.

32. The assumption, therefore, that the natural mode of procedure will not enable the facts of each case to be brought before the court, appears to me to be warranted neither by the arguments brought forward, nor by the two cases cited, and consequently all the objections which involve this assumption as an enthymeme, fall to the ground.

33. The second main objection is, that the plan will place too much power in the hands of

* I entertain, indeed, a strong conviction that the existence of a simple system of procedure would open a much wider field for forensic talent and employment than at present. The elicitation of truth amidst conflicting statements, the clear exposition of principles from circumstances "immersed in matter," and the logical reasoning required to bring these principles within the rules of the law, are operations that will be so immeasurably better conducted by men trained in legal science and controversy at the bar, than by the common herd of mankind, that it seems to me clear their services can never be dispensed with. And if so, all that money now spent in useless procedure, will form a larger fund for their employment.

No. 1. On Civil Judicature in the Presidency Towns.

of the judge. Now no one is more alive than myself to the evils of attributing undefined irresponsible powers to the judicial authorities, and although I conceive that Mr. Bentham has gone ludicrously far in the surveillance he proposes to exercise over judges (whom, truth to say, he often treats little better than pickpockets), I confess that I should be sorry to see any of the existing checks over their discretionary power diminished. But it appears to me that India is the last country where any apprehension on this score needs to be entertained. The judges of the Supreme Courts have very little of the moral support which judges in England derive from the influential classes of society. They do not form a part of, and have no connection whatever with, the local government of the country, and they are occasionally placed in something like direct conflict with it. They exercise a decided and direct control over the governing classes of the community, who have been said by a very high authority * occasionally "to confuse power and right in a manner in which nobody confuses them at home," and such control, however lightly or temperately administered, can scarcely prove otherwise than galling. The public press represents the interests of the executive classes almost exclusively, and therefore has additioual motives to the tendency of a public press generally, to keep a rigid look out for judicial peccadilloes. The bar, lastly, either from local circumstances, or the absence of that easy gradation to the bench which occurs with the bar in England, have little of that esprit de corps which distinguishes the profession at home; and, from their connexions with clients, with the governing classes, and with the press, they are more prone to concur in any carpings and cavils at judicial authority, than to support it even in its due exercise by their moral influence. These circumstances may not be prejudicial in their result to the public interest, however annoying occasionally to the judge personally (and Sir James Mackintosh alludes to them feelingly more than once), but most undoubtedly they afford potent sanctions against any undue exercise of power.

34. The specific case pointed out by Sir L. Peel (App. p. 65), as giving greater power than that which a judge ought to possess, consists in the power attributed to him of deciding "whether a suit shall be instituted in the first instance or not." But, with deference, it appears to me that this power is no greater than what the judge possesses, and most frequently exercises at present. If a plaintiff applies for a writ, and fails to persuade the judge, either by himself or his counsel, that he has got a cause of action, I can see no greater exertion of power in a refusal of the writ, than is displayed under the present system when the judge nonsuits the plaintiff, equally, after hearing his own view of the case as urged by his advocate. An arbitrary abuse of this power has been checked hitherto by the publicity of proceedings, by the license of speech in counsel, by the power of the party to bring forward his case again and again, and by appeal; to say nothing of the other motives influencing every judge more or less strongly, love of reputation, love of justice, fondness for the art, &c. These checks have proved amply sufficient hitherto to prevent wanton misdecision; they would exist with equal force in the system proposed, and the only innovation is, that the power would be exercised without the parties being required to expend 1,200 rupees to bring their case into court.

35. The other objections, not included in the above two propositions, are of a minor character. If the plan is not applicable to Calcutta, because the time of the judges is already fully occupied, it would be a misplaced economy on the part of Government to withhold from the community a sufficient number of courts, by which law might be administered at one-tenth of the present expense on the common law side, *see* App. p. 53, and at a still greater ratio of diminution, both of time and expense on the equity side.

36. But there need be no additional expense to Government, for it appears to me, I confess, that the system which prevails in India for the Judges of the Supreme Courts to sit conjointly at the trials of matters of fact, is warranted neither by principle nor by the home practice, which in all other matters has been so servilely followed. All trials of fact in England (with the exception of the nearly obsolete trial at bar), are tried before a single judge, whether at equity, or at Nisi Prius, or in criminal sessions. Another exception indeed exists in the case of trials before country gentlemen at quarter sessions, but this is so confessedly the worst tribunal in England, that it can hardly afford an example for the Supreme Courts in India. If then a recurrence to English practice were made by the latter courts, there would probably be quite sufficient time for the Calcutta judges to get through all the cases that would arise on the new system, singly in the first instance, and conjointly as a court of appeal, from the decision of any one of the three judges. This last advantage is wanting to the Presidencies of Madras and Bombay, but it is a deficiency in a judicial system so greatly to be deplored, that I cannot help supposing that, at some time or other, the Government will supply it. And what leads me more strongly to this conclusion, is the fact, that the appointment of a third judge would add little or nothing to the expenditure now made, as it would supersede the necessity of employing non-professional judges at the petty sessions and court of requests, and so commit the whole judicial business of the Presidency to its legally educated and responsible judges.

37. The objection as to the inability to introduce the scheme proposed gradually and without violent change, has been so completely anticipated by the cautious provisions of the Law Commission, that it is unnecessary to notice it further.

38. I have thus satisfactorily to my own mind, and after a most careful perusal of Sir Lawrence Peel's minute, disposed of the various objections which he brings against oral pleadings,

* Sir Benjamin Malkin. Letter to Governor of Singapore, on the Government Records.

pleadings, and the appearance of the parties in the first instance before the judge. But I cannot be blind to the inclination we all have to regard one's own arguments with complacency, and to undervalue those of one's opponent. I think it very probable, therefore, that on a question of this kind, the reasoning which I conceive to be altogether untenable, may appear to others of overwhelming force, or at all events equally specious with that which I have urged, I therefore address myself to the practical proposition which I mentioned in my first paragraph.

39. It will be seen that the question at issue is, as to the results which may be predicted from the employment of a new system. It is in great degree, therefore, a question of prophecy. But there is this distinction between me and my opponents, and this great advantage on my side, that I am able at every stage of the inquiry to point at the successful operation of a system in practice, conducted upon the principles I contend for. In the small cause court at Bombay, the pleadings are conducted under the superintendence of an officer of the court; and the parties are examinable at each stage of the inquiry. The result of the first rule is, that during the three years and upwards that I have had a seat upon the bench, I never witnessed the decision of a cause upon any other ground than the merits. The result of the second rule is, that in every case where conflicting testimony occurs, the immense advantage obtained by the power of sifting the parties themselves, enables the judge to form a much clearer and more satisfactory conclusion than in any other mode in which disputed facts are brought before the court. The result of the two rules combined is, decision of suits at one-tenth of the ordinary expenditure, and a satisfaction to suitors with the mode in which their cases are disposed of, that I do not apprehend arises upon litigation on other sides of the court. It appears to me, therefore, that Bombay offers peculiar advantages for making an experiment of the species of court proposed by the Law Commission. There seems to be a desire on the part of the community that the powers of the court should be extended, and the memorial lately presented to Government with a prayer to this effect, was supported by the recommendation both of Sir Henry Roper and myself, when Government did us the honour of consulting us. The Bombay judges have time upon their hands which might be devoted to the new court, and if the court of requests were left as it is for the present, the experiment might be made without a single rupee of additional expenditure. Nor would any violent change be at all introduced. The small cause court would remain the exclusive court for suits under 350 rupees only; for all other causes, it would be at the option of plaintiffs to take them there or not, and we may be quite sure that the acuteness of mankind to discover their own interests, would soon ascertain whether the fears prognosticated by Sir L. Peel were imaginary or not. If the scheme did not work well, it would be abandoned at once; if the public, on the other hand, found it to accord with their interests, the disputed problem is solved.

40. I have not had an opportunity of communicating with the Chief Justice on this suggestion, as I am writing this paper at the Hills, but as I am proposing a scheme which undoubtedly throws more court business upon the judges than heretofore, I think it only fair to him to state, that I am perfectly willing to undertake the sole sittings of the small cause court, so as to allow of all the causes decided by me (on which any difficulty may arise), to go up on appeal to the Chief Justice, as a sort of Chancellor. This is the only method in which I can suggest to myself the formation of an efficient court of appeal, where there are only two judges, and although the arrangement would place the puisne judge in a more subordinate post than he at present fills, I am quite ready to submit to this infinitesimal loss of dignity, and to the extra work contemplated, for the sake of the public benefit, which I anticipate from the experiment.

41. I have only, finally, to apologize for the wide range and controversial tone which this paper has necessarily assumed, and to observe, that my justification consists solely in the opinion I entertain, that the questions here discussed, have a much wider range than the narrow limits of Bombay.

I have, &c.
(signed) *E. Perry.*

(No. 38.)

From *T. R. Davidson*, Esq, Officiating Secretary to the Government of India, to Secretaries to the Governments of Bengal (No. 38); Fort St. George. (No. 56); and Bombay (No. 57); dated 3 August 1844.

Legis. Cons. 3 Aug. 1844. No. 4.

Sir,

In continuation of my letter, No. 29,* dated he 22d June last, I am directed by the Governor-general in Council, to forward to you the accompanying printed copy of a Supplement to Appendix of the Report of the Indian Law Commissioners therewith forwarded, dated the 15th February 1844.

Home Department, Legislative.

* Madras, No. 44. Bombay, No. 45.

I have, &c.
(signed) *T. R. Davidson,*
Officiating Secretary to the Government of India.

Fort William,
3 August 1844.

(No. 1435.)

Unrecorded. From the Under Secretary to the Government of Bengal, to *T. R. Davidson*, Esq., Officiating Secretary to the Government of India, Home Department; dated 12 September 1844.

Sir,

Judicial. In compliance with the requisition conveyed by your letter (No. 38), dated the 3d ultimo, I am directed by the Honourable the Deputy-governor of Bengal to transmit, for the information of the Supreme Government, the accompanying copies of letters noted on the margin,* relative to the Report of the Indian Law Commissioners on Civil Judicature in the Presidency Towns.

2d. The opinion of the Sudder Board of Revenue will be submitted when received.

I have, &c.

(signed) *A. Turnbull*,
Under Secretary to the Government
of Bengal.

Fort William,
12 September 1844.

From *C. W. Brietzcke*, and *Russomey Dutt*, Esqrs., Commissioners of the Court of Requests, to *F. J. Halliday*, Esq., Secretary to the Government of Bengal, Judicial Department; dated 31 July 1844.

Sir,

We have the honour to acknowledge the receipt of a letter (No. 1094), from Mr. Under Secretary Turnbull, dated the 8th instant, forwarding copy of a Report from the Indian Law Commissioners, dated 15 February 1844, with a revised draft Act for establishing a court of subordinate civil jurisdiction in the city of Calcutta, and copies of a minute by Sir Erskine Perry, a letter from Sir Henry Roper, and a letter from the judges of the Supreme Court, with a minute of Sir Lawrence Peel annexed, and requesting our opinion thereon.

2. We have perused these important documents with feelings of great interest, and shall not hesitate to report our sentiments candidly on the subjects which they embrace.

3. The advantages of the administration of justice by one system of courts, with one uniform, cheap and easy procedure, and the practice of vivâ voce examination of the parties in the suit, are undeniable, but any new scheme which may be necessary to be substituted in lieu of the one in force for years, and with the workings of which the people are habituated, requires, we think, serious consideration and caution.

4. In whatever advantageous light the establishment of a subordinate court of civil jurisdiction, with one uniform system of procedure in common for all description of causes, such as generally come at present before the Supreme Court in its common law side, and the court of requests, respectively (for the sake of brevity, we shall denominate the first, "intricate cause," and the second, "simple cause") according to the revised draft Act now submitted by the Indian Law Commissioners, may appear in theory, we feel assured that its practical utility, in all respects, will be very doubtful. In a tribunal which will be required to hear and adjudicate daily upwards of 200 "simple causes," and also causes of small amount generally, an intricate, cumbrous and dilatory procedure, and we must confess that the procedure prescribed in the draft Act, though less dilatory and expensive, and more efficacious than the existing procedure of the Supreme Court, still appears to us intricate, cumbrous and dilatory, as respects those descriptions of causes, is more likely to defeat the ends of justice than to facilitate its administration. What, in our opinion is highly desirable in such a court is, that its procedure be simple and easy; its judges be able (at least in small cause suits) to communicate with and understand freely, and without any intervention, plaintiff, defendant and witness; and that it may be reached easily by all classes of suitors. And in case it should be found necessary to establish two separate courts

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* From Commissioners Court of Requests, dated 31 July 1844; from Registrar to Sudder Court, No. 1267, dated 23d ultimo, with Enclosure.

courts for the adjudication of causes, of small and large amount, the jurisdiction of each court, we think, should be clearly defined.

5. Having premised thus much, we shall proceed to offer such observations on the different sections of the draft Act for the new court, as may appear to us necessary to elucidate our views.

6. We regret that we differ somewhat in opinion with the Indian Law Commissioners in two of the most fundamental points upon which this Act is based, and also in some minor points, as far as they are applicable to the "simple causes" and causes of small amount generally; and we regret this the more because our opinions, we believe, do not coincide with those of the most enlightened jurists.

7. The points of difference we allude to are—First, The institution of all suits on an ex-parte examination of the plaintiff before one of the judges, who is to be at liberty to grant summons, or reject the application at his discretion; and, secondly, the application of one uniform system of written procedure in common to all description of intricate and "simple causes" for large and small amount.

8. We are by no means admirers of the system of previous examination of the plaintiff, nor of allowing process to be issued without some deposit of institution fee by him.

9. On the first head, we think, in "simple causes" suits, as well as small amount cause suits generally, such a procedure will not only be dilatory, but highly unsatisfactory, and in some instances injurious to suitors.

10. It would not be out of place to mention here a remarkable fact, which often occurs in the court of requests. A defendant in a suit against whom a verdict may have been pronounced, sometimes honestly, and sometimes designedly, supposes himself aggrieved. He presents a petition to the commissioners praying a summary reconsideration of the case, and is told that his prayer cannot be complied with summarily; but he may, in conformity to the rules of the court, institute a cross suit for a rehearing, after depositing the amount of debt and costs decreed against him. He does so; and if upon the second investigation the former decree is confirmed, and his cross suit dismissed, he invariably says to the commissioners, "you have directed me to institute this suit, and how can you now dismiss it, and cause a heavy loss to me by costs?" Now, when such is the impression in cases like this, what will be the impression and feeling of the suitor on a verdict being pronounced against him, in a suit, the institution of which in a manner has been previously sanctioned by the court. And in the same manner a suitor will be very much dissatisfied on being summarily and abruptly dismissed, merely because the commissioner who holds the pre-examination upon a summary ex parte inquiry, should be of opinion that there was no cause of action. It is not an unfrequent occurrence in the court of requests, that the plaintiff in the opening of his case, either by reason of ignorance or timidity, is unable to state it so clearly as to satisfy the commissioner that there was a good cause of action; but the defendant, on being interrogated, either at once confesses judgment, or admits that there was once a cause of action, but it is now voided by subsequent or other matter.

11. Nay, more, it happens daily that some cases must necessarily be heard ex parte. The plaintiff appears and proves the service of the summons and the attachment, either at the defendant's house or personally. He then proceeds to call his witnesses, and to produce his books; these are all carefully examined and cross-examined. Doubts arise in the mind of the sitting commissioner as to the justice of the claim; perhaps a material witness is absent from Calcutta, whose presence would clear up the matter. The plaintiff is therefore directed to issue out a second attachment against the defendant, with a view to bring him before the court to plead, returnable in one month, and to produce the witness he requires. On the defendant appearing, and being confronted with the witness, he instantly confesses judgment, and prays for time to pay the debt by instalments. Neither can we omit stating here, that on hearing both parties and examining their witnesses, it sometimes turns out that the plaintiff's claim has been liquidated in full, and that really he had none at the period of instituting his suit.

12. These facts indicate, we think, one thing, the extreme difficulty of conducting correctly a pre-examination of the plaintiff's claim, and the impossibility of obtaining all particulars, so as to enable the most acute judge to say whether a good cause of action exists. Indeed, in whatever light we view this subject, it appears to us fraught with serious objections.

No. 1.
On Civil Judicature in the Presidency Towns.

13. On the second head, we think the system of allowing suits to be instituted without deposit of some costs, would encourage fraudulent litigation, and be oppressive to honest men, without an equivalent chance of reimbursement of the expenses of judicial establishment by a levy of a fee against the losing party. Our letter, dated 10th September 1840, conveys fully our views upon this subject, which subsequent experience has rather strengthened; and as they so fully coincide with those recorded by the honourable H. T. Prinsep, in a minute dated 17th September 1842, we have taken the liberty to copy it in the margin.*

14. We are therefore of opinion that, at least in all small cause suits, plaintiffs should be allowed to obtain process without any previous inquiry, or any other restraint than the deposit of an institution fee, and that it should be a fixed rate of per centage upon the sum sued for.

15. The minor points of difference alluded to by us are,

1st. The strict application of one uniform procedure to all description of causes; and,

2dly. Presence of a jury.

16. Section 10 treats on the manner of commencing suits, and sections 11, 12 and 13, on pleadings. The plaint is to be reduced in writing, and we presume the pleadings also. Such procedure, we fear, will be dilatory, perplexing and vexatious to, and in many instances out of the reach of the small amount cause suitors generally, and the business of the court will fall into arrear, unless a large number of commissioners were appointed to keep pace with it. We apprehend, however, that the latter arrangement will not only be expensive, but inconvenient. We are therefore of opinion, that no written plaint or pleading in detail should be required from the small amount cause suitors generally, but that they should be all oral, and the result only, and not the details, should be noted down by the presiding commissioner, or an officer of the court under his immediate direction.

17. Under sections 8 and 9, provision is made for a jury, but "their verdict shall only be for the information of the conscience of the court." We do not anticipate any beneficial result from this imperfect provision. Generally speaking, a jury in a civil case, we think, makes the machinery of justice unnecessarily cumbersome and unwieldy.

18. In reference to the appointment of the commissioners of the new court, alluded to in the 2d, 3d and 4th sections, we observe the following note appended at the bottom of page 4 to the Law Commissioners' Report:

"The only qualification we have introduced into the Act for the professional commissioners is, that they shall be barristers of five years' standing. Under this provision, the judges of the Supreme Court might, of course, be employed in administering justice in the new court; but if they should not be so employed, the suitors will have the ready means of obtaining the benefit of their learning, under the scheme which we are recommending by appeal to the College of Justice."

19. And we are of opinion that it will not only enhance the dignity of the new court in the eye of the suitors, but the court will possess their confidence much more, especially in respect to the decisions of legal points, if the judges of the Supreme Court were made ex-officio commissioners, as proposed in the draft Act read in Council on the 23d November 1843. An addition to section 2 appears

* "The judge is left at his discretion, in decreeing a cause, to adjudge against the losing party a fee, to be realized in part relief of the cost of the judicial establishment. I have heretofore pointed out, that this method of reimbursing Government will never answer, for whose business will it be to pursue the debtor and exact the amount so adjudged. The order will, so far as the treasury benefits, be mere waste paper; and, at any rate, will be realized so irregularly as to make the law tax unfair as it will be unpopular.

"The principle, as it seems to me, on which Government is entitled to demand fees, is that courts and judicial officers are only resorted to for the compulsory enforcement of debts, when the creditor cannot realize by his own means; for the aid he asks he expects, and is of course willing to pay, looking to recovery from the unwilling debtor, if his means shall suffice. The Government is, in this respect, like an arbitrator or referee, who always is paid before he lets the award out of his hands, leaving the after recovery to be adjusted as part of the subject of arbitration. If any fee at all is taken to reimburse the charges of judicial establishments, it should be taken as the condition of affording the aid of court by the issue of the first process. The Government never was, nor can be, a successful enforcer of decrees. The result would probably be to fill the gaols with Government debtors, entailing further charges on Government, and yielding nothing."

appears to us necessary; namely, "that separate sittings may be holden before different commissioners at one and the same time, at any convenient place within the town of Calcutta."

20. No comments appear necessary on sections 1, 5, 6, 7, 15, 16, 22, 23, 24, 25, 26, 27, 28 and 29.

21. The section 14 appears to us ambiguous. Sections 17, 18, 19 and 20 relate to fees. We have already expressed our opinion on this point in the 8th, 13th and 14th paragraphs; and we beg now only to add, that it appears to us advisable that a discretionary power should be given to the commissioners to grant process free of costs, and to remit costs, wholly or in part, to unfortunate honest suitors. Further, we think that it would be very difficult to carry into effect the provision of section 21.

22. No provision appears to have been made in the draft Act for the commissioners taking the usual oath of office, nor for executing decrees of the zillah court of Twenty-four Pergunnahs, under Act XXVII. of 1839, and taking depositions of witnesses under Act VII. of 1841, nor for the apportioning of diet money to debtors confined in execution, as at present is established by law.

23. We are of opinion that it would be beneficial if the provisions of Act XIV. of 1840 could be extended to the Hindoo and Mussulman suitors; but we apprehend that as long as 21 George 3, c. 70, s. 17, remains unrepealed, this object cannot be accomplished.

24. In conclusion, we beg respectfully to state our humble conviction that, without the modifications suggested by us, the utility of the Act now recommended by the Indian Law Commissioners in respect to the adjudication of all causes of small amount generally, appears to us very doubtful, and that the draft Act, read in Council on the 23d November 1843,* for the establishment of a "small cause court," by the provisions of which, in cases of legal difficulties and doubts, the opinions of the judges of the Supreme Court as ex-officio commissioners are made available, appears to us better suited for the adjudication and disposal of causes of small amount generally, than the one now recommended, notwithstanding that the former establishes a separate court for this class of causes.

* *Vide* the Draft Act (the last of these Papers), p. 116.

We have, &c.,

(signed) *C. W. Brietzeke*,
Russomoy Dutt,
Commissioners.

Court of Requests,
31 July 1844.

(True copy.)
(signed) *A. Turnbull*,
Under Sec. to the Gov^t^ of Bengal.

(No. 1267.)

From the Register of the Sudder Dewanny Adawlut, to *F. J. Halliday*, Esq., Secretary to the Government of Bengal; dated 23 August 1844.

Sudder Dewanny Adawlut.
Present: R. H. Rattray, C. Tucker, J. P. M. Reid and A. Dick, Esqrs. Judges.

Sir,

I AM directed to acknowledge the receipt of your letter (No. 1092) of the 8th ultimo, with its accompaniments.

2. In reply, the majority of the court desire me to observe, that these papers refer exclusively to the common law and equity jurisdiction of the Supreme Court, on which they feel themselves unable to offer any opinion.

3. A minute, recorded by Mr. Dick on the subject, is herewith forwarded.

I have, &c.

(signed) *J. Hawkins*,
Register.

Fort William,
23 August 1844.

No. 1.
On Civil Judicature in the Presidency Towns.

MINUTE on the Report of the Indian Law Commissioners upon Judicature in the Presidency Towns.

BEING called upon by the Government to give my opinion on the above Report, I have read it with the utmost attention and a lively interest.

The larger portion of the Report is dedicated as a preliminary step to a most interesting, elaborate and successful defence of the comprehensive views entertained by the great Lord Mansfield, and the learned Justice Buller, on the propriety of courts of law granting relief in every instance in which a court of equity would eventually give it. Sir William Blackstone seems to have entertained a like opinion, when he declared, "It were much to be wished, for the sake of certainty, peace and justice, that each court would, as far as possible, follow the other in the best and most effectual rules of attaining those desirable ends. And sure there cannot be a greater solecism than that in two sovereign independent courts established in the same country, exercising concurrent jurisdiction, and over the same subject-matter, there should exist in a single instance two different rules of property, clashing with or contradicting each other:" and a little further on he speaks of "two separate jurisdictions now existing in England, but which never were separated in any other country in the universe."—Com. III., 441. Such sentiments, it will naturally be expected, must meet with a ready concurrence from a Company's judge, who has been in the habit during thirty years of granting in one and the same courts whatever relief law, equity and good conscience could administer. The fact is, the separation of the two systems of law and equity in English judicature was purely fortuitous, and originated from nothing in the nature of the things, as is evidenced by its non-existence in any other country in the universe; therefore its introduction into a new system of judicature may at once be negatived without hesitation: were, however, the question the rooting up of the separate system from English judicature, the growth of ages, the culture of the brightest intellects, and the profoundest learning, the boldest reformer might pause trembling! Where both systems exist, as in the Supreme Courts of the Indian Presidencies, both may be extensively reformed and improved, as shown clearly in Sir Lawrence Peel's minute, and yet preserved distinct. There is perhaps more than plausibility in the following opinion: "The power which the superior courts of equity possess in certain cases to correct and amend the law, nay even control its administration by other courts, is most beneficial, as in the instance of issuing injunctions, which peculiarity in the English system of jurisprudence, by keeping the provinces of law and equity distinct, preserves to the courts of common law those advantages of simplicity and precision which they could not enjoy if their established forms of proceeding were suffered to bend to and be modified by the equitable circumstances of each particular case, whilst at the same time the intolerable inconvenience which must arise from a too rigid adherence to rules too narrow to embrace complicated questions is obviated, by the institution of a court empowered "to supply what is defective, and to control what is unintentionally harsh in the operation of general principles."

2. The aim and end of the Report is the establishment of a subordinate court for Calcutta, to be governed by equity and good conscience, following the law, that is, by English law and English equity. In this respect it would, in a great degree, accomplish the wishes of two great luminaries of the law, Lord Chief Justice De Gray, "who never liked equity so much as when it was like law," and Lord Mansfield, "who never liked law so much as when it was like equity." It would go far to unite the truth and justice of equity with the cheapness and expedition of law. Appeals are to lie from this court to the College of Justice. If the court is to follow English law and English equity, I would, with due deference, suggest the propriety, nay, necessity of restricting the appointment of all the commissioners to members of the English legal profession; and the Judges of the College of justice to Queen's judges. They alone will be virtually the judges, for no non-professional commissioner, nor any of the Company's sudder judges will presume or venture to differ from their learned colleagues. Sir William Blackstone thus speaks of English equity: "The system of our courts of equity is a laboured connected system, governed by established rules, and bound down by precedents from which they do not depart, although the reason of some of them may perhaps be liable to objection."—Com. III. 433. Again, "The system of jurisprudence in our courts, both of law and equity, are now equally

equally artificial systems, founded on the same principles of justice and positive law."—Com. III. 434. And again, "A set of great and eminent lawyers who have successfully held the Great Seal, have by degrees erected the system of relief administered by a court of equity into a regular science, which cannot be attained without study and experience any more than the science of law."—Com. III. 1844. Would it be wise, would it be just to expect any man, however well and liberally educated, and naturally endowed, to administer on two such complex sciences, justice and equity without study professionally and without experience.

3. It is proposed that the pleadings be oral, and reduced to prescribed form by the judge. The evils of this have been well pointed out by Sir H. Roper, and forcibly demonstrated by Sir Lawrence Peel. It appears in Sir Erskine Perry's minute, that the experiment has been tried at Western Australia and at Singapore, with what success is not stated. If civil causes could be tried like criminal ones, plaintiffs, defendants, witnesses and proofs all present, and decided off hand, no doubt much expense would be saved, and incalculable vexation prevented. This course might do for very simple cases, and of very limited value; in complex cases it would certainly fail; and in important cases off-hand justice would too frequently be cruel injustice; cheap articles are too often painfully dear. Sir H. Roper says, the oral system would annihilate the bar; and Sir Lawrence Peel, that it would deteriorate the bench. How deplorable would be the consequence of either evil. Both have shown how the superfluous expenses and delays of pleadings might be curtailed, and the benefits fully preserved. In estimating English jurisprudence we must not look to pounds, shillings and pence only. Its moral effect on the constitution, on the nation, and on every country and people to which its influence extends, should ever be in view. To what mainly do Englishmen owe their freedom and their independence? To their laws, and their righteous administration. To what do judges owe their profound learning, their acute intellects, their patient bearing and research, their incomparable probity and impartiality? To the learning, the astuteness, the untiring assiduity, the wachfulness, the honesty and the independence of the English bar—the true bulwark of England's freedom. The English bar should, therefore, I would strenuously urge, be fostered and encouraged in its genuine inherent qualities in every British colony. There is another consideration, I humbly conceive, which should not be lost sight of in legislating for a colony: every tie that closely connects it with the mother county is valuable, and nothing is so strong as a country's laws and its judicature. These should, therefore, be preserved as similar as possible.

4. With reference to the expression in the Report, that the Presidency courts should be made fit models for the mofussil courts, which should be taught not only by precept, but by example,—I will take leave merely to observe, that the Cornwallis system of judicature is well calculated for the Company's courts, and the circumstances of the country, and our singular rule: it was founded, I believe, partly on the English and Scotch systems, and partakes of a great deal of what is good in them, free from much that is bad in the way of unnecessary technicalities, verbosity, expenses and delays: it has suffered much since its first institution by heedless reforms, though improved in some respects: if administered by judges properly educated and trained up by successive advancements; and the bar of pleaders well cared for, and the pleadings reduced to more simplicity and precision, I believe it would prove excellently adapted for the wants of the Indian community, and tend to promote liberty and honesty of feeling. The Regulation code, especially of 1793, is so clearly interwoven with proprietary rights in land, that it must at all events be preserved in its integrity.

Sudder Dewanny Adawlut, Calcutta, 19 August 1843. (signed) *A. Dick.*

(A true copy.)
(signed) *W. Kirkpatrick*, Deputy Register.

(A true copy.)
(signed) *A. Turnbull*,
Under Secretary to the Government of Bengal.

No. 1.
On Civil Judicature in the Presidency Towns.

Unrecorded.

(No. 1599.)

From the Under Secretary to the Government of Bengal to *T. R. Davidson*, Esquire, Officiating Secretary to the Government of India, Home Department; dated 16 October 1844.

Sir,

Judicial.

With reference to your letter, No. 38, of the 3d instant, I am directed by the Right honourable the Governor of Bengal to forward, for submission to the Supreme Government, the accompanying copy of a reply, dated the 4th idem, from the Commissioners of the Court of Requests, regarding the letter from Sir Erskine Perry to the Government of Bombay, printed in the Supplement to the Appendix of the Report of the Indian Law Commissioners.

I have, &c.

(signed) *A. Turnbull*,
Under Secretary to the Government of Bengal.

Fort William,
16 October 1844.

From the Commissioners of the Court of Requsts to *F. J. Halliday*, Esquire, Secretary to the Government of Bengal, Judicial Department; dated 4 October 1844.

Sir,

We have the honour to acknowledge the receipt of a letter (No. 1474) from Mr. Under-secretary A. Turnbull, dated the 16th ultimo, forwarding, for our observations, two printed copies of a letter from Sir Erskine Perry to the Government of Bombay, dated 22d May 1844, as a Supplement to the Appendix of the Report of the Indian Law Commissioners, sent to us with the despatch (No. 1094) of the 8th July last, and beg to say in reply, that, having attentively perused the paper now transmitted, we do not see any reason to alter our views, as expressed in our letter of 31st July last, and consequently we have no additional observations to offer on the subject under consideration.

We have, &c.

(signed) *C. W. Brietzeke*,
Russomoy Dutt.
Commissioners.

Court of Requests,
4 October 1844.

(True copy.)

(signed) *A. Turnbull*,
Under Secretary to the Government of Bengal.

Unrecorded.

From Sir *H. Roper*, Knight, Chief Justice of the Supreme Court of Bombay, to the Right honourable the Governor General in Council, &c. &c. &c.; dated 10 January 1845.

Honourable Sir,

The Government of Bombay informed me in October last, that the Government of India requested to have the opinions of the judges of the Supreme Court at Bombay, respecting the Report of the Law Commissioners, dated the 15th of February 1844.

Shortly after I had begun to write upon the subject, interruptions arose from private matters, and immediately afterwards a term and a session occurred, so that I was unable to conclude writing the observations I have now the honour to transmit, until the middle of December, since which period much time has been lost through the dilatoriness of the person employed to copy what I had written.

I have, &c.

(signed) *H. Roper*.

Bombay,
10 January 1845.

No. 1.
On Civil Judicature in the Presidency Towns.

As the judges have been requested to give opinions on the Report of the Law Commissioners, dated the 15th of February 1844, it is scarcely open to me to say, that my opinion is expressed in my letter of the 4th of August of the previous year, which, as forming part of the Supplement to the Report, has already been submitted to the Government of India. That letter commented on Sir Erskine Perry's suggestions for changing the mode of administering justice, and therefore has reference to the Report, in which similar plans and opinions are proposed and advocated. When the letter was being written, I had no reason to suppose there was any such unanimity between Sir Erskine Perry and the members of the Law Commission; and it appeared to me that the Commissioners had not invited any discussion of the subject; I therefore limited myself to a few general observations, and when afterwards aware that Sir Erskine Perry's minute had been favourably entertained, I was glad to find the judges at Calcutta had canvassed it more fully, and it might be sufficient for me to say, that, with some slight qualification, I concur in their opinions, as expressed in the minute of Sir Lawrence Peel, dated the 13th of February 1844.

Sir Erskine Perry's minute, and his subsequent letter of the 22d May, are auxiliary to the Report, together with which they have been printed, and they are obviously relied on as supporting or confirming the latter. I shall therefore controvert certain positions in the minute and letter to which I cannot assent, and some of which have, I think, a tendency to prevent a dispassionate consideration of the subject; but I shall first point out a minor inaccuracy which cannot affect the general principles contended for. In the 48th paragraph of the minute it is proposed, that by an Act of the Government, the interest on unclaimed estates in the hands of the ecclesiastical registrar be applied to the maintenance of the projected court. An Act of the Government could have no such effect, for in default of legatees, next of kin and creditors, those funds are the property of the Crown. If it were notified, not merely in the London Gazette, which few people read, but also in the principal newspapers of London, Dublin and Edinburgh, that such estates are still unclaimed, the Crown and other parties entitled might become apprized of their rights, and claimants to the eight lacs in question might speedily appear.

An impartial inquiry into the merits and demerits of the Supreme Courts can hardly be obtained in India, where each of those courts, from its establishment, has been viewed with jealousy by local rulers and members of the civil service of the East India Company, forming the most influential classes of the community. The difficulty is increased when, as in the present instance, the discussion is chiefly carried on between judges of those courts on the one hand, and upon the other the Law Commission, consisting, very differently from the original intention of the Legislature, of three members of the civil service, and one gentleman whose professional practice had terminated long before his arrival in this country. Further difficulties have arisen from the institution of comparisons between the Supreme Courts and those of the mofussil, to the disadvantage of, and with highly coloured views of the defects of the former; and from a representation that different forms of process for matters of civil, criminal, legal, equitable, ecclesiastical or admiralty cognizance, were adopted in the Supreme Courts, because Sir Elijah Impey, and the other judges first appointed to the bench at Calcutta, were under temptation "to form a costly establishment, with a number of offices, to which the different codes of practice were to afford fees, and of which the founders were to have the patronage." These comparisons and positions, if undisputed, might be held undisputable; and I shall first apply myself to the imputation upon Sir Elijah Impey and his colleagues.

I know not whether their respective circumstances exposed the judges who first sat upon the bench at Calcutta to the alleged temptation, or whether, in exercising their patronage, those judges afforded reason to believe that offices in the court had been created from unworthy motives. When we consider, however, what has occurred in the United States of America; if we do not see reason to doubt the expediency of administering law and equity by the same modes of procedure, we may at least hesitate to ascribe dishonest views to the first judges of Calcutta, because in their court, law and equity and other branches of jurisprudence were kept separate, being administered by different modes of procedure, as in England.

No. 1.
On Civil Judicature in the Presidency Towns.

Mr. Justice Story says: "In nearly all the states in which equity jurisprudence is recognized, it is administered in the modes and according to the forms which appertain to it in England; that is, as a branch of jurisprudence separate and distinct from the remedial justice of courts of common law. In Pennsylvania it was formerly administered through the forms, remedies and proceedings of the common law, and was thus mixed up with legal rights and titles, in a manner not easily comprehensible elsewhere. This anomaly has been in a considerable degree removed by some recent legislative enactments. In some of the states of the Union, distinct courts of equity are established; in others, the powers are exercised concurrently with the common law jurisdiction, by the same tribunal, being at once a court of law and a court of equity, somewhat analogous to the case of the Court of Exchequer in England. In others, again, no general equity powers exist; but a few specified heads of equity jurisprudence are confided to the ordinary courts of law, and constitute a limited statutable jurisdiction."

In the tribunal above described as analogous to the Court of Exchequer in England, equity is administered in the same manner as in the Supreme Courts in India. One object of the Report is to have equity administered, as formerly in Pennsylvania, through the same forms, remedies and proceedings as the common law, if not through "the forms, remedies and proceedings of the common law." Whether equitable and legal rights and titles might not thus become "mixed up in a manner not easily comprehensible elsewhere," may be worthy of consideration, especially as legislative enactments have been required to check such evils in Pennsylvania, inhabited by a shrewd people, fully awake to their own interests, and amongst whom equity jurisprudence had no existence till 1790, long after Pennsylvania had ceased to be subject to the British crown. Indeed, it is worthy of remark, that in several of the countries now included in the United States, there was no equity jurisprudence whilst they continued colonies of Great Britain; but at present there are few states in which it has not been adopted; and in nearly all the states in which it now exists, it is administered in the like modes and forms as in England, separate and distinct from the justice of courts of common law. And this state of things has been established since the revolution. In Pennsylvania, where equity jurisprudence was according to the system contended for by the Law Commissioners, legislative remedies for that system have been resorted to. What the evils and remedies were, I have at present no means of ascertaining; for I have but one or two books relating to American law. I find the equity jurisprudence of Pennsylvania in question in the case Sims Lessee *v.* Irvine, in the Supreme Court of the United States in the year 1799, and again in Hollingsworth *v.* Fry, in the Circuit Court, Pennsylvania district, in the year 1800. In the last case, Mr. Paterson, a judge of the Supreme Court, said: "There is a strange mixture of legal and equitable powers in the courts of law of this state. This arises from the want of a distinct forum to exercise chancery jurisdiction, and therefore the common law courts *equitise* as far as possible." But neither of those cases discloses the nature of the evils alluded to, and I now merely rely on what has occurred in the United States, as ground for doubting whether Sir Elijah Impey and his brother judges were actuated by sordid views, in keeping law, equity and other branches of jurisprudence separate at Calcutta, and administering them by different modes of procedure, as in England.

Under the charter of the Supreme Court at Calcutta, it was imperative on judges to administer justice in its several branches according to modes and forms analogous to those appropriated to them respectively in England. After prescribing the mode of procedure in actions at law, in general terms, the charter provided that the court should be a court of equity, and administer justice in a summary manner, "as nearly as might be, according to the rules and proceedings of the High Court of Chancery." Criminal justice was directed to be administered in such or the like manner and form, or as nearly as the condition and circumstances of the persons and the place would admit of, as courts of oyer and terminer and gaol delivery did or might in England; and with respect to the ecclesiastical and admiralty jurisdictions, a slight conformity to modes of procedure in use in the analogous jurisdictions of England was enjoined. A passage from Sir Elijah Impey's convincing speech at the bar of the House of Commons, on the 4th of February 1788, is prefixed to the copy of the charter inserted in the first volume of the Rules and Orders of the Supreme Court,

Court, &c., edited by Mr. Smoult and Mr. Ryan. It thence appears, that the draft of the charter in question had been perused by Lord Thurlow, altered by Lord Loughborough, revised by Lord Walsingham and Lord Bathurst, and commented upon by them all respectively, when in office. We may conclude that they approved of the provisions of the charter, and that the judges of Calcutta, in organizing the court, could not have disregarded the opinions of such men.

It would be misapprehension to suppose that such evils as are exemplified by the statement of the case of Poonjee Caunjee *v.* Abdool Ruheem Khan, in Sir Erskine Perry's minute, sec. 18, are of common occurrence under the present system of equity jurisprudence at Bombay. The bill was short, and might have been answered within less than 15 weeks; but there may have been overtures for peace in the interim, and it does not appear when the counsel and attornies respectively received their instructions. A person employed to copy the interrogating part of the bill, not seing the usual words, "whether, and how otherwise," in that part by which, in case assets should not be admitted, it was required that an account should be set forth, altogether omitted copying that passage, and hence the answer was defective, in not setting forth an account. Within 12 days after the exception had been taken, the further answer was put in. The cause might have been heard in the next term, and without any evidence being taken; for the defendant's answer admitted the complainant's claim, but denied assets. The complainant, however, successively filed two amended bills, each so copious as to require a new engrossment. The object was to extract full accounts, independently of proceedings in the Master's office. Notwithstanding the authority of White *v.* Williams and Leonard *v.* Leonard, and that class of cases, it appears to me that such a course should be wholly disallowed. There was nothing analogous to it in the old action of account, which the judges at Calcutta now propose to restore, thus impliedly consenting that, to some extent, the system I object to shall be discontinued.

Two years elapsed after filing the rejoinder before the case was brought to a hearing, when a decree for an account was taken by consent. The delay, I conceive, could not have occurred, had the plaintiff been determined to speed the cause; but he may have been influenced by the following motives, to which a gentleman who, as acting master in equity, became acquainted with the suit, assured me that much delay in the Master's office was attributable. The defence was, want of assets, and this gentleman informs me he understood that the complainant, apprehending the defence might be made good, if the account were taken immediately, deferred proceeding, in order that further assets might be got in, and that interest upon the amount already received might accumulate. There are circumstances consistent with this view of the matter; for when the answer was filed, a large portion of the assets (9,051 rupees) ultimately received, had not been recovered by the executor. The complainant did not bring the decree into the Master's office until more than three months after its date, and from that time up to January 1838, a period of nearly two years, only 11 effectual meetings were had before the Master, whereas the complainant might have taken out as many warrants as he pleased. From the 12th of April 1840 to the 10th of February 1841, that is to say, in a period of ten months, there was only one attendance at the Master's office. Some delay may have arisen from the gentleman who was Master in 1836 having become insane. Another gentleman was appointed to act for him till he resumed his office in, I think, 1837, but he soon became ill again, and was obliged to relinquish his appointment.

To me it appears, not only that the case is peculiar, but that the description of it in the minute is somewhat coloured, for we therein find a period of above twelve months, which it is said elapsed between a demand for payment and the filing of the bill, put forth as a portion of the law's delay. The minute also is inaccurate as to some of the particulars of the case. It is said, "the plaintiff having a claim against the testator of between 2,000 and 3,000 rupees, applied to the defendant for payment of his debt, and at all events for an account of the testator's assets, but the defendant refused both one and the other. The plaintiff was therefore forced to file his bill, &c." There was no evidence of any such application for an account of the testator's assets prior to filing the bill. It is not even alleged in the bill that any such application was made. The complainant's claim was founded on a bill of exchange, drawn in his favour upon the testator. It was

stated in the bill in equity, that the testator accepted the bill of exchange as security for the drawer, and also that the testator paid to the complainant a small portion of what was due upon the acceptance, and that after the testator's death the defendant had accounted with the drawer, and had been credited in, or had received value for the full amount for which the testator had become liable by the acceptance. But there is not a word in the bill of any prior application for an account of the testator's assets. After alleging, as a pretence, on the part of the defendant, his declaration that he had no assets, the usual charge to the contrary is added in these words, "Whereas your orator charges the contrary thereof, and so it would appear if the defendant would set forth as he ought, but which he refuses to do, a full, true and particular account, &c." Even this charge was not admitted by the answer, in which the defendant fully admitted the plaintiff's claim, and offered to account for the assets.

It is said in the minute that the answer was excepted to, and on argument a further answer was ordered. The origin of the exception I have already mentioned. There was no argument of the exception. No order for a further answer was made, and within twelve days after the exception was put upon the file, the further answer was put in; circumstances tending to show, as the fact was, that the omission had occurred through the oversight of the defendant's counsel. After nearly three years litigation the complainant took, by consent, the same decree which he might have had upon bill and answer within the first five or six months.

It is said in the minute, "a long litigation of nearly four years took place on these points in the Master's office, when a report was presented altogether against the defendant. This report was excepted to by the defendant, but all his objections were overruled." It should have been added, that owing to an error of the Master, the defendant was charged with 17,263 rupees too much. Had that error not occurred, the testator's estate would have been found indebted to the defendant, whose defence, want of assets, would thus have been established. It was ordered, on further directions, to the effect that the error should be rectified, and, with a view to costs I presume, that the Master should inquire and report whether certain property received by the defendant, had been fairly brought to account. The defendant in an account annexed to his answer, and in another account filed in the Master's office, had given credit for considerably less than the just amount, the Master therefore reported, that the defendant had not fairly brought to account the property in question. Exceptions were taken but overruled. Finally, it is said in the minute, "a decree on all points raised by the defendant, was made against him, when a further controversy was raised by him as to his own liability to costs, on the ground of being an executor." The cause had come on upon the exceptions and for further directions, and the exceptions being overruled, the only points remaining, were, whether the defendant had made out his defence, want of assets, and who should pay the costs of the suit. The estate was found indebted to the defendant in 884 rupees; so the result of the suit as to the principal point, want of assets, was decidedly in his favour. Still he was ordered to pay to the complainant all the costs of the suit, and, as he had acted dishonestly in filing false accounts, I think, if the court had power to do so, it exercised a sound discretion in ordering him to pay the costs. In Robinson *v.* Elliott, 1 Russell, the result of the account in the Master's office, was, that there were no assets unadministered, but the executrix was charged with more than she had admitted in her answer, and therefore, although the bill against her was dismissed, it was dismissed without costs. The case before Sir Erskine Perry was much stronger. In Nicloson *v.* Wordsworth, Lord Eldon intimated, that where a bill is dismissed, a defendant may be ordered to pay the costs; and see Mortimer *v.* Orchard, before Lord Loughborough, and Anon., 4 Madd. 273. In this country the courts exercise a very wide discretion in such matters, but I am not aware of any exact precedent for the order in question, and therefore feel no surprise at there having been a controversy as to the liability of the defendant.

In my letter of the 4th August 1843, I expressed opinions that stagnation in the China trade and in mercantile affairs in general, had latterly caused litigation to decrease; that such effect was temporary, and that there was then nearly as much business in the court at Bombay as there had been at any time during the ten preceding years. This view was in no respect refuted by the schedule

schedule of cases heard and actions tried during the years 1840, 1841, 1842, annexed to Sir Erskine Perry's minute. In the 4th paragraph of the minute, that schedule is referred to as showing the amount of business in the court. In the 6th paragraph, it is said, that although the number of suits in the mofussil courts is annually increasing, those in the Supreme Court decline in a like ratio, and in a note upon the latter statement it is said, "The number of plaints filed on the common law side of the court, have fallen off 20 per cent, during the last three years, as taken on an average of the preceding ten years." It follows that the schedule thus adduced as evidence of the small amount of business in the court, had merely reference to that period in which there had been the least business during the thirteen preceding years; and so far from there having been evidence of an annual decline of business, the schedule showed that the amount of business in the year 1842, exceeded that of either of the next two preceding years. In fact, the schedule tended to establish my belief, that interruption of the China trade had caused a decrease of litigation, and that such effect was merely temporary. The opium was surrendered in March 1839, and in the Dewallee of that year scarcely any accounts were adjusted. European and native merchants exerted themselves to induce creditors in the bazaar to show forbearance to their debtors, as was in evidence before the Committee of the House of Commons appointed to inquire into the surrender of the Opium. Hence in 1840, the first year to which the schedule referred, there was but little doing; there was but still less in the following year, but towards the end of that year the trade was to some extent resumed, and it became certain that compensation for the opium would be granted, and accordingly in 1842, law business considerably increased. It had still further increased when my letter of August 1843 was being written, and it may be concluded, that a further improvement has taken place, inasmuch as the first three terms of the present year have been insufficient for the transaction of business, and sittings after each term have been required.* My opinion is further confirmed by that of a professional gentleman of considerable experience. He has expressed his belief that the amount of wholesome litigation in the court at "Bombay, has increased rather than diminished," adding that "much business is now kept out of the court that in former days probably would have found its way there." Above four years ago I understood from Mr. Cochrane, who had been at the Calcutta bar, that more solid business was transacted in the court of Bombay, than in that of Calcutta, where, I believe, much time was formerly occupied in disposing of demurrers, exceptions and such like proceedings, which, unless founded on some substantial question, and not upon mere points of form, have been, for several years, utterly discountenanced at Bombay. On the whole, I doubt whether at the present period judges are more occupied at Calcutta than at Bombay, especially as at the latter place three of the criminal sessions for the present year have already occupied above 52 days, with the exception of Sundays and two or three holidays, and the fourth session is yet to come. But the criminal business during the present year, has been unusually heavy, and one case occupied nine days, and another three days.

In my letter of the 4th of August 1843, I said the cost of litigation in the Supreme Courts was very great, and ought to be diminished, but the expenses incurred on the plea side of the court at Bombay are, I believe, somewhat incorrectly stated in the 8th and 9th paragraphs of Sir Erskine Perry's minute, and in the schedules to which they refer. His estimate is, "that a defended cause in the Supreme Court costs the losing party about 1,200 rupees, that an undefended cause costs about 450, and that even in causes when the defendant confesses the claim or gives a cognovit on the first opportunity he has to do so, the expenses amount to no less than 189 rupees." It appears that the number of cases from which this calculation was made, included those cases in which, owing to peculiar circumstances, such as references to arbitration, special motions, &c., extraordinary costs were incurred. Thus, although the estimate may be correct,

* During the fourth term, which commenced and concluded after the above passage had been written, there was but very little business, and it was all disposed of in a very few days. This has been chiefly attributed, and I believe, justly, to the absence of a principal counsel, and to the illness of an attorney, who was in considerable practice. He became unable to transact business shortly before the term began, and died a day or two before the term ended.

No. 1.
On Civil Judicature in the Presidency Towns.

correct, as giving in one sense the average amount of costs in each of all the cases forming the mass of the litigation in question, it seems erroneous to intimate, as in the 9th and 22d sections of the minute, that in an ordinary action such expenses are incurred. The taxing officer has furnished me with tables and calculations upon the subject, founded on examination of the registry of bills of costs in his office for the same three years specified by Sir Erskine Perry. The officer tells me, he has taken "the cases which appear to him to determine the general and usual costs in defended causes, undefended causes and cognovits for those several years. Where the costs included arbitrations, special motions or matters of exception, they are not inserted, as the costs in such cases are special rather than general."

According to the taxing officer's estimate, corroborated by tables which accompany his statement, the cost of a defended action to the losing party is about 800 rupees (Sir Erskine Perry's estimate is "about 1,200 rupees"); the costs of an undefended action are about 192 rupees (Sir Erskine Perry's estimate is "about 450"); and where a cognovit or confession of the claim is given, the average costs have been 147 rupees (Sir Erskine Perry's estimate is "189 rupees").

The amount of fees to counsel in the defended cases from which the above estimate was made has also been ascertained, and thence it is stated that on an average, 239 rupees have been paid to counsel in a cause, leaving about 561 rupees for the remuneration of attornies on both sides, and the officers of the court.

These costs, in my opinion, are too high; but considering that during the five years including 1839 and 1843 judgments were recovered by plaintiffs in the Supreme Courts in 338 causes, defended and undefended, for the amount in the whole of 17,69,970. 2. 1½., and that the taxed costs of the plaintiffs in such cases amounted in the whole to 53,890. 3. 7½; being at the rate of about three per cent. upon the sums recovered, I doubt whether there be such disproportion as is intimated in Sir Erskine Perry's minute, between the cost of suing in the Supreme Court and in the courts of the East India Company. In the latter, according to the second Bombay Regulation of 1827, section 52 and Appendix (L.), the fees to a vakeel for prosecuting or defending a suit, are three per cent. on the amount sued for, if not more than 2,000 rupees; if the amount exceeds 2,000 rupees, and does not exceed 10,000 three per cent. on 2,000 rupees of the amount, and two per cent. on the remainder; in suits for value not exceeding 20,000 rupees, three per cent. on 2,000 rupees of the amount, two per cent. on 8,000 rupees of the amount, and one per cent. on the remainder. Though the fee upon any amount above 20,000 rupees was formerly half per cent., I believe it is now fixed at one per cent. Each party is generally bound by special agreement to pay a much larger per centage to his own vakeel in the event of his succeeding; sometimes one-fourth, sometimes, it is said, one-half. I have known evidence of such agreements on two or three occasions before the Supreme Court at Bombay. The Stamp-tax on law proceedings is also very heavy.—*See* Bombay Regulation XVIII. of 1827, Appendix (C.), (D.), (E.) and (F.)

Suits for small amounts may be conducted at a cheaper rate in the mofussil courts than in the Supreme Court; but the larger the value sought to be recovered in the former tribunals, the greater becomes the cost, and in an extravagant ratio, especially as appeals from such courts so frequently occur. In 1834 or 1835, there was a decree against one Heerachund Bedreechund, in the Supreme Court, for upwards of 14 lakhs, and another man is now defendant in a suit in which about 14 lakhs are claimed from him. What enormous sums might be levied from parties to such suits in a mofussil court by way of charges for stamped paper, fees to vakeels and the share of the vakeel of the successful party. The Bombay Government being engaged in a suit about a village in Guzerat, producing about 12,000 rupees per annum, the case went before the Privy Council. The Government, I understand, had to pay 60,000 rupees as costs, of which perhaps one-half were costs incurred in this country. I have been furnished with the following case, which has recently occurred. Two Hindoo women disputed the right of heirship to a wealthy shroff; one of them obtained a certificate of heirship, which was confirmed by the Sudder Adawlut; the other filed a suit to annul it, and obtain possession of the property. She stated the property in dispute at one lakh (it is said to be many lakhs); the stamped paper for the plaint was therefore 1,000 rupees. The assistant judge dismissed the suit, on the statements in the plaint, without taking evidence. The costs of both parties were

were 3,941 rupees. On appeal, the judge reversed the first decree without taking any evidence, and merely annulled the certificate of heirship. The costs of both parties in that appeal were 3,186 rupees. They have a further appeal pending before the Sudder Adawlut, the costs of which will be about 2,480 rupees to the unsuccessful party, exclusive of fees to her own vakeel, and irrespective of the private agreement for bonus or per centage upon which the successful party will be liable.

I believe the expense of suing in the Supreme Court chiefly arises from the cost of office copies of the pleadings and fees to the officers of the court. If those officers were paid by the Government, as it is proposed the officers of the projected court shall be, or if compensation were given to present holders of offices, pleadings might be delivered between the parties instead of being filed. They might be handed in at or shortly before the trial or hearing, and would furnish materials for making up the record. Under such a system, the costs of suitors in the Supreme Court would be much less, I believe, than those at present incurred in the courts of the East India Company.

Of late years much has been done with a view to lessen the expense of pleading in English courts of law and equity, and much more, I think, might easily be done. In equity, all formal parts of pleadings should be excluded. Merely the legal effect of written instruments should be set forth. Answers might be confined to traversing the plaintiff's case, and stating the defendant's, and no admissions could be required in the answer, if the plaintiff were allowed to read, as admitted, whatever was not denied. Perhaps the complainant should not be permitted to anticipate the defence in his bill; anomalous pleading and much nicety and repetition would thus be avoided. The introduction of vivâ voce examination of witnesses in equity, and of both parties, as well in law as in equity, would at once abolish the preparing interrogatories for witnesses, and the interrogating part of the bill. Or if the vivâ voce examination of parties be held inexpedient, they might be examined on interrogatories founded on the bill and answer. If, however, vivâ voce examination were adopted, the same precise statement of matters of evidence, at present usual in the bill and answer, should be no longer requisite, and thus much benefit might result to the parties.—*See* Hall *v.* Maltley, 6 Price. Cross bills might thus be abolished, and a defendant in equity might be permitted to ask the court to declare instruments sued on, fraudulent, and to order them to be cancelled. Several other changes might be suggested.

The expense of litigation probably operates, not progressively, or in causing a gradual or annual decrease of business, as seems to have been supposed, but by prescribing limits proportional to the value of matters in dispute, so as to preclude having recourse to a costly tribunal for what may not be worth heavy charges for a suit. The Supreme Court is a forum unsuitable to small matters, which should be disposed of in some such court as that proposed by the Law Commissioners, more simply and less expensively organized. Courts of the latter description can also, in their manner, decide affairs of greater moment, and whether their jurisdiction should therefore be unlimited, appears to be a question arising on the Report. Unless their ability to dispense justice be fully equal to that of a Supreme Court, I conceive their authority should not be extended. No doubt such courts will be popular, for recourse may be had to them on cheap terms. In general, they will be resorted to in the first instance, to the exclusion of any more costly tribunal, charges for suing in which will not be incurred unless upon appeal, if permitted, from alleged erroneous decisions of less expensive courts. It is proposed to allow an appeal from the court of the Law Commissioners, but how greatly is a right prejudiced by an erroneous decision in the first instance. How difficult does it then become to obtain justice by appeal. There is usually a disposition in the Superior Court to uphold the judgment already given, which must have considerable effect even when the case is tried de novo, and where credit to any extent is given to the inferior tribunal for accuracy. As to facts, how completely may points of law be swamped by an improper finding. Courts of appeal are not always, or, perhaps, often resorted to, where error has occurred, and even when applied to are but imperfectly corrective. It is therefore important to adopt means for dispensing justice as fully as may be in the first instance, especially considering the many ways in which imperfect administration of law has pernicious effects upon society. A better

No. 1.
On Civil Judicature in the Presidency Towns.

description of tribunal may be costly, but the expense should be defrayed by the State or by suitors. I believe much moral and political mischief results from defective courts, and that, therefore, they should have but a limited operation. To a certain extent they have been hitherto necessary evils, for without them claims of small amount would have remained unsetted. If their jurisdiction cannot be restricted to such matters without expense to the State and to the richer classes of suitors, I still believe it consistent with the interests of the community that the State, or wealthy suitors, should bear the cost of maintaining better courts for more important affairs, having original, and not merely appellate jurisdiction. Such superior tribunals influence inferior courts in various ways, and tend to purify them not a little. Into what state would courts of requests and judicatures of that description degenerate in England, if the courts at Westminster were abolished, or what would the small cause court at Bombay in a few years become, if the Supreme Court were not within view of the judges at that Presidency and the public.

Thus, unless the forum proposed by the Law Commissioners should be better instructed, and capable of arriving more nearly than the Supreme Courts at a perfect administration of justice, I think its jurisdiction should be limited to small affairs, and that its being the cheaper court should be accounted a matter of secondary importance.

But the superiority of such a court as means of distributing justice, seems to be thought sufficiently established by several criterions. It is said, in the first place, that it would carry off the business from the Supreme Court. I have no doubt it would, for as being the less expensive court, suitors, even the wealthiest, would resort to it; they would first try their chance there, and only have recourse to a more expensive tribunal if the latter had cognizance of appeals from the former, and an appeal had become necessary or expedient, and thus matters might go on till such evils had resulted from a bad judicial system as rendered a change or remedy indispensable. If measures were taken to enable honest litigants to sue upon the same terms with regard to charges in either court, the Supreme Court might, and, I believe, would be preferred.

The unfitness of Supreme Courts for the distribution of justice is also contended for on the ground that their business gradually decreases, whilst that of the mofussil courts is annually increasing. I have already dwelt on the alleged progressional decrease of business in the former courts, and, I trust, have shown that it did not exist, and if the business of mofussil courts has increased as compared with that of Supreme Courts, it may be that such a state of things has arisen from the comparatively defective administration of justice by the former. Rights will be invaded or withheld under a very imperfect judicature, more frequently than where the administration of justice is comparatively equable and certain, and I have long believed that the common notion of natives of India being more litigious than the rest of the world has arisen, because the very imperfect judicial system under the India Company engenders litigation, which they who are blind to existing defects, ascribe to a peculiar character in the people.

The relative merits of Supreme and mofussil courts can scarcely be estimated from the quantities of business transacted in them respectively. Appeals to the Supreme Court from subordinate jurisdictions are almost unheard of, for the latter tribunals are chiefly occupied in small matters not worth the expense of an appeal. In each of the mofussil courts, except the lowest, there is much business from appeals; no slight evidence of a defective judicial system.

The leading or principal natives at Bombay are greatly averse to appearing as litigants, which they seem to consider as a disgrace. During the last September term, there was an important case respecting a ship called the "General Wood," which would have been kept back had not an English merchant consented to appear as sole plaintiff on the record; several natives were joint owners, but declined to let their names appear. I am not aware that such feelings have much influence in the mofussil.

Chief members of the native community at Bombay seek to acquire importance as patrons or protectors, and to this end are much employed in inducing litigants to accept their mediation. Much apprehension of their displeasure is apparently felt, and considerable sacrifices are made to propitiate them. With

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that view in a recent case, a party compromised for a sum of money an indisputable claim to a much larger amount, full payment of which could have been easily enforced.

The Supreme Court gives little encouragement to fraudulent or frivolous suits, a description of business which, I have been told, is rife in the mofussil, and, by the advice of both branches of the profession at the Presidency, much litigation is prevented respecting matters which give employment to the provincial courts.

Lastly, the Supreme Court only exercises jurisdiction over comparatively important matters, those of minor consequence being disposed of in the small cause court and the court of requests. The zillah courts entertain the most inconsiderable suits, suits for less than a rupee.

Under such circumstances it is difficult to draw comparisons founded on the quantities of business which the courts in question respectively dispose of. I believe there is excessive litigation in the mofussil courts, and I attribute the excess to a very faulty judicial system.

Many years ago, on first arriving in this country, I also was told and swallowed much as to the excellence of provincial courts, till certain particulars from time to time came to my notice, which somewhat abated previous estimates of their merit. At length, about the year 1832, a case for opinion detailed proceedings in a suit respecting a very simple matter, which had been carried through inferior country courts into the Sudder Adawlut. In every stage such errors and improprieties were said to have been committed, that I utterly disbelieved the statement, and in writing my opinion expressed unqualified disbelief accordingly. Some months afterwards a gentleman in the civil service of the Company told me he had read the opinion, and assured me that the case had been truly stated. Such an authority left no room for doubt, and such proceedings, I am confident, could not have occurred, unless under a grossly defective judicial system. Prejudice may influence my judgment of such matters, but I rely on the opinion of others whom I believe impartial, as well as upon my own, in professing a belief that the Company's courts are unequal to the administration of justice, owing to several causes, some of which it may be useful to specify, as similar evils will, I think, affect the court of the Law Commissioners.

Civil servants who preside in the Company's courts have had no professional education or experience. Hence they imperfectly comprehend rights and wrongs involving nice distinctions, or modified or rendered complex by manifold relations arising from the business of life, and they have no power of ascertaining how, in like cases, legal principles have been previously applied. Unguided by rules of law or evidence, they are easily misguided in various ways through prejudice or passion, and being left much in their own power, they may allow others to exercise power over them. They become partisans more frequently, and when thus affected are more mischievous than professional judges, for they are less under control. It often happens that the Serishtadar has great influence with the European judge of a provincial court, especially as such judge is generally but imperfectly acquainted with the language in which the proceedings are carried on. I am told he is seldom able to read or write it without difficulty. The proceedings are therefore read to him by the Serishtadar, who also records the evidence; and although the judge may sometimes dictate the words of the decree, I understand that is not always or often the case, and the decree is almost uniformly written by the Serishtadar. What power may not that officer possess? and where the judge is ignorant, or indolent and confiding, what mischiefs may or must arise.

Sir Erskine Perry expressed his disapproval of unprofessional judges, in a minute upon the inexpediency of establishing, at Bombay, a small cause court, similar to one proposed to be erected at Calcutta in the year 1843. The minute was sent to the Government of Bombay, along with a letter I had written on the same subject, dated the 6th January 1844. It appears from the 2d and 13th sections of the proposed Act for establishing the new court recommended by the Law Commissioners, that such court will be subject to the defect in question, and that all the commissioners thereof, except the chief, may be without any legal education. Difficulties in law may easily escape the observation of an unprofessional commissioner; and it is not improbable that, in his ignorance, he may make light of them, or disregard them, especially as ample scope for self-sufficiency is provided, by leaving it dependent on his own opinion of his own

No. 1.
On Civil Judicature in the Presidency Towns.

ability, whether the suit is to be proceeded with before him, or to be transferred to the chief commissioner.

On a former occasion I observed, that there is no expression of sound public opinion in India, where the presence and intervention of professional men are the most effectual, if not the only checks upon the errors and infirmities of a judge. That great benefits otherwise arise from the employment of counsel, is apparent from Sir Erskine Perry's letter to the Government of Bombay. In the 30th paragraph, he says, "The eminent advantage of such (legal) assistance is so obvious, that no one would fail to avail himself of it, when within his reach, if his rights or possessions became the subject of legal discussion." In the 29th paragraph, he says, "It is true that in such cases (where parties are not wealthy enough to employ the assistance of counsel) the court, in the absence of any forensic advocacy on either side, would often fail in discovering points material to the issue, points which the parties themselves might be blind to, and the law delivered would be frequently inferior in quality to what it would have been after hearing all that legal acuteness and industry would suggest."

In this country the advantages accruing from the employment of counsel are peculiar to the Supreme Courts; for although there are vakeels in the courts of the East India Company, they are ignorant men of very inferior station in life, and are incapable of instructing or controlling the judges before whom they practise. They are permitted to contract with their clients for additional rewards or commission in case of success, and hence they become seriously interested in the result, and are under temptation to tamper with witnesses, and to resort to other fraudulent proceedings.

In the last paragraph of my letter of the 4th of August 1843, I intimated my belief that the establishment of such tribunals as the Law Commissioners recommend, would cause the annihilation of the bar at each Presidency, or that, at all events, counsel would seldom be employed. Sir Lawrence Peel is of opinion, that such a consequence would not ensue, at least, at Calcutta, and I have no doubt that if it did not take place at Calcutta, it could not at Bombay. Sir Erskine Perry thinks the projected courts would open a much wider field for forensic talent and employment. After long consideration, I retain my original impressions about the matter, for the following reasons.

In the small cause court at Bombay, so much referred to for its supposed similitude to the court of the Law Commissioners, counsel are but little employed. Sir Erskine Perry says, "The eminent advantage of legal assistance is so obvious, that no one would fail to avail himself of it, when within his reach, if his rights or possessions became the subject of legal discussion." My experience of the small cause court leads me to a different conclusion. The dealings of many litigants therein prove them to be men of substance, and some money-dealers who often resort to it, are personally known to me, and I have no doubt they are wealthy, and yet counsel are seldom employed in that court, and very seldom indeed by those who, from frequent experience, may have acquired greater skill in the conduct of their suits. The clerk or officer of the court, if applied to, becomes agent and legal adviser to both parties, pretty much as the judges of the court of the Law Commissioners are to act. But although the agency of attornies is thus dispensed with, it often happens that a party, distrusting the officer of the court, and reluctant to confide in one who is the confidant of the other party, employs a native lawyer to manage his case, and it is chiefly where native lawyers thus conduct the business, that counsel are retained for the trial. The chief reason for thus resorting to professional assistance may be, that although the officer of the court nominally prepares the brief, the native lawyer often adds observations or the names of witnesses, and probably extracts some additional fees for himself. This alone may induce the native lawyer to advise his client to retain a barrister, for when we find that counsel are not much employed by suitors of skill and experience, it may be doubted whether the services of counsel are so beneficial in the small cause court as in tribunals differently constituted; and the retaining of counsel in the small cause court seems but little dependent on the difficulty or simplicity of the case. In cases of some difficulty even between wealthy parties, barristers are not usually employed, whilst they are sometimes retained for the trial of very simple matters. Generally, when counsel appears, the case, however simple, lasts much longer than it would otherwise, and cannot be so summarily disposed of.

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Sir Erskine Perry says, in a note to the 30th paragraph of his letter to the Government of Bombay, "The elicitation of truth amidst conflicting statements, the clear exposition of principles from circumstances," immersed in matter, "and the logical reasoning required to bring these principles within the rules of the law, are operations so immeasurably better conducted by men trained in legal science and controversy at the bar, than by the common herd of mankind, that it seems to me clear their services can never be dispensed with." To me, on the other hand, it seems clear their services will be dispensed with whenever they can be dispensed with; and that they can be dispensed with in such a court as that recommended by the Law Commissioners, and in the small cause court at Bombay. The fact that in the latter court they are, to a very great extent, dispensed with, in some degree establishes the proposition.

Professional aid is costly, and although the above-mentioned advantages arise from it, and therefore great benefit to society, yet the expense falls directly upon suitors, and will not be incurred if success can be obtained without it. The court of the Law Commissioners will be, like the small cause court, so constructed, that although barristers may practise therein, their assistance may yet be dispensed with, and when employed by one party only, may sometimes tend to the prejudice of the client, owing to the infirmities of the judge. I believe it is essential to the advancement of justice that both parties be represented by counsel, and that will not always, or perhaps often, be the case where practically, as in the small cause court, the employment of professional aid is optional, and the retaining a barrister on one side does not render it necessary or expedient that the other party should appear by counsel also. In such a tribunal, where neither litigant is assisted by counsel, the judge endeavours to decide impartially, and his efforts may be successful, although, as Sir Erskine Perry observes, he may often fail in discovering points material to the issue, and the law delivered may frequently be inferior in quality to what it would have been after hearing all that legal acuteness and industry could suggest. If counsel appear for one only of the parties, the judge may fail in his efforts to be impartial, for it lies upon him to be legal adviser on the other side; it depends on him alone to combat fallacies and sophistries advanced by the barrister, his competitor; his feelings may, and, I believe, often do become interested to the injury of his judgment; a leaning to the side he advocates is engendered, and he may unconsciously become a partisan. Perhaps these considerations have weight with the experienced suitor in the small cause court. If he and his opponent be alike without professional aid, they are so far on equal terms. Should his adversary alone have counsel, he may think the judge may, therefore, lean towards himself; and on his part, he may be reluctant to be the only one to retain a barrister, lest the court should contract a leaning to the side unprovided with such support. In criminal trials, if there be no counsel for the prosecution, I think a culprit has less chance of escaping when defended by council, than if he be without such assistance, unless there be some point of law decidedly in his favour which might escape the notice of the court, or unless there be a good defence to be substantiated by witnesses, for examining whom professional skill may be important: I have reason to believe that persons under criminal charges have sometimes been advised to the like effect.

The grounds on which I thus account for the services of counsel being, to a great extent, dispensed with in the small cause court at Bombay, will equally affect the court of the Law Commissioners, in which I, therefore, think professional aid will be very seldom resorted to, although it is probable that native lawyers and other low practitioners, like vakeels in the provincial courts, will often be secretly consulted. Indeed, the 18th section of the proposed Act for establishing the court, should it become law, will, in itself, go far to exclude counsel from practising. A power in the judge to declare whether the assistance of a lawyer was reasonably required or not, I have no doubt would often be capriciously exercised, according as piques or partialities arising from the deportment of counsel, and various other causes might influence the judges' mind. Besides, the unprofessional commissioners will be, in a great degree, incompetent to form opinions on the subject, and it is not improbable that barristers may refuse to practise before them. But little utility or satisfaction can arise from discussing points of law with men wholly ignorant of the science.

If the sciences of professional men be virtually excluded, the evils pointed out by Sir Erskine Perry must arise, and judges will often fail in discovering

No. 1.
On Civil Judicature in the Presidency Towns.

points material to the issue, and the law delivered will be frequently inferior in quality. If the court of the Law Commissioners should be defective in such important particulars, and if it should become, as is intended, and, I doubt not, will be the case, the only court at each Presidency, must it not prove highly detrimental to the prosperity and morals of society.

Other defects in the provincial courts arise from the mode of pleading therein. In the 4th Bombay Regulation of 1827, rules for pleading are prescribed. They are so general that under them a very good system might be pursued, but the pleaders and the judges in those courts are unprofessional, and, perhaps, very properly under such circumstances, there are no provisions for enforcing conformity to the rules, which in practice are but little attended to. I have now before me some specimens of the pleading which, in fact, occurs. They are prolix, inconclusive, impertinent, argumentative, declamatory and discursive. Hence, not only are they more protracted than pleadings in the Supreme Court, at least, on the plea side thereof, but departures in pleading are frequent, the grounds of suit and of defence are shifted; immaterial issues arise, and matters really important are overlooked. Moreover, it frequently becomes difficult to ascertain whether any and what issues have arisen, or whether any and what evidence is required. Problems which, under the 23d section of the Regulation, the judges of the courts in question have to solve, and to that end are obliged to consult and have intercourse and interviews with the parties, whereby prejudices and prepossessions are engendered. So far as pleadings in the court projected by the Law Commissioners shall be prepared by unprofessional men, I have no doubt the evils alluded to as occasioned by ignorant pleaders; whether professional or unprofessional are also to be the judges, and further, are to act as legal advisers to the parties, I am confident they will very often become partisans, arbitrary and unjust; especially as, in a short time, there will be no other tribunal in view to control or afford a better example, and as counsel, if my opinion be correct, will seldom or never practise in the court of the Law Commissioners.

It is said that pleading or special pleading is inapplicable to India, because "it is almost impossible that a race of men like special pleaders should flourish in this country, and from the remarks of Sir L. Peel, Sir Erskine Perry gathers, that the statute of Beaupleader is as much a dead letter at Calcutta as it is at Bombay." During my experience of nearly 16 years at the latter Presidency, I have seen several barristers whose reasoning powers were well developed, and who I believe, are and were (for some are dead) not incompetent as pleaders. Pleaders go wrong occasionally in England, more frequently in India, but in the latter country they are pretty much on a par as to the science with the judges before whom they practise. Consummate skill, however, is by no means essential either to the bench or bar, and it is obvious that pleaders, however imperfect, are more likely to attain the ends of pleading by aiming at a perfect system, than by avowedly adopting one which is inaccurate and incomplete, or by disregarding the rules of pleading altogether. A great deal of what is complained of as technicality in pleading, is founded on analysis of the intellectual faculty, and is in conformity with and in furtherance of the operations of logical minds occupied in determining a dispute. There was a time when, through excessive strictness, the end was often sacrificed to the means; justice, to a blind adherence to certain rules prescribed for its attainment, but by due relaxation of which their object is frequently secured. Accuracy should be required to a salutary extent, or the rules of pleading, as in the provincial courts, will soon be disregarded, and it is very difficult to ascertain the medium between over indulgence and being extreme, to mark what is done amiss.

If a just remission of rules, and due indulgence as to amendments be truly and uniformly aimed at by the courts, the whole system will be progressively ameliorated, and the mischiefs of occasional or frequent error will be greatly remedied. Sir Erskine Perry commends the practice in the small cause court, of referring all technical errors in the pleadings to the jeofail of the clerk. Such a practice may be safely carried to an unlimited extent in that court, where the officer acts as agent to both parties; under such a system, it seems impossible that a technical error can mislead either party. In the Supreme Courts, it might be a rule that, at the trial, no pleading shall be held invalid on account of verbal or technical error; that the court shall decide what is verbal or technical error; that all mistakes which shall not have misled the opposite party shall be deemed merely technical or verbal, and that where such mistakes have occurred, the

pleadings

pleadings shall be construed and altered according to the meaning of the parties.

For a long period, as already mentioned, demurrers for matters of form have been discountenanced in the court at Bombay, and are therefore very rare; but previous to the trial, certain errors in pleading may be objected to, which, with a view to enforce due attention and skill in pleaders, ought not to be excused; for instance, errors which preclude the opposite party from logically taking issue. Such defects may be considered by some persons as merely technical or verbal, but they are substantial, and not merely formal.

The court at Bombay has exercised such powers with respect to amendments, &c., as are conferred on courts of record and judges at Nisi Prius in England, by 3 & 4 Will. 4, c. 42, ss. 23, 24. In this, the profession appeared to acquiesce, and perhaps the authority might be assumed, or the like ends obtained under the clauses in the charter directing the court to give judgment according to justice and right.

The Law Commissioners object chiefly, or solely, to the mode in which neglect of the rules of pleading is visited upon suitors, and the consequent mischief. They allege that this can only be remedied by what they term oral pleading, but which in fact is written pleading, prepared by the judges or commissioners of the court. Sir Erskine Perry, on the contrary, proposes to abolish pleading altogether. What he terms oral pleading, consists in the story of each party being told orally, and if there be no consequent reduction to writing, there is in fact nothing that a logician can call pleading, especially if every suitor is to tell his own story without professional aid. He obviously advocates the total abolition of pleading, because in the 22d section of his minute he repudiates an essential quality of every system of pleading, the separation of the law and fact; and in the 28th paragraph, he even denounces the petition and answer system, of which he says, "This mode of procedure contains within itself all the inherent defects of special and equity pleading. The suitor's story is not told by himself, but by his legal adviser." In the previous sentences he had said, the petition and answer system "has uniformity and simplicity to recommend it. Any one can draw a petition. No inveterate forms oppose themselves as obtacles to prevent the judge from finding his way to the fact in the case." He cannot mean to intimate that although a petition be uniform, simple and free from inveterate forms, so that "any one can draw a petition," it necessarily contains within itself, all the inherent defects of special and equity pleading, or that the story told in a petition is necessarily told, not by the party himself, but by his legal adviser. This 28th paragraph, in fact, imports that a party himself, and not his legal adviser, should tell his story to the court; and that a party is not even to employ the simple uniform petition, which any one can draw, as a vehicle for his story, but should tell it orally himself, without using any written pleading whatever. The note upon the 21st paragraph of his letter to the Government of Bombay, it appears to me, confirms this construction. He therein concedes to the Law Commissioners "the use they propose to make of certain rules of special pleading which have been found effective in practice," and subsequently adds, "I conceive, however, that if written pleadings are abolished, and with them the greater part of the technicalities with which written pleadings are accompanied, it is a misnomer to apply the designation of special pleading to a new system in which only a few of its rules are adopted." Thus, he contemplates the abolition of written pleadings, and five minutes' reflection will convince many a man that if written pleadings be abolished, no logical pleading can easily be carried on. In fact, Sir Erskine Perry intends there shall be no pleading whatever beyond the telling of his story by each party, for there is nothing in the minute to import that, according to his plan, any thing further is to take place, although we may conclude the judge or officer is to be at liberty to make notes.

The Law Commissioners, on the other hand, propose a widely different system; for they intend that, from the oral pleading of the parties, or their agents, written pleadings shall be framed, not by a professional adviser, indeed, but by the commissioner or judge. Nor do they intend, as Sir Erskine Perry assumes, to use certain only of the rules of pleading; for in their Report they say, "In the Supreme Court there are the elaborate rules of English pleading, calculated for the most part, as we believe, to produce the best results, when they are observed;" and further on they say, "The logical rules which constitute the essence of pleading are of universal application;" and using the words of Mr. Serjeant

No. 1.
On Civil Judicature in the Presidency Towns.

Stephen, they term special pleading "a fine judicial invention;" and they object to the oral pleading in the court of requests as not being subjected to any rules, whilst the rules they prescribe in their draft Act, section 12, for pleading in the intended court, might embrace an elaborate system. That they intend a pleading much more special than Sir Erskine Perry advocates, is apparent from their precepts to separate law and fact; that pleas be kept distinct from demurrers; and that no plea be double or argumentative, &c. There are no provisions, however, for enforcing adherence to the rules, which I have therefore no doubt would soon become, like rules for pleading in the provincial courts, mere dead letter. Through want of skill and experience, the unprofessional commissioners would be incompetent to carry out the system, and through want of responsibility, and consequent inattention, the professional commissioners would soon become almost equally inefficient; and therefore, even as matters stand, I have no doubt that pleadings at law, in the Supreme Courts, are more concise and sufficient than pleadings would be under the system of the Law Commissioners.

In the 11th paragraph of his minute, Sir Erskine Perry expresses himself to the effect, that, "so far as his experience goes, the immense expenditure which attends a trial in the full court, is not rewarded by bringing the case to be tried a whit more satisfactorily before the judges," than it would be brought before them in the small cause court. I have already said that barristers are seldom employed in the small cause court; but, by the passage above quoted, Sir Erskine Perry does not mean that no benefit results from the attendance of counsel at a trial; such a construction would be irreconcileable with the opinions subsequently given in his letter to the Government of Bombay, as to the advantages accruing to judges and suitors from professional services. He intimates, I conceive, that the written forms adopted for bringing a case to trial in the small cause court, are as effectual and satisfactory as the mode of pleading in use in the Supreme Court. I concur in that position so far as the jurisdiction of the small cause court, and the forms of declaration used therein, are concerned; but thus far there is little difference between the latter court and the Supreme Court. The process of the small cause court is confined to actions for debts and liquidated damages, in which the cause of action does not exceed 350 rupees. A very simple form of declaration is prescribed, which in itself affords but little information as to the nature of the claim preferred, a knowledge of which is acquired by the judge, and perhaps by the defendant, from statements made by the officer, and from the bill of particulars which accompanies the declaration. Thus, there is little that can be called pleading, on the part of the plaintiff, in that court, especially where the claim is founded on an indebitatus assumpsit, and the like observations may be made as to similar actions in the Supreme Court, for the money counts are as simple and as brief as the counts adopted in the small cause court, and in themselves afford as little information as to the ground of action. The same also may be said of other forms of declaration used in the Supreme Court. What can be more general or vague than a declaration in trover or ejectment? what particulars of the suit can be collected from such preliminary pleadings? In each court the declaration on a bill of exchange or promissory note is somewhat more explanatory, for it describes the note, and shows whether the defendant is sued as drawer or acceptor, &c.; but since the new rules were established, the counts on bills and notes in the Supreme Court are as simple and brief as declarations on such instruments in the small cause court. On the whole, it seems to me, that in actions for debts and liquidated damages, and for several other matters, it signifies little what form, or whether any form of declaration be adopted. It is only requisite that the defendant have notice of the claim preferred, and that may be communicated in various and very simple ways. When relief is sought, either in law or equity, upon unusual grounds, more precision in the introductory pleading may be expedient.

If, therefore, the declarations used in the small cause court be similar to those employed in like cases in the Supreme Court, it may well follow that, so far, a case for trial is brought before a judge as satisfactorily in the one court as in the other; but my concurrence in the opinions of Sir Erskine Perry on this subject goes no further; for in the small cause court there is virtually no pleading at all on the part of the defendant, who alleges he is not indebted, or makes some statement equally vague, and under such a plea is permitted to adduce any matter which may form a defence to the action. Although this answers in the small cause court, where the officer acts as agent or legal assistant to both parties,

parties, and is thus previously apprised of the defence to be set up, I cannot think with Sir Erskine Perry that a case is not brought before the judges more satisfactorily in the Supreme Court than in the small cause court; for, in my opinion, the procedure in the small cause court is chiefly defective, because the officer of that court acts as agent and legal adviser to both plaintiff and defendant. The mode of pleading in question may be the best which could be adopted under what thus appears to me a very imperfect system, but it does not remedy what I consider the defect; and that mode of pleading would be insufficient in the Supreme Courts, where, as in the superior courts in England, the respective litigants have each his own professional agent and adviser. Formerly, in those courts, a very vague, general style of pleading, on the part of the defendant, was admitted in cases of the same description with those within the jurisdiction of the small cause court, but in order to obviate the consequent inconvenience, and the necessity thereby engendered for the plaintiff coming armed at all points, new rules requiring greater precision in pleading on the part of defendants, were prescribed, first in England, and afterwards in the Supreme Courts of India. Still, in many important matters, great latitude of pleading is allowed to defendants in the superior courts, as well in England as in this country; but the effect of the new rules has been the introduction of greater precision in pleading by defendants; and, considering that those rules were framed by the judges of England, we may hesitate to yield to the opinions of those who would virtually abolish pleading altogether.

But the small cause court at Bombay, it is argued, has succeeded, and therefore the proposed court must be successful. The jurisdiction of the small cause court is limited; that of the proposed court is to be unlimited. The small cause court co-exists with the Supreme Court, a better tribunal, affording to judges, suitors and the public an example, as I believe, of a better administration of justice, and the judges, being chiefly occupied in the latter court, are less liable to become arbitrary, negligent or ignorant. The proposed court will soon become the only tribunal at each Presidency; for, as the cheaper forum, it will carry off all business from the Supreme Court, especially as it is probable the judges of the former will be unable to resist a leaning on their parts towards the plaintiffs. It is well known how business increased in the Court of Common Pleas in Ireland, owing to Lord Norbury's inclination to the plaintiffs.

In the 30th section of his minute, Sir Erskine Perry speaks of examination of the parties as adopted in the small cause court at Bombay, and in the 39th paragraph of his letter to the Government of Bombay, he says the parties are examinable in that court at each stage of the inquiry, and that therefore, in every case where conflicting testimony occurs, immense advantage is obtained by the power of sifting the parties themselves. I hence conclude that Sir Erskine Perry, when presiding in the small cause court, examines and sifts the parties. I have myself gone as far as I have seen other judges go in that court, that is to say, when a case has been nearly brought to a conclusion, and it has become almost certain whether the plaintiff or the defendant would succeed, I have asked the losing party if he had anything to say with respect to such and such matters, obstacles to his success. This I have done; not intending to rely upon what the party might say, but in order to obtain a clue to further evidence, if any, and because it often happens that the officer of the court has not been fully informed by the parties, or has failed to elicit all the particulars of the case. I have never seen any other judge go further in the court in question. Sir Erskine Perry's practice may be very salutary; but I am not aware of the law or custom by which it is authorized.

I incline to think that the vivâ voce examinations of parties to suits in law and equity would have a beneficial effect. If that procedure be expedient, and should be legalized, it would in itself work an important change, and greatly reduce the expense of litigation. It might be as well to try such an experiment before having recourse to the greater innovations recommended by the Law Commissioners. Against such a measure it may be strongly urged, that thereby the system of intermediate agency between the court and the suitor is violated; that system by which, to use the words of Sir Lawrence Peel, "in spite of natural inequalities, the powerful and the weak, the negligent and ignorant, the bold and the timid, are enabled to meet in equal terms on the arena of justice." It is said, that to place suitors on equal terms, you should take their examina-

No. 1.
On Civil Judicature in the Presidency Towns.

tions as well as their pleadings, from their law agents, giving to the other side the power of excepting to insufficient answers or examinations, and relying on the penalties against perjury, and the characters of the practitioners, as protections against falsehood and fraud. The mental qualities of suitors are, indeed, as various as their physical strength. One party may be dull, ignorant or old; his memory may have failed; he may be agitated or nervous. If required to answer on the instant, to matters contained in a bill or answer, or to things relating to the subject of dispute in an action at law, he may make incorrect statements or admissions to his prejudice, because he makes them without due and just qualifications. Very different would be the situation of an able, bold or cunning person, self-possessed and fertile in resources and explanations. To a considerable extent, however, the like objections apply to vivâ voce examination of witnesses. It may be replied, indeed, that the statements or answers of a party may be looked upon as admissions, without due allowance being made for mental or physical infirmities, or without its being perceived that anxiety as to the result or other matters so agitated the examinant, as to incapacitate him from doing justice to his case. Are judges incompetent to the full perception and consideration of such matters, and the making just allowances accordingly, or are jurors supposed equal to these arduous duties, which are frequently entrusted to them, when trials of issues are directed by the Court of Chancery? However these queries should be answered, the feeling in England is adverse to the vivâ voce examination of parties; and although under decrees in equity the Master is directed to examine witnesses vivâ voce if he thinks fit, he is only allowed to examine the parties on interrogatories.

I do not greatly advocate the vivâ voce examination of parties, upon the ground that judges may derive assistance from observing the demeanor of the plaintiff and the defendant. Unless in peculiar instances, where deportment is strongly marked, and of a very decisive character, I think it unsafe to allow the demeanor, even of an ordinary witness, to have much influence on the mind. Judges, jurors, barristers unemployed in the pending suit, and bystanders, often differ widely in their respective estimates of the demeanor of a witness, and very fallacious opinions, I believe, are often formed by those who much rely on such criterions. In my opinion, indeed, the most formidable objection to the vivâ voce examination of parties is, that it would, to a great extent, violate the system of intermediate agency between the court and suitor, and place judges in a situation in which they would be particularly liable to contract sympathies, antipathies and prejudices, or to indulge, strengthen or give effect to such affections, if pre-existent or otherwise derived. In the second page of Mr. Gresley's book on Evidence, there is the following note: "Doubtless, a judge will occasionally betray a feeling or a bias of which advantage may be taken; suitors are said sometimes to have assumed the appearance of poverty, in order to find favour in the eyes of Lord Hale." Sir Herbert Compton told me, that the leaning of the court to pauper parties was matter of observation at Calcutta, and I have heard it strongly hinted at in the court at Bombay. But, as already suggested, if the vivâ voce examination of parties be inexpedient, might they not be examined on interrogatories? Might not each party, as well at law as in equity, be permitted to file or deliver interrogatories for the examination of the other? Pleading in equity might then be abbreviated. Bills of discovery, with reference to actions at law, might be abolished; and if defendants in equity were to be considered acting parties, and entitled to call upon the court to order fraudulent instruments to be cancelled, &c., cross bills might be also disallowed. A bill to enable plaintiffs and defendants to examine each other on interrogatories, was brought into the House of Lords by Lord Wynford several years ago, but was thrown out, being opposed by the present Lord Chancellor and Lord Eldon.

Shortly before Mr. Anderson acted as Governor of Bombay, he told me it was intended to establish at Calcutta a court similar to the small cause court at Bombay, and he asked what I thought of the latter. At that time I had no idea the discussion now pending could arise, and so far my reply, that it required great care to prevent the small cause court from becoming a nuisance, was perfectly impartial. That opinion was founded on experience as counsel, as well as upon the bench. I thought that, as in the court in question, judges were to a great extent uncontrolled and unassisted by counsel, the proceedings were sometimes over summary, the law delivered of inferior quality, and material points of

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law and fact undiscovered or unnoticed. Evils of the latter description I thought frequently arose from the officer of the court acting as agent for both parties, by one or other, or both of whom he often was distrusted, and was thus kept in the dark as to important features in the case. It is a common allegation of the officer, that he has been unable to get such a party or parties to attend upon him. Even when sufficient attendance of parties is attainable, the officer cannot be expected to feel the same zeal, or to exhibit the like energy or skill on behalf of either of the suitors, or for both, as would be evinced by a professional assistant for one party only. Moreover, as the officer acts as agent and legal adviser to both parties, and has personal intercourse with them in those capacities, he is very liable to contract a bias to one side or the other; and, I think, almost always does so. The judge, it seems to me, is very much in the power of the officer, who states the case on both sides to the court, and the party against whom the officer has a leaning, is pretty much in the predicament of having his case stated by his opponent's counsel.. Owing to the above circumstances, it appears to me that the court for small causes, though a good court of the kind, and useful, holds out great encouragement to fraudulent litigation, and does injury to some extent to the welfare and morals of society. It may be said, that many of the evils alluded to are attributable to the intermediate agency of an officer, whereas in the court of the Law Commissioners, the judges are to perform those duties which devolve upon the officer in the court for small causes. I do not, however, impute any wilful misconduct to the officer of the latter court. I merely think he is influenced, as a judge or any other man would be if similarly circumstanced; that the judges of the projected court will be influenced in the same manner, and that as they are to have greater power, greater evils will ensue.

It appears from the draft of the Act prepared by the Law Commissioners, that in the intended court the plaintiff, or under certain circumstances his agent, is to appear before a judge or commissioner of the court, and orally, or in writing, lay the case before the commissioner, who thereupon, and, from what he may elicit by examination of the plaintiff or his agent, is to frame the declaration. If the commissioner discerns any cause of action, the defendant is to be summoned or arrested, as the case may require; and he, or under certain circumstances his agent, is to appear before the commissioner, who may examine him, and who, in the presence of both parties or their agents, is to proceed to take the pleadings, and settle the demurrers and issues of fact.

Whatever renders a judge active in conducting a cause, is bad in principle, and inconsistent with his functions; an axiom which, in every stage of procedure prescribed for the intended court, is wholly disregarded. Whilst unusually extensive powers are given to the judge, the system of intermediate agency between him and the suitor is voilated throughout, and accordingly prejudice and passion will have ample room, as well as ample grounds, to operate.

In the first instance, the commissioner is to discharge those duties which an able, upright attorney performs towards a client preferring a claim against another person. He is to hear or receive the statement of the claimant; elicit, by queries or otherwise, further information if expedient, for which latter purpose he is to be armed with power to punish prevarication or falsehood, and he is then to determine, in his own mind, whether there be any valid cause of action. I think all this would be better done by an attorney, to whom, as being his own agent, and of his own selection, and not a judge, the party might be more candid and unreserved. I have the less doubt the attorney would be more effective than the commissioner, because the latter is also to act as agent and legal adviser to the defendant; and the plaintiff will be most reluctant, I believe, to confide the whole matter to the commissioner, and will endeavour to conceal weak points, and whatever may, in his opinion, have an injurious effect upon his case, all which an attorney might be able to discover. The like observations may be also made respecting the commissioner's agency for the defendant: should either party appear to shuffle, with a view to better his case, the commissioner, whether he impose a penalty or not, may contract a bias against him; but I think his leaning will usually be against the defendant, for his more active agency will, in general, be exercised for the plaintiff, with whom, to some extent, he may identify himself accordingly. Besides, much delay and many adjournments will often occur before the case of each party can be fully understood,

No. 1.
On Civil Judicature in the Presidency Towns.

in order to being duly expressed in the pleadings; and the commissioner will want zeal and inducement to exert such energy, skill and patience, with respect to either of, or both the litigants, as would be exercised by a responsible counsel or attorney acting for one party only; and in the absence of professional control and assistance, the commissioner's conduct may be arbitrary; he may fail in discovering material facts and points, for parties themselves may be blind to facts as well as points of law, if they do not perceive how they affect the case, and the law delivered may be frequently inferior in quality.

Not only are judges and the parties themselves blind to important matters of law and fact, which, with professional aid, would be discovered; but it often happens that where a judge perceives a point, he at first considers it untenable, and if alone would unhesitatingly overrule it, and yet the same point is afterwards put by counsel in a different light, and becomes the principal feature in the case. It may be said, parties are to be at liberty to employ attornies and counsel in the intended court, but, for reasons already given, I think they will seldom have such assistance, especially as they can only have it under restrictions, and the draft of the Act obviously imports, that the commissioners are, in general, to discharge those duties which are now usually performed by attornies or counsel. In general, therefore, it is to rest with a commissioner, professional or unprofessional, unchecked and unaided by counsel, to determine whether the plaintiff has stated a good cause of action; in other words, whether the action is to be instituted or not; and also, whether any and what points of law, or issues of fact, are to be raised; these last-mentioned matters must be left to his discretion, unless it shall be incumbent on him to take every demurrer, and raise every issue suggested by the parties; in the latter case, endless prolixity and nonsense must ensue; and if he is to exercise discretionary power in such particulars, he will be often subjected to reproaches and upbraidings, not always unjust, from the unsuccessful party.

Although Sir Erskine Perry discards written pleadings altogether, the Law Commissioners adopt them. As already mentioned, my own conviction is, that pleadings at law in the Supreme Court are already more concise than pleadings will be under the system of the Law Commissioners, and I have no doubt that pleadings in equity might be reform edso as to secure a like result. The commissioners of the intended court, whether professional or unprofessional, would find it difficult to frame declarations or pleadings more brief, and yet sufficient, than those most commonly in use on the plea side of the Supreme Courts; in the more unusual pleadings there is much room for improvement. Abbreviation is difficult and laborious, and considering how irresponsible the commissioners of the proposed court will be, as compared with barristers and attornies, I think that after a little time their pleading will be inadequate and prolix. In brevity of pleading, I therefore believe nothing will be gained under the proposed system, and but little, if anything, in the cheapness of drawing pleading. Most, or very many of the pleadings now used at law, are drawn by attornies, and for them a comparatively small rate of remuneration is charged; but whether pleadings be drawn by attornies, barristers or judicial commissioners, they must be paid for in one way or another. Under the new system, judicial commissioners are to perform the part of attornies, counsel or officers of court, and thus a much greater number of judges will be required, and if such judges are to be remunerated upon any thing like the same scale as civil functionaries in the service of the India Company, they must be highly paid; and yet the greater portion of their duties will be such as are now performed by barristers and attornies. A great portion of their pay may thus be considered as costs for their services in acting as attornies or counsel, and in drawing pleadings; and upon striking a balance between such costs of drawing pleadings under the projected system, and costs as they might be reduced under the existing system, I am confident there would be little, if any, difference in favour of the former. Such costs of drawing pleadings by judicial commissioners would probably be extracted in some way from the suitors, but if not, they must fall wholly upon the Government; and if Government were to pay salaries to officers of the Supreme Court, instead of leaving them to be supported by fees, pleadings might be delivered between the parties, and the expense of pleadings would then be little, if any thing, beyond that incurred in drawing them.

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Sir Erskine Perry believes he has fully met and refuted Sir Lawrence Peel's objections. It appears to me he has done neither. I shall not, however, go at any length into the argument, but limit myself to observing that Sir Erskine Perry assumes, that those objections are resolvable into two propositions:—"First, the proposed plan will introduce misdecision, and consequently uncertainty, into the law. Second, the plan gives the judge too much power." As to misdecision, he says, "This class of objections proceeds upon two assumptions, first, that the proposed procedure will not bring the facts in each case to the notice of the court; second, that upon the facts so brought, the judge will decide on arbitrary notions of justice and equity, and not on the substantive law of the land." This last position he terms an assumption altogether untenable and gratuitous, because "No change is proposed to be made in the substantive law of the land, but only in the mode in which the controversies of suitors are to be brought forward, in order to have that law applied to them." What he calls "the first assumption," viz. "that natural procedure will not bring out the facts," and which he imputes to Sir Lawrence Peel, he says, "is therefore all that needs to be noticed." After asking, "What arguments have been brought forward by Sir L. Peel to warrant this assumption?" he says, "To me it appears that the great advantages of the scheme consists in its aptitude to admit of all facts in issue between the parties being readily brought before the court, and that it is directly calculated to obviate those evils in the existing system, by which essential facts are often shut out, and by which so many decisions pass irrespective of the merits of the case." He then alludes to cases at the assizes in England, in which, through mistakes of pleaders and negligence of attornies, the parties have been turned round on the pleadings, or put out of court by a failure to prove a notice or signature, and concludes by saying, the volumes of reports "are equally full of decisions where the interests of suitors have been concluded for ever on some blunder or other of their legal advisers, and wholly irrespective of merits."

There are few professional men but will deny that this last assertion, as to interests of suitors being concluded for ever on some blunder of their legal adviser, irrespective of merits, is warranted by any thing that occurs in England at the present day, and I am not aware that there has been any instance of the kind at Bombay. As to parties being "turned round on the pleading," I certainly think the court at Bombay has not shown ready liberality in these matters, although on some occasions, to prevent the results in question, effective measures have been adopted, and adjournments granted from day to day, and even from term to term. I cannot at this moment recollect any case in which a party has been so "turned round" of late years at Bombay, and if judges have not already the power I think they possess, of remitting rules and adopting measures to meet the exigencies alluded to, such power might easily be conferred, and its exercise rendered incumbent on the courts. The mischiefs mentioned by Sir Erskine Perry could not indeed occur under the system he proposes, for thereby, as already shown, written pleading is to be altogether excluded; the parties are to tell their stories orally, and are not even to make use of petitions, which "any one can draw," lest the story should be told, not by the party himself, but by his legal adviser, and as there is no provision for reducing the oral pleading into written pleadings, conformable to the plan of the Law Commissioners, parties cannot be turned round on the pleadings.

But the first assumption ascribed to Sir Lawrence Peel is, "That the proposed procedure will not bring the facts in each case to the notice of the court," and one of the objections resolved into this last proposition is, that "the plan requires a judge of higher qualities than can be found, and even the highest qualifications would not be sufficient to ensure success, because the judge would have too much power." It appears to me that to fulfil the duties of attorney and counsel to each of two adverse litigants, a man requires very high qualities indeed, qualities rarely, if ever, to be found; that some of the difficulties of acting in this double capacity are but little diminished, whilst others equally formidable arise, where the same person also undertakes the office of judge between the parties, and that he who presumes to exercise such various and inconsistent functions, will probably fail in his duty as a judge, especially, as in such capacity he will have very great discretionary power, power which, from the infirmity of human nature, and the want of adequate control, must occasionally or often be abused. It, therefore, seems to me, that, owing to the difficulty of the various duties assigned to the judicial commissioner in the intended court, and the occasional or frequent abuse

No. 1.
On Civil Judicature in the Presidency Towns.

of the discretionary powers entrusted to him, the proposed procedure, although it may often bring the facts in a case to the notice of the judge, inasmuch as the party, when not himself blind to them, may disclose them, yet, that such facts may be distorted, disregarded or made light of, as ignorance, prejudice or passion, may suggest; and that, under the like influence, the law applied may oftentimes not be the substantive law of the land, but such law strained, shortened or misinterpreted, as occasion may require.

But in the 23d paragraph of his letter, Sir Erskine Perry mentions what he considers preventive checks upon undue exercise of power by Indian judges, to wit, "The judges of the Supreme Courts have very little of the moral support which judges in England derive from the influential classes of society." Therein, it appears to me, lies the greatest danger. Moral support would sustain them when right, and abandon them when wrong. Upheld thereby, they would disregard the cabals or opposition of those whose fraud, violence or injustice were corrected or impugned in the administration of the law, and the apprehension of losing such support would greatly tend to keep them within due bounds. Unaided and uncontrolled by this moral influence, they may truckle, temporize or shrink from uncompromising performance of their duties, or they may overstrain their power for their own gratification, or that of others.

Sir Erskine Perry further intimates, that the local Governments and governing classes feel that the Supreme Courts have hitherto, in some slight degree, controlled them. The existence of any independent court in the country would produce the like effect. As he observes, however, the restraint, although lightly and temperately administered, can scarcely prove otherwise than galling, and I believe it has long been their object to remove it, and various proceedings of the Law Commission are obviously tending, in various ways, to its removal, and to the establishment of courts of a very different character. Under such circumstances the local Governments and governing classes may be, as Sir Erskine Perry leaves us to infer, very anxious to detect judicial errors, but the same feelings which occasion this anxiety, indispose them to afford that moral support already mentioned, and which, by being attendant on a judge when right, and forsaking him when wrong, is the chief security for due administration of justice. In fact, the local Governments keep carefully aloof, unless when cases are brought forward in which they are intimately concerned, and that is but seldom, for there is scarcely an instance of a prosecution for an offence by a civil servant being instituted in the Supreme Courts, such matters being almost uniformly disposed of by secret committees, and as to civil cases, there is generally such a leaning on the bench towards the ruling power, as deters many a suitor from going to law. A man must have a strong case to succeed where he is opposed to the local Government, and when at the bar, I have several times advised against the institution of suits against the East India Company, or where the Government of Bombay upheld the opposite party, not because I thought the client had not a fair demand, but because I was convinced the court would lean against him so strongly, that even if he obtained a verdict, he would probably be saddled with his own costs, or that very inadequate damages might be awarded. Still the Supreme Courts are some check upon power which would otherwise be more without control. Notice must be taken by the Government of glaring offences of civil servants, and redress for civil injuries must often be accorded, because the Supreme Court is open to aggrieved parties, if they choose to proceed in it, and if driven to seek redress in that way, publicity and inquiry are at least attainable; for where attornies and counsel practise they cannot well be evaded, and in courts such as the Supreme Courts, there are, even in this country, some strong restraints upon the judges.

Another supposed preventive check is mentioned in the following terms: "The public press represents the interests of the executive classes almost exclusively, and therefore has additional motives to the tendency of a public press generally, to keep a rigid look-out for judicial peccadilloes." The newspaper trade has a demoralizing effect on those engaged in it. In India especially the European societies, being very limited individuals, frequently come into collision, petty party feelings and personal liking and dislikings are engendered, and when newspaper editors assail or applaud a man professedly on public grounds, it often happens they have been instigated by some dishonest, paltry motive. Hence, although their misstatements of facts are mischievous and annoying, their opinions are usually considered worthless. Each Indian newspaper primarily represents

represents the selfish interests, opinions, party feelings, piques and prejudices of particular individuals or cliques who are proprietors, or of its editor, and in a small society these concerns are so paramount and absorbing, that public spirit has but little opportunity to operate. If it be made worth while to the proprietors or the editor, directly or indirectly, as it often is, the newspaper will advocate the views of the executive classes, and not otherwise. But the argument may be put into a small compass. Sir Erskine Perry does not ascribe the representation of the interests of executive classes by Indian newspapers to high or public feeling. It has rarely sprung from so pure a source. Hence, however the public press may look out for judicial peccadilloes, its censure or its praise must fail of having full effect, and the preventive check in question must to some extent be feeble and ineffectual.

Lastly, Sir Erskine Perry thinks the bar in this country "more prone to concur in any carpings and cavils at judicial authority, than to support it even in its due exercise by their moral influence." That the bar in India are not so useful in the latter respect as the English bar, I cannot deny, and no doubt, unworthy characters are to be found at the bar as well as in other walks of life, but they are soon detected, and become insignificant. Still I fear the animadversions of the bar upon the exercise of judicial authority in this country are frequently correct, and I have no doubt they are more felt by the judge, and have greater effect upon him than observations from any other quarter, and are more effectual than any other check. There are always some men in the profession whose respectability, knowledge of law and honourable feelings are unquestionable; whose opinions cannot be disregarded, and who will abide by a judge in good report or evil report so long as they think he has fairly done his duty, and who will only impugn his conduct when they honestly think him in the wrong. I therefore think the bar form indeed a preventive check, but not because of their proneness to concur in carpings and cavils, a quality which must tend to lessen their moral influence and ability to control.

Each of these supposed restraining powers, except the last, is represented as arising from the peculiar situation of judges of the Supreme Courts. They are therefore inapplicable to the court proposed by the Law Commissioners, the judges of which, it may be inferred from the draft of the Act accompanying the Report, are to be appointed by the Governor of Bengal, and are to be paid, each such a salary, respect being had to his qualifications, as to the Governor-general in Council shall seem meet. It requires no great discrimination to perceive that such judges will be circumstanced very differently from judges of the Supreme Courts; that they will have a strict connexion with the local Governments of the country from which their appointments will have been obtained, and upon which the amount of each respective salary is to depend; that they will seldom or never be placed in any thing like conflict with the governing classes of the community, by which and by the press, so far as it may represent the interests of those classes, such judges will accordingly be upheld. Neither can these supposed restraining powers apply to the court proposed by Sir Erskine Perry. Should the tender of his services be accepted, and should he be appointed chief commissioner of such a court, either at Calcutta or Bombay, he will have been appointed by the local Government; in whatever light he may view himself, he will not be viewed by others as a judge of the Supreme Court, and he may not experience any want of that species of moral support, the want of which he has relied on as restraining the abuse of judicial power.

Judges in the colonies, I understand, are to some extent dependent on the local rulers, and I have been assured that defects in the administration of justice consequently arise, although in each colony there is usually a large European population, not forming a part of the executive class, but mixing therewith, influencing and controlling it, and although English colonists, if seriously injured, may become so clamorous as to make themselves heard in Downing-street or at Westminster, and therefore local rulers may study to appease them. In this country, however, there are but a few Europeans not included in, or employed under the executive class, the influence and power of which class is therefore paramount The natives have no intercourse on equal terms with the executive European class or with Europeans in general, and the difficulties they encounter in seeking relief in England are notorious. Hence, one ground of the expediency of having in this country courts independent of and unconnected with the local authorities, and which, after all, has been but imperfectly effected.

No. 1.
On Civil Judicature in the Presidency Towns.

Sir Benjamin Malkin, it appears, carried out at Singapore and approved of a system somewhat similar to that proposed by the Law Commission. His judicial qualities are highly spoken of, and under him the system may have worked better than could be expected under a judge of less estimable qualities and inferior attainments. Still I should receive with great caution the opinion of a judge as to the operation and effects of a favourite system. I should prefer the evidence of the suitors and practitioners, if any, who may have had experience of the court during the period he presided in it. A judge may imagine he has done a great deal of good in cases in which the profession or the public think he has shown himself a decided partisan.

Warnings of danger from the abuse of judicial power have been represented as uncalled for, and Mr. Bentham is charged with having gone ludicrously far in the surveillance he proposed to exercise over judges; but lawyers of experience, including Mr. Fearne, have concurred in the following sentiments of Lord Camden: "The discretion of a judge is the law of tyrants; it is always unknown; it is different in different men; it is casual, and depends upon constitution, temper and passion. In the best it is oftentimes caprice; in the worst it is every vice, folly and passion to which human nature is liable."

It is intended that the new court shall administer equity as well as law. It is to have cognizance of matters within the jurisdiction of courts of common law, but it is to apply the rules of English equity whenever those rules would be held applicable if such matters came under consideration in a court of equity. In short, when equity would affect any matter brought forward in the proposed court, equity jurisprudence is to be administered forthwith.

Many cases of fraud, accident and even trust, as cases of bailment, and that large class of cases in which the action for money had and received is maintainable, have long been cognizable at law, though formerly considered proper objects for a court of equity. The judges at Calcutta, as I understand them, are of opinion that the jurisdiction of courts of law might be extended to all cases of accident, mistake, dower and partition, account when not involving the execution of a trust, administration of assets, and, to a considerable extent, to demands for specific performance. It seems to me that, whether a case coming under any of these heads of jurisdiction could be properly taken cognizance of by courts constituted differently from courts of equity, would depend upon its particular circumstances. If the object of the suit were single, or not very complicated, and there was but one class of plaintiffs and but one class of defendants, all persons in each class having a unity of interest in the subject, it might be disposed of by a court constructed like a court of law, but in such a tribunal it would be difficult to dispose of a suit to which there were numerous parties, all standing in different relations to the matter, such matter being manifold and complex.

The practice recommended by the Law Commissioners is represented as all-sufficient, and equally adapted to all cases, whether of legal or equitable cognizance. If it be indeed so, there could be but little gained by transferring matters of equity to law in the court they propose to erect, and it might be better to preserve the present distinction between legal and equitable jurisdiction, and to appropriate to each a particular side of the intended court, for such a measure might prevent them from being mixed up, as Mr. Justice Story says, "in a manner not easily comprehensible elsewhere." So also, in the Supreme Courts, if pleadings and proceedings in equity were rendered sufficient without being redundant, there would be but little, if any, advantage in the transfers from equity to law which the judges of Calcutta advocate. I concur in their views, subject to the qualifications mentioned in the last paragraph, and if the existing procedure in equity is to remain unaltered, I have no doubt that much good would often result from the measures they propose, but such good would arise because a man could sue at law cheaper than in equity. Whether a matter of equity be brought forward in a court of law or in a court of equity, it should be introduced by appropriate pleadings. A simple matter of equity might be brought before a court constituted as a court of law, by means of pleadings perhaps equally brief with those usually resorted to in such a court; why should it not be brought forward in like manner in a court of equity? Putting summary procedure out of the question, if a complex matter of equity could be disposed of in a court constituted as a court of law, it could only be by means of pleadings of much greater length, and more complicated and numerous proceedings, than would

would be necessary for such subjects as are usually committed to courts of law; but why, in a court of either description, should the length of procedure be disproportionate to the subject; and does not the difference in this respect between a court of law and a court of equity chiefly arise from those peculiarities in the latter, for which, in a former part of these observations, I have suggested remedies? Would not the adoption of vivâ voce examination of witnesses in equity, in itself work a great and salutary change? Might not summary procedure, as exercised in bankruptcy, and such measures as the judges of Calcutta suggest in the last paragraph of Sir Lawrence Peel's minute, be introduced with good effect; and if all or many of these alterations were accomplished, wherein would the procedure at law have advantage over that in equity, and in such a state of things, what benefit would result from transferring to law particular branches of equity jurisdiction, except so far as courts of law might thus be enabled to dispose of a simple matter of equity incidentally or unexpectedly arising in the course of an action at law. Courts of law already exercise power for such purposes to a considerable extent, to wit, in cases of accident, mistake and fraud, and in such circumstances as occurred in Legh *v.* Legh, and the cases mentioned in note (*w*), 1 Bos. & P. 448.

The Law Commissioners seem to aim at an unlimited extension of the last-mentioned power; judging from their arguments on such subjects, they claim for their court, authority to dispose of any matter of equity, however complicated in character, or whatever number of persons may be interested therein, which can arise respecting the subject of an action at law. Judging from those arguments, they apparently contend that such matter of equity should be summarily disposed of in a court of law, upon the same pleadings alone as the action of law required, irrespective of the equitable matter, and with the parties to the action at law alone before the court.

The Law Commissioners adopt the imperfect report of Rattle *v.* Popham, 2 Strange, 992, and state that case as follows: "It appeared that upon a marriage settlement a power was given to every tenant for life, when in possession, to limit the premises to any woman he should marry, for her life, by way of jointure and in lieu of dower. The tenant for life made a lease for 99 years, determinable on the death of his wife. Lord Hardwicke, in a court of law, held the lease not to be warranted by the power." They add, apparently on the authority of the report of Zouch *and* Woolston, by Burrow, the following words therein attributed to Lord Mansfield: "The widow brought her bill in the Court of Chancery, and Lord Talbot, arguing from the same premises, the power and the lease, without any other circumstance, held the lease to be warranted by the power." According to the same report, Lord Mansfield stated, that Lord Talbot had declared "it was not a defective, but a blundering execution of the power, and had decreed the defendant to pay all the costs both at law and in equity."

The report in Strange is erroneous, because it is therein stated, that the power was to limit by way of jointure and in bar of dower; whereas it appears from the report of the case in Chancery, as given in Sir Edward Sugden's work, upon the authority of the registrar's book, that the power was not to give an estate in bar of dower, but the power was "for Walter, when he should have any estate in possession in the premises for his life, by any deed, to assign, limit or appoint to or for the use of or in trust for any woman or women that should be his wife for her life, in lieu of jointure, all or any part of the premises, to take effect from his decease;" thus he was left at large to make a provision for his wife, and it was not essential that such provision should be in bar of dower. Had it been so, the execution of the power would have been erroneous, for the additional reason that the estate given by Walter Savage, was no bar of dower. The statement of the case in equity, as attributed to Lord Mansfield in the report in Burrow, is perhaps erroneous in several respects, but is certainly wrong in this, that it is therein said Lord Talbot "decreed the defendant" (Savage, the remainder-man) "to pay all the costs both at law and in equity." In Sir Edward Sugden's work, the decree, upon the authority of the registrar's book, is stated in the following words: "It was decreed that the plaintiff should be quieted in the estate comprised in the jointure-deed during so much of the 99 years as she should live, and the defendant was to pay unto the plaintiffs their costs of the suit; and the injunction formerly granted in this cause for stay of the defendant's proceedings at law against the plaintiffs was to be continued."

Thus it appears the defendant was not decreed to pay the costs at law as well

as in equity, and when we detect so material an error, it is not unreasonable to suppose that in other respects also, with regard to this case, either Lord Mansfield may have been wrong in making the statements ascribed to him by the reporter, or the latter may have been wrong in imputing them to Lord Mansfield. The latter supposition seems to have been embraced by Lord Redesdale; *see* Shannon *and* Broadstreet, 1 Sch. & Lef. 70, 71. The account of the case in Ambler, 342, so far as it goes, corroborates that given in Sir Edward Sugden's Appendix. The statement regarding Burlton *et* Ux. *v.* Humphries and others, in Cave, imputed to Lord Mansfield in 4 Burrow, 2056, is another instance in which either Lord Mansfield mis-stated the case, or the mis-statement was wrongfully ascribed to him by the same reporter. Ambler, 256, and Clarke *v.* Parker, 19 Vesey, 20, 21.

With respect to Rattle *and* Popham, Lord Mansfield is represented to have said that "Lord Talbot, arguing from the same premises, the power and the lease, without any other circumstances, held the lease to be warranted by the power." I shall endeavour to show that Lord Talbot did not maintain any such doctrine. Lord Mansfield is represented to have asserted that Lord Talbot said "it was not a defective but a blundering execution of the power." No such expression is imputed to Lord Talbot in the report contained in the Appendix to Sir Edward Sugden's book, although some at least of the dicta of Lord Talbot in the case are therein professedly given; nor is any such expression attributed to Lord Talbot by the Master of the Rolls, in Alexander *v.* Alexander, or by either of the Lords Commissioners Willes and Wilmot, in Churchman *v.* Harvey, or by any other authority in any instance in which Rattle *and* Popham or Newport *and* Savage has been mentioned. In fact, Newport *and* Savage is always classed amongst those cases in which relief has been given against the defective execution of powers, and it is clearly an instance of defective execution within Lord Redesdale's definition in 1 Sch. & Lef. 63.

But whether Lord Mansfield was wrong or not in making such statements and using such expressions, regarding the case of Rattle *and* Popham, is unimportant, except so far as error in those particulars may detract from that weight which so high an authority might otherwise possess. His conclusion respecting this point of equitable jurisdiction was, no doubt, conformable to his opinions on similar subjects. It may be assumed that he held, that as the Statute of Uses makes good at law whatever is a good power or execution in equity, it followed that whatever was an equitable ought to be deemed a legal execution of a power.

Unquestionably the same construction of a power should prevail at law as in equity; and so it does. A power to limit an estate of freehold is construed at law as not authorizing a grant of a different species of estate, as a term for years; and the same construction prevails in equity, which, however, goes further, and although holding the grant for years not warranted by the power, yet, if there be no fraud, and the grant was made for meritorious consideration, will make a decree which, without declaring the estate for years to have been duly made, will yet relieve the grantee, by securing to him the enjoyment of it consistently with the intention of the grantor and of the person who created the power. The distinction was apparent to the Law Commissioners, but they have not embraced it. They say, "Lord Redesdale admits that whatever is a good power or execution in equity, the Statute of Uses makes good at law; but he implicitly denies that such an execution of a power as the lease in the case of Rattle *and* Popham, is good in equity. According to him, it is only such an execution as a court of equity, by its peculiar mode of acting will make good." They then proceed insisting upon the opinions of Lord Mansfield and Mr. Justice Wilmot, as given in Burrow, as authorities, and conclude, "that the only reason why a court of equity acts in such cases in the peculiar mode alluded to, is for the purpose of making such an execution of a power good at law." Now in this the Law Commissioners are quite wrong; for, to take the case they have themselves selected, although if the execution of the power in Rattle *and* Popham could have been or had been held good at law, there would have been no necessity for the court of equity to act, yet the decree respecting Rattle *and* Popham did not make the execution of the power in that case good in law, or declare it to be good in any respect. The decree left the execution bad at law, and merely provided in consideration of the circumstances, that the remainder-

man

man should not avail himself of the defect. No conveyances were directed, and the matter remained at law, as before the decree in equity, except that the remainder-man was enjoined from proceeding at law by ejectment or from disturbing the possession of the widow. It seems the bill was in the nature of a bill for quiet possession; Cockshot *and* Parke, Tothill's Rep. 177, Hughes v. Morden College, 1 Ves. sen. 187, Prac. Reg. 254, &c. Equity acts in such a case, not by making or declaring that which is bad to be good, but by exempting the case, in consideration of its peculiar circumstances, from the general operation of the law.

In Wykham *v.* Wykham, 18 Ves. 415 & 423, Lord Eldon puts the matter somewhat more explicitly than Lord Redesdale, in the following words: "I am not surprised that any one attempting to execute this power should have considerable difficulty how to do it. He could not get far wrong in equity; as being for a meritorious consideration, it would do in equity in almost any form in which that intention was clearly expressed. I say it would do in equity, as although the phrase is frequently met with in the common law reports, that what is not a good execution of a power at law, cannot be a good execution in equity; if by that is meant, that what cannot be sustained as a good execution of a power at law cannot be sustained in equity, I do not agree with that interpretation. Though not a good execution of a power anywhere, it may be that which a court of equity will take care to have executed. I therefore agree with Lord Redesdale, with the same difference expressed in his observations upon Lord Mansfield's language in Burrow's Reports; not admitting as doctrine to be maintained, that what a court of equity will substantially support as a good execution of a power in equity, is therefore a good execution at law; notwithstanding it is confidently there stated, that there can be no difference in the execution of a power at law and in equity. If it is to be understood a strict literal execution, viz. that it was duly executed, that must be the same both in courts of law and equity; but that a court of equity will enforce the substantial intention of the person executing, where a court of law cannot deal with it, is I apprehend extremely clear." *See* also Butcher *v.* Butcher, Gooday *v.* Butcher, 1 V. & B. 93 & 98, and 9 Ves. 393. So also in Clarke *v.* Parker, 19 Ves. 21, 22, Lord Eldon observes: "Lord Mansfield, in Long *v.* Dennis, says further, 'I mention these cases to 'show that the court ought not to make strides in favour of a forfeiture;'" and then Lord Eldon proceeds thus: "The strides, if any, were the other way. What follows resembles his observations on the execution of powers. I agree in the next passage, that there can be but one true legal construction of a condition; but if the proposition is, that a court of law can hold a condition to be performed in all circumstances in which a court of equity says, though it is not performed, relief shall be given against the non-performance, that is utterly unfounded."

The phrase "a good execution of a power in equity," is a loose expression, signifying not that the execution is good anywhere, to use the words of Lord Eldon, but that a court of equity, accounting the execution bad, but considering that the act done evinced the intent of the party who had the power to execute the same, and finding there was meritorious consideration on behalf of the appointee, will secure to the latter such benefit as can be granted consistently with the respective intentions of him who created, and of him who meant to execute the power. That such is the true construction of the phrase, and that with a view to give relief, equity holds the execution bad, and looks upon the defective act not as good, but merely as evidence of intention, several considerations tend to establish. If equity held the execution literally good, it should relieve even a volunteer, whereas it only grants relief where there is meritorious consideration. If equity in such instances held the execution literally good, it would be in effect to maintain the absurdity, that to limit an estate for years was consistent with a power to limit for life; that to limit for 40 years consisted with a power to limit for 10 years. Equity would relieve the meritorious party intended to be benefited by such an excessive execution as last alluded to. It would secure to him the use for 10 years, and no longer. It would do so, holding the execution bad as at law, although the loose expression "the execution is good for so much," might be employed.

If verbal inaccuracies are made ground for the position that what is held bad at law is held good in equity, an accurate expression commonly used in equity might be quoted to disprove the fallacy. An execution bad at law is frequently called

called in equity a defective execution, which expression imports that equity considers it defective.

Whether the Law Commissioners be right or wrong in asserting that Lord Mansfield never meant to say that Lord Talbot found fault with the decision at law in Rattle *v.* Popham, it is quite clear that, according to the report in Burrow, Lord Mansfield himself did find fault with that decision, and upon the ground that Lord Talbot, " arguing from the same premises, the power and the lease, held the lease to be warranted by the power, and said it was not a defective, but a blundering execution; words importing that the execution was good at law, a blundering execution, but not a bad one. Sir Edward Sugden, however, shows (1 Vol. 516) that Lord Talbot clearly held the execution bad at law, inasmuch as, sitting in a court of equity, he held, as appears from the report of Newport *and* Savage, that it was not a mere blundering, but a defective execution. Lord Mansfield's argument is, the decision at law was eroneous, or the execution, which at law was held defective, would not have been declared in equity on the same premises, not to be defective. Sir Edward Sugden's position is, that in equity the execution was declared to be defective, and that therefore the argument of Lord Mansfield fails. If the execution was held defective as well in equity as at law, the construction of the power at law and in equity was the same; in each forum the execution was considered bad.

Lord Redesdale, in Shannon *and* Broadstreet, and Lord Ellenborough, in Burne *and* Prideaux, deny Lord Mansfield's imputations on Rattle *and* Popham to be well founded. Those imputations, so far as appears, went on the idea that the execution had been held in equity, not to be defective. Lord Redesdale obviously considers that it was held defective in equity, in the same sense as at law, and perhaps Lord Ellenborough may have entertained the same opinion, for he arrived at the same conclusion, namely, that Lord Mansfield's imputation on the decision at law in Rattle *v.* Popham was ill founded, and that imputation, as already shown, was maintained upon the position that the execution had been held good in equity.

In maintaining his views as to legal and equitable jurisdiction, Lord Mansfield had advantages in the case of Rattle *v.* Popham, for the decision therein at law was questioned upon other grounds than those assigned in 2 Burrow, 1147. That decision went upon the resolution in Whitlock's case, and that resolution, it has been argued, was a mere *obiter dictum* (see Burne *v.* Prideaux), and has been said to have been held too nice. Also, the power extended only to a single life, and there was no injury to the remainder-man by reversionary or concurrent leases. But at present there is no doubt that in Rattle *and* Popham the execution was bad, for the power was to limit a freehold, whereas only a chattel was appointed, and the differences between the estates in quality, in the qualifications they respectively confer, and with respect to executions, forfeitures, barring dower and the right of the remainder-man to suffer a remedy, are irreconcileable.

If the notions of the Law Commissioners were carried out, a man in an action of ejectment might acquire or retain possession of land in which he had agreed, but not in writing, to purchase from the owner of the fee, a term of 100 or 200 years, paying a small rent for the same, the parol agreement being followed by such circumstances as in a court of equity would entitle the vendee to a specific performance, but which circumstances wholly depended on parol evidence. There would be no record either of the parol agreement, or of the subsequent circumstances in the proceedings at law; indeed the purchaser's rights might be admitted without action; and in either case, whether his claims were litigated or not, at the end of the term the respective rights of the parties then entitled, if not utterly forgotten, would merely rest upon tradition.

Moreover, the Law Commissioners follow Lord Mansfield in maintaining that in actions of ejectment, such as Rattle *v.* Popham, a court of law should recognise title in an appointee under a power defectively executed, if there be circumstances in the case that would entitle the appointee to relief in equity. One of the results of establishing this doctrine would be, that a party entitled to an estate for a term of 30 years, might recover possession on an instrument purporting to appoint an estate for a much longer period, or a party entitled to one species of estate would recover upon an appointment of an estate of a different description. It would not appear upon the proceedings in an action of ejectment, how much the lessor of the plaintiff was entitled to, a point upon which the decree of a court of equity would be explicit. If a party who had thus recovered in ejectment

ejectment continued in possession for some years, the remainder-man might have difficulty in enforcing his rights, and, at all events, the title deeds, muniments and assurances of property would be inconsistent with the actual rights of the parties. Where a court of equity relieves an appointee under a defectively executed power, without decreeing conveyances conformable to the equitable rights of the parties, the existing appointment is inoperative at law, and under it no possession can be recovered which by lapse of time or otherwise might confuse, obscure or alter just rights; and the decree in equity explains and rectifies the whole matter. Nor can the Law Commissioners say that the court of law should declare the rights of the parties, or decree conveyances. They follow the opinions and arguments of Lord Mansfield regarding actions of ejectment, in which no such proceedings are admitted. Indeed, they contend (Report, page 18) that a court of equity directs a conveyance merely for the purpose of conferring a good title at law. It would follow, that a conveyance must be wholly useless where a good title is already recognized at law. Equity decrees conveyances, in order that they may answer the ends of conveyances,—in order that they may establish, secure and evidence good titles, both in law and equity. It is generally expedient that such conveyances should exist for the security of property, and to prevent litigation, and with the like views, if existing conveyances be inconsistent with the rights of the parties, the execution of perfect conveyances is frequently expedient, and where proper cases for such interference are made out, equity may decree accordingly. But it is not imperative on a court of equity, where an equitable title is bad at law, to have it made good at law by a conveyance. Equity may leave the title bad at law, as in Newport *v.* Savage, and, without decreeing any conveyance, may secure to the parties, by equitable process, the enjoyment of their several rights.

These are but a few of the evils which may arise, where, to use the expression of the American judge, Mr. Patterson, "there is no distinct forum to exercise chancery jurisdiction, and the common law courts equitise as far as possible." A court of law, in order to dispose of matters of equity connected with an action at law, would have to go into all the circumstances of the case, for, upon such circumstances, and not merely upon a particular instrument or deed, the equity would depend. To determine even whether there was meritorious consideration, it might be requisite to go into many circumstances not apparent on the deeds before the court, and not duly brought before the court either by the plaintiff or the defendant; and if the rights of the parties depended upon matters of equity rather than or as well as matters of law, many more parties might be interested in the matters of equity than were before the court with respect to the matters of law. It might also happen, that the matters of equity were by no means, or but insufficiently, raised or brought forward by the pleadings, and might therefore take one or both the parties by surprise, and the determination of matters of equity without proper pleadings and records, would cause confusion and obscurity in the administration of justice. To such difficulties, Mr. Justice Kelly alluded in Lessee of Massey *v.* Touchstone, an action of ejectment, in which the pleadings were general, not an action for breach of contract, in which the pleadings explicitly put forth the circumstances of performance and non-performance. He then drew the general conclusion, that a judge in a court of law should leave equity to its proper tribunal, and not foreseeing any attack from the Law Commissioners, he inadvertently referred to the case then before him as illustrating the evils he referred to. The case was comparatively simple, and did not fully exemplify the evils in question. Thereupon the Law Commissioners fall foul of him, and, as Lord Redesdale says, "looking at particular cases rather than at the general principles of administering justice, observing small inconveniences, and overlooking great ones, allege, *inter alia*, that Mr. Justice Kelly seems to have entirely forgotten that the agreement in the case referred to, and all the circumstances of performance and non-performance, are beyond all question the proper constitutional subjects of common law jurisdiction," and conclude several pages of matter in the same strain, by stating, "that where there is a legal agreement, and no formal objection which would preclude the party at law, a court of equity will not decree specific performance unless it is satisfied that the party is, under the circumstances, entitled to damages at law. That is, the courts of equity hold, that in such cases the question whether there is a clear equity, depends upon the question whether there is a clear title to damages at law."

No. 1.
On Civil Judicature in the Presidency Towns.

As a portion of the premises to this conclusion, the Law Commissioners have adopted the doctrine, that because "before Lord Somers' time courts of equity would not even entertain a suit for specific performance of an agreement, until the plaintiff had first recovered damages at law for the breach of it," therefore, "according to the Chancellors who preceded Lord Somers, not only were the courts of law competent to this investigation" (whether a party asking for specific performance of an agreement has a clear equity), "but they are the only courts which are competent to it."—*See* the Report, page 25.

The Law Commissioners thus assume that, previous to the time of Lord Somers, courts of equity sent a party applying for a specific performance to try his right at law, in order that the court of law might investigate whether he had a clear equity. But the true ground for thus sending the party to try for damages at law, was not that assigned by the Law Commissioners, probably not even that which is usually assigned, namely, to try whether the plaintiff had a legal right, *i. e.* whether the agreement was legal and the breach of it a wrong, points which in those early times a court of equity, it has been supposed, might have been unwilling to assume a right to determine. But, as Mr. Butler expresses it, "the grand reason for the interference of a court of equity is, that the imperfection of legal remedy, in consequence of the universality of legislative provisions, may be redressed. Hence, for a length of time after the introduction of equitable judicature into this country, it was thought necessary, that before equity should interfere, this imperfection should be manifested by the party's previously proceeding at law, so far as to show, from its result, the want or inadequacy of legal redress, and his claim for equitable relief."

If the defendant, in Lessee of Massey *v.* Touchstone, had brought his action against the lessor of the plaintiff for breach of contract in not making the lease, "all the circumstances of performance and non-performance" would have been before the court of law (so far as was necessary) to ascertain whether a lease had been made, whether there had been any breach of contract, and, if so, to estimate the damage, but not with a view to determine whether, if the agreement were unperformed, Lord Massey should be compelled to perform it. The question whether a broken contract should be specifically performed depends, not merely upon "the circumstances of performance and non-performance" important in an action for breach of contract, but upon other, or all the circumstances of the case. Not only does equity sometimes relieve by granting a specific performance where damages may not be recoverable at law, but sometimes it will refuse a specific performance where damages may be recovered at law, the rescinding and decreeing specific performance of contracts being in the discretion of the courts. If a plaintiff's title be involved in difficulties which cannot be immediately removed, equity will not compel the defendant to take a conveyance, though he might at law be subject to damages for not completing his purchase. 1 Fonbl. 190, note (*i.*); and *see* Mortlock *v.* Buller, 10 Ves. 292. Thus irrespective of the particular case before Mr. Justice Kelly, the circumstances of performance or non-performance, which are brought before a court of law with a view to damages for breach of contract to make a lease, do not necessarily include those circumstances upon which it must depend whether a specific performance of that contract will be decreed in equity. The latter are not "the proper legitimate, constitutional subjects of common law jurisdiction." The judges at Calcutta propose to make them so, but they are not so at present, and were not so at the time when the Report of the Law Commissioners was being written.

As I think all courts should be empowered to examine parties, if not vivâ voce, at least upon interrogatories, I think such a court as that proposed by the Law Commissioners should possess the power in question, and if an outstanding term should be set up in an action of ejectment, should be authorized to determine the effect of such term upon the same principles as a court of equity.

It is unnecessary to dwell upon those cases, much insisted upon by the Law Commissioners, in which judges have expressed opinions regarding the boundaries of legal and equitable jurisdiction, which have been long since overruled: no doubts or questions that the latter decisions are the more reasonable, and must prevail.

The Law Commissioners deduce from Moses *v.* Macfarlane, and Farquharson *v.* Pitcher, "that courts like the Court of King's Bench ought to be furnished with the means of doing justice in all cases within their jurisdiction, and that courts of conscience, inasmuch as they cannot be furnished with such means without

without great risk of injustice, ought not to be suffered to exist at all." If the superior courts could dispose of claims of small amount at a proportional expense, courts of conscience and tribunals of that description might be dispensed with; but hitherto no court in any considerable degree capable of a sound administration of justice has been contrived or established, in which the expense of litigating small demands has not been excessive, as being disproportionate to the matter sued for. Thus courts of conscience and courts of requests for deciding petty matters have been hitherto necessary evils. For the reasons already given, it appears to me that the Law Commissioners propose to erect but a very bad description of court of conscience, a court which cannot be maintained without great expense to the country, if not to the parties, and which will be the more mischievous because it is to exercise unlimited jurisdiction.

I have long thought that, under the judicial system at present existing, a court should be debarred from entertaining a suit or action in which it could not administer complete justice; therefore, that a court of law should have no jurisdiction over cases in which the effect of the judgment at law would directly or indirectly be annulled in equity. In an action at law, the moment it appears, although not specially pleaded, that matter of equity beyond the jurisdiction of courts of law is involved or incidentally comes in question, so as immediately to affect the rights of the parties, I think the plaintiff should be nonsuited, on such terms as to costs as a just discretion might direct. In this sense I think that an equitable title might be set up in ejectment as a bar to the further progress of the action.

I have already dwelt in general terms upon the question whether a court engaged in administering law should be allowed to "equitise," and, if so, to what extent: Lord Eldon has said of the separation of courts of law and equity, it "mainly contributes to the complete and effectual administration of justice in this country, and secures to the people an administration of justice to an extent and in a degree such as are unknown, and must be ever unknown where that separation is not effectually made and observed." He perhaps overrated the effects of the separation alluded to, and it certainly appears to me that in some instances the separation need not be observed so strictly as at present: but the Law Commissioners would wholly abolish it. The weight of authority is indeed against them; but they make light of it, and assail even Lord Redesdale, to whom they impute the following sophism:—"The Scotch courts are bad. The Scotch courts administer law and equity together. Therefore, courts which administer law and equity together are bad." It is fortunate for the memory of Lord Redesdale, which must otherwise have been grievously damaged through this perversion of his argument by the Law Commissioners, that what he did say is contained in his judgment in Shannon *v.* Broadstreet, and is published in the report of that case. But experience as well as authority is opposed to the views of the Law Commissioners. I have shown what have been the results of experience in these matters in the United States of America; and the experience which England had of the Court of Exchequer, although equity was administered therein as distant from law as could well be in a court administering both law and equity, was the chief reason why the equitable jurisdiction of that court was taken away, and given to the Court of Chancery, in the year 1841.

I have no doubt that if the proposed changes be salutary for India, it would be at least equally salutary for England to effect similar changes in that country, and therefore there is reason to believe that these propositions of the Law Commissioners will be duly canvassed by competent jurists, before their adoption in India is permitted.

(signed) *H. Roper.*

Fort William, Home Department, Legislative, 23 November 1843.

Legis. Cons. 23 Nov. 1843. No. 87.

The following extract from the proceedings of the Right honourable the Governor-general of India in Council, in the Legislative branch of the Home Department, under date the 23d November 1843, is published for general information.

"Read a second time the draft of a proposed Act, dated the 30th September 1842, and published in the Calcutta Gazette of the 1st October 1842, for the better administration of justice, within the town of Calcutta, in small causes not included within the jurisdiction of the court of requests.

No. 1.
On Civil Judicature in the Presidency Towns.

"*Resolution.*—The Right honourable the Governor-general in Council resolves, that the following amended draft on the subject be published for general information:

ACT, No. of 1843.

"AN ACT to facilitate the Administration of Justice, by the Establishment of a new Court for the hearing and determining of Causes of small Amount.

"1. WHEREAS it is desirable that a court should be established in Calcutta for the hearing and determination of causes of small amount, and also to provide, in certain cases, for a rehearing of the same by way of appeal:

"It is hereby enacted, that the judges of the Supreme Court of Judicature at Calcutta, shall be ex-officio Commissioners of the court hereby constituted, and together with so many other Commissioners not exceeding three, as the Governor-general in Council shall from time to time appoint, shall from and after the notification hereinafter mentioned of the constitution of the court, be a court of record, to be called "The Court for the trial of Small Causes at Fort William in Bengal;" and that Charles Waire Brietzeke, Esq., and Raboo Russomoy Dŭtt, the present Commissioners of the court of requests now established in Calcutta, shall be two of the first Commissioners of the court hereby constituted.

"2. And it is hereby enacted, that each ex-officio, and each other Commissioner of the court hereby constituted, shall, in open court and before entering upon the duties of his office as a Commissioner of the said court, be sworn diligently and honestly to administer justice as a Commissioner of the said court, according to the best of his knowledge and ability: Provided always, that in the event of any Commissioner objecting to take an oath, from religious scruples, it shall be lawful for such Commissioner to make a solemn affirmation to the same effect, in lieu of the oath required to be administered and taken in manner above-mentioned; and the said Commissioners are hereby empowered to administer such oath or affirmation to each other.

"3. And it is hereby enacted, that the Commissioners of the said court, or any of them, may, and they hereby are respectively authorized, severally, as well as jointly, to perform all such duties other than the appellatory duties hereinafter mentioned, as the Commissioners of the said court are hereby required to perform, and severally as well as jointly to exercise all such powers and privileges, except as aforesaid, as the Commissioners of the said court are entitled to under the provisions of this Act.

"4. And it is hereby enacted, that sittings for the purpose of trying such causes, and adjudicating upon such matters as may be lawfully tried and adjudicated upon by the Commissioners of the said court, may be holden before any one or more of the said Commissioners; and separate sittings may be holden before different Commissioners at one and the same time, at any convenient place within the town of Calcutta.

"5. And it is hereby enacted, that, as soon as conveniently may be done upon the passing of this Act, it shall be notified by the Government of India, by publication thereof in the Gazette, that the court hereby constituted is constituted and empowered to act as such court as aforesaid, and that the court of requests for the town of Calcutta has ceased to exist, and thereupon, and upon the publication thereof aforesaid, the said court of requests shall cease to exist: Provided always, that no judgment or order, or any other act whatever legally had, made, done or pronounced by the said court before it shall so cease to exist, shall be avoided, or in any respect affected by the provisions of this Act, but shall remain in full force and virtue in the same manner as if this Act had not passed, nor shall any actions, suits, causes or other proceedings depending in the court of requests at the time of the said court so ceasing to exist, be in any respect abated, but the same shall be transferred to the court hereby constituted, and shall be determined in the said court in like manner and by the same rules and forms of proceeding to all intents and purposes, as if the said court of requests were continuing, and the same were determined therein, and all papers, books, muniments and other things of, or in the said court of requests,

requests, shall be transferred and delivered over to the court hereby constituted, to be deposited and preserved in and by the said court.

"6. And it is hereby enacted, that the jurisdiction of the court hereby constituted shall extend to the hearing and determining of all matters over which the said court of requests has or may have jurisdiction, and to the trial and adjudication of all matters over which the Supreme Court of Judicature at Fort William in Bengal, on its plea side, has or may have jurisdiction: Provided always, that the party defendant shall be an inhabitant, at the time of the institution of the suit, within the local limits of the jurisdiction of the said Supreme Court; and it is hereby provided, that every person who would be held amenable to the jurisdiction of the Supreme Court by reason of inhabitancy, if the suit had been instituted therein, shall in like manner be deemed subject to the jurisdiction of the court hereby constituted: Provided always, that no action, suit or other proceeding shall be brought in the said court for the recovery of any debt or damages exceeding 400 rupees, or for the recovery of any real estate exceeding in value 100 rupees per annum; and that no action for assault and battery, or for written or oral defamation, shall be cognizable by the said court.

"7. And it is hereby enacted, that in all actions, suits and other proceedings whatever in the court hereby constituted, if one or both the parties be British subjects, Hindoos or Mahomedans, the Commissioners of the said court shall decide according to the law as administered in the like cases in the said Supreme Court of Judicature, subject, nevertheless, to such rules and regulations as may be herein expressly enacted, and as the said Commissioners may be authorized to make for regulating the process, forms of proceeding, including the statement and entry of the cause of action and defence, or other allegations in the suit, and the general practice of the court; provided that no person shall be incompetent as a witness either by reason of being a party to the suit, or married to, or of kin to any party to the suit, or of liability to the costs of the suit, or on any other ground of interest, but solely on the ground of defect of understanding or want of religious belief.

"8. And it is hereby enacted, that the major part in number of the said Commissioners for the time being may and shall from time to time frame rules and orders concerning the process, forms of proceeding, including the mode of stating and entering the allegations of the respective parties in the progress of the suit, and the practice and the costs, and generally the conducting the business of the court; provided that such rules and orders shall not be enforced until they are confirmed and approved by the Governor-general of India in Council.

"9. And it is hereby further enacted, that the said court, and each and every Commissioner thereof in his respective court, may and shall exercise such power and authority for the purpose of compelling the attendance of parties or witnesses, or for punishing contempts of the authority of the court, as the judges of the Supreme Court as aforesaid may lawfully exercise in the like case on the plea side of the court.

"10. And it is hereby enacted, that all pleadings and other allegations of the parties shall be made orally before the said Commissioners, by the said parties or their attornies, and the legal result thereof shall be shortly entered in a book or books under the authority of the court, by some officer of the court; to which book or books the parties or their attornies shall have at all times access, without payment of any fee or reward, and shall be permitted, at their own expense, to take copies or extracts therefrom of any proceedings in the suit.

"11. And it is hereby enacted, that in any action, suit or other proceeding, it shall be lawful for the said Commissioners, if they think fit, to adjourn the further hearing of such action, suit or other proceeding upon such terms, and for such time as they shall think fit; and if, on the hearing of any case, the Commissioner or Commissioners trying the same shall be desirous that the same should be heard before any one or more of the ex-officio Commissioners of the said court, it shall be lawful for such Commissioners, if they shall think fit, to refer the same to one or more of such ex-officio Commissioners, and for such purpose to adjourn the case; and the same shall be then heard and determined

No. 1.
On Civil Judicature in the Presidency Towns.

mined before the said ex-officio Commissioners, or one or more of them, as they the said ex-officio Commissioners shall think fit.

" 12. And it is hereby enacted, that if any person or persons shall find him, her or themselves aggrieved by any judgment or order made or pronounced by any one or more of the said Commissioners, not being an ex-officio Commissioner, in any action, suit or other proceeding involving any question of title to lands or real estate, or in any case where an order has been made directing the payment of a sum exceeding Company's rupees, such person or persons may, upon giving such security as the said Commissioners shall think proper, appeal against the said judgment or order to the ex-officio Commissioners of the said court, provided that any one or more of the said ex-officio Commissioners shall be competent to hear and determine the said appeal: Provided always, that no appeal shall be allowed upon the ground of the decision being against evidence, if there be any evidence to support it, or on the ground of falsehood imputed to the evidence: Provided always, that an application for leave to appeal shall be made to the said ex-officio Commissioners within one fortnight from the making or pronouncing of such judgment or order.

" 13. And it is hereby enacted, that the said Commissioners may and shall settle, as soon as conveniently may be after the passing of this Act, not exceeding two calendar months from the time of the constitution of the court, a table of fees to be paid by all and every person or persons engaged in any suit, action or other proceedings in the said court, for the transaction of all business relating to the same; and the said table of fees shall be hung up in a conspicuous part of the said court; provided that all such fees shall be subject to the approval and confirmation of the Governor-general in Council, and provided also, that no costs shall be chargeable against the adverse party for any fees paid to or any expense incurred by the employment of any counsel, or attorney acting as counsel, except in cases of appeal, or unless some one of the Commissioners shall certify that the circumstances of the case were such as to require the assistance of counsel.

" 14. And it is hereby enacted, that the Governor of Bengal shall appoint from time to time such clerks, officers and servants as shall be found necessary to the efficient transaction of all the business of the court, and to the due administration of justice; and such officers, clerks and servants shall receive respectively such reasonable salaries as the said Governor shall think proper to appoint, subject to the approval of the Governor-general in Council.

" 15. And it is hereby enacted, that the fees payable as aforesaid to the court hereby constituted shall be applied towards the payment and remuneration of the clerks, officers and servants above-mentioned, and generally towards the expense of maintaining the said court; and in case the said fees should exceed the amount required for these purposes, they shall undergo from time to time such revision and reduction as the Governor-general in Council shall think proper to make.

" 16. And it is hereby further enacted, that the said court hereby constituted shall have power by any rules and orders to be made, subject to such approval as aforesaid, to adopt all or any of the provisions and powers made and conferred by any lawful authority for and upon the court of requests, and which it may lawfully exercise at the time of its ceasing to exist as aforesaid, so far as the same are not repugnant to the provisions of this Act.

" *Ordered*, That the draft Act be re-considered at the first meeting of the Legislative Council of India after the 23d January 1844."

(signed) *T. R. Davidson*,
Officiating Secretary to the Government of India.

—No. 2.—

No. 2.
On giving Power to Commissioners of Court of Requests relating to Recovery of Merchant Seamen's Wages.

ON GIVING COMMISSIONERS OF THE COURT OF REQUESTS SO MUCH OF THE POWER GIVEN BY STAT. 5 & 6 WILL. 4, c. 19, TO JUSTICES OF THE PEACE IN ENGLAND, AS RELATES TO THE RECOVERY OF WAGES DUE TO MERCHANT SEAMEN, AND ON OTHER MATTERS, CONNECTED WITH SUCH SEAMEN IN BRITISH INDIA.

Dated the 25th April 1844, with connected Papers.

EXTRACT from a Despatch addressed by the Government of India to the Honourable the Court of Directors, in the Legislative Department, No. 1; dated 2 January 1837.

Suggestion of the Bombay Government relative to a recent Act of Parliament (5 & 6 W. 4, c. 19) for the protection of Merchant Seamen.
Legis. Cons. 18 July 1836. Nos. 4 to 6.

61. THE senior magistrate of police at Bombay submitted to the local Government the expediency of passing an Act for giving effect under that Presidency to the Act of Parliament passed on the 30th of July 1835, intituled, "An Act to amend and consolidate the Laws relative to the Merchant Seamen of the United Kingdom, and for forming and maintaining a Register of all the Men engaged in that Service." The Advocate-general at Bombay was consulted on the subject, and his opinion, with the senior magistrate's suggestion, were forwarded to us, with the opinion of the Right honourable the Governor in Council of Bombay, that, although they considered the measure advisable, they did not deem it necessary to submit the draft of an Act, as the subject was applicable to all India, and would engage our attention as a general question.

62. We have forwarded the correspondence to the Indian Law Commissioners, and we have taken the opportunity of suggesting to them the expediency of conferring upon the commissioners of the petty court at Calcutta, so much of the power as is given to justices of the peace in England as relates to the recovery of wages due to seamen while in the port of Calcutta: we requested them to insert provisions to this effect in any new enactment which might be forthcoming, having reference to the petty court. The other branches of river jurisdiction referred to in the Act of Parliament belong to the bench of magistrates, and will engage the early attention of the Law Commissioners.

(No. 975 of 1836.)

From *E. H. Townsend*, Esq., Acting Secretary to the Government of Bombay, to the Secretary to the Government of India in the Legislative Department, Fort William; dated 3 June 1836.

Legis. Cons. 18 July 1836. No. 4.

Sir,

I AM directed by the Right honourable the Governor in Council to transmit to you, for the consideration of the Right honourable the Governor-general of India in Council, the accompanying copy of a letter from the senior magistrate of police, dated 8th April last, suggesting the passing of an Act, giving effect under this Presidency to the Act of Parliament passed on the 30th July 1835, intituled, "An Act to amend and consolidate the Laws relative to the Merchant Seamen of the United Kingdom, and for forming and maintaining a Register of all the Men engaged in that Service," with the opinion of the acting Advocate-general, and to state, for the information of his Lordship in Council, that although this Government consider the measures of the kind suggested by Mr. Warden advisable, this Government have not deemed it necessary to submit the draft of

No. 2.
On giving Power to Commissioners of Court of Requests relating to Recovery of Merchant Seamen's Wages.

an Act, because the subject applying to the whole of India, it will no doubt engage the attention of the Governor-general as a general question, should his Lordship be pleased to concur in the views taken by this Government regarding it.

I have, &c.

Bombay Castle, 3 June 1836. (signed) *E. H. Townsend*,
Officiating Secretary to Government.

(No. 137 of 1836.)

Legis. Cons. 18 July 1836. No. 5. Enclosure.

From *John Warden*, Esq., Senior Magistrate of Police at Bombay, to the Secretary to Government, Judicial Department; dated 8 April 1836.

Sir,

1. The Act of Parliament, of which the accompanying is a copy, intituled, "An Act to amend and consolidate the Laws relative to the Merchant Seamen of the United Kingdom, and for forming and maintaining a Register of all the Men engaged in that Service," was lately brought to my notice by Captain Hopkins, commander of the "Buckinghamshire." It has had effect from the 31st day of July last, and if, as I believe, it be in force, not only in India, but in every part of the world where a British merchant ship may be found to be subjected to its provisions, and there are two respectable British merchants to enforce them. I beg leave to suggest to the Right honourable the Governor in Council, that 50 copies be forthwith printed for the use of this, the collectors' and master attendants departments, and of others whom it may concern.

2. But if it should be said not to have effect here, I think the Government of India should be solicited to pass an Act giving it the sanction of law at this Presidency.

3. In the 47th para. of my report to the Law Commission, I stated my belief, "that there is no class of people who require more protection from tyranny and injustice than sailors," and I am gratified to find my opinion so soon justified by the passing of an Act of Parliament, "to give seamen all due encouragement and protection."

4. In the same report I stated that I was left to perform my "duty towards seamen without the guidance of a single Regulation, and that the general complaints were, that they were disrespectful, broke their liberty, refused to return to their ships, &c. &c." and the Governor will observe that this Act of Parliament gives me authority to act efficiently in all these matters, and at the same time to protect seamen from wrong, and to recover their wages for them in a summary mode, without their having recourse to the Supreme Court, the slow and formal proceedings of which render it quite useless to sailors whose ships are about to sail, and which is just the time when disputes arise between commanders and seamen.

I have, &c.

Bombay Police Office, 8 April 1836. (signed) *John Warden*,
Senior Magistrate of Police.

(No. 19 of 1836.)

From *H. Roper*, Esq., Acting Advocate-general of Bombay, to *J. P. Willoughby*, Esq., Secretary to Government; dated 4 May 1836.

Sir,

I have had the honour to receive your letter of the 28th ultimo, requesting my opinion as to the applicability to British India of the 5th & 6th Will. 4, c. 19, intituled, "An Act to amend and consolidate the Laws relating to the Merchant Seamen of the United Kingdom, and for forming and maintaining a Register of all the Men engaged in that Service."

The statute appears to me to have been drawn up in a very loose manner, and I am unable to give a decided or satisfactory opinion with respect to it; indeed,

your

No. 2.
On giving Power to Commissioners of Court of Requests relating to Recovery of Merchant Seamen's Wages.

your inquiry is so general, that in order to give an adequate answer, it might perhaps become necessary to comment at great length upon each of the 55 sections in the Act.

The powers given by several clauses in the statute to one or more justice or justices of the peace in any part of his Majesty's dominions, and the powers given by the 51st section to collectors or other chief officers of the customs at the several ports of the United Kingdom, and of the British possessions abroad, unquestionably are conferred on justices of the peace, collectors and chief officers of customs respectively, in British India.

I incline to think that vessels belonging to Bombay, or registered there, and the crews of such vessels, are not within the second section of the statute, which provides that written agreements shall be entered into with his seamen by the master of any vessel belonging to any subject of his Majesty of the United Kingdom, trading to parts beyond the seas, or of any British registered ship of the burthen of 80 tons or upwards, employed in any of the fisheries of the United Kingdom, or in trading coastwise, or otherwise. The 54th section provides, that the Act shall not extend to any ship registered in or belonging to any British colony, having a legislative assembly, or to the crew of such ship, while such ship shall be within the precincts of such colony. India, strictly speaking, is not a British colony, and has not a legislative assembly; but the Supreme Government of India can now make laws; and therefore, and as the 2 Geo. 2, c. 36, the 2 Geo. 3, c. 31, and the 31 Geo. 3, c. 39, did not apply to vessels belonging to or registered in any port in India, or to the crews of such vessels, I conclude the late Act was not intended to affect such vessels or crews. Besides, though heavy penalties are imposed by the Act, it would seem that no means of recovering, in India, any greater penalty than 20*l.* is provided by the 53d section.

The register office for seamen is clearly to be established at the port of London only, and it is unnecessary to establish any such register office in India.

I have, &c.

(signed) *H. Roper*,
Acting Advocate-general.

Bombay, 4 May 1836.

(True copies.)

(signed) *E. H. Townsend*,
Acting Secretary to Government.

(No. 192.)

From *W. H. Macnaghten*, Esq., to *F. Millett*, Esq., Secretary to the Indian Law Commissioners; dated 18 July 1836.

Legis. Con. 18 July 1836. No. 6.

Sir,

I AM directed by the Right honourable the Governor-general of India in Council to transmit to you, to be laid before the Indian Law Commissioners for their consideration, the accompanying copies of a letter from the acting Secretary to the Government of Bombay, dated the 3d ultimo, and of its enclosures, on the subject of passing an Act for giving effect, under the Presidency of Bombay, to the Act of Parliament of the 30th July 1835, relative to merchant seamen.

2. It has occurred to his Lordship in Council, that it would be expedient to confer upon the commissioners of the petty court so much of the power as is given to justices of the peace in England, as relates to the recovery of wages due to seamen while in the port of Calcutta, and the Law Commissioners are requested to insert provisions to this effect in any new enactment that may be forthcoming, having reference to the petty court. The other branches of river jurisdiction referred to, would seem to belong to the bench of magistrates, but it is requested that the whole subject may engage the early attention of the Law Commissioners.

I have, &c.

(signed) *W. H. Macnaghten*,

Council Chamber,
18 July 1836.

No. 2.

EXTRACT from a Despatch addressed by the Government of India to the Honourable the Court of Directors, in the Legislative Department, No. 7; dated 16 April 1838.

Construction of the Stat. 5 & 6 Will. 4, c. 19, a law required to enable Captains and Seamen to dissolve an Agreement of Service when mutually willing to do so.

Legis. Cons. 29 Dec. 1837. No. 1 to 3.

22. AT our consultation of the annexed date, we took into consideration a reference from the chief magistrate of Calcutta, on which the Right honourable the Governor of Bengal had obtained the opinion of the Advocate-general; we concurred with our law adviser in thinking, that the provisions of section 38 of the Statute 5 & 6 Will. 4, c. 19, is applicable to Calcutta. With reference, however, to the date of that law (30 July 1835), which is posterior to the date (14 March) of Act No. IV. of 1835 of this government, we thought that it could not be legally administered otherwise than by two justices of the peace.

23. The chief magistrate further stated, that he had been called upon by the commanders of ships frequenting this port to comply with the terms of sect. 41 of the statute law above cited. On this point it appeared to us, in accordance with the views of the Advocate-general, that the law in question was not applicable to the territories of the East India Company; we however, desired the chief magistrate, if he should be of opinion that the provisions referred to are essentially necessary to the protection of sailors frequenting this port, to submit for our consideration the draft of a law embodying those or similar provisions.

(No. 2405.)

Legis. Cons. 29 Dec. 1837. No. 1.

From *F. J. Halliday*, Esq., Officiating Secretary to the Government of Bengal, to *R. D. Mangles*, Esq., Officiating Secretary to the Government of India, Judicial Department; dated 5 December 1837.

Sir,

Judicial Dep.

I AM directed by the Honourable the Deputy Governor of Bengal to transmit to you, for the purpose of being laid before the Government of India, for their consideration, the accompanying documents, in original, as specified in the margin.*

I have, &c.

(signed) *F. J. Halliday*,
Officiating Secretary to the Government of Bengal.

Fort William, 5 December 1837.

Legis. Cons. 29 Dec. 1837. No. 2.

From *D. M'Farlan*, Esq., Chief Magistrate of Calcutta, to *R. D. Mangles*, Esq., Secretary to the Government of Bengal; dated 3 February 1837.

Sir,

Enclosure.

I HAVE the honour to report, that I have been called upon by the commanders of ships frequenting this port to comply with the terms of the 41st section of the Act, cap. 19, of the 30th July 1835, when they had individuals among their crew with whom they were disposed to part, and who had no objections so to part with their commander; with a desire of doing what lies in my power to facilitate such agreements, I have entered on the ship's articles a narration of the fact in the following form:—

"Certified, that William Ramsay, master, and Peter Goldie, able seamen, appeared before me this day, and both expressed their willingness that the articles entered into between them to serve on the "Jean" should be at an end; to which I do not object.

"(signed) *D. M'Farlan*,
"Calcutta Police Office, 5 March 1836." "Chief Magistrate."

I need

* Letter from Calcutta Chief Magistrate, dated 3d February 1837. Letter to Advocate-general, dated 7th February 1837. Letter from Calcutta Chief Magistrate, with Enclosure, dated 8th November 1837. Letter to Advocate general, dated 27th November 1837. Letter from Advocate-general, dated 28th November 1837.

No. 2.
On giving Power to Commissioners of Court of Requests relating to Recovery of Merchant Seamen's Wages.

I need not remark, that I am not one of the authorities mentioned in the Act; indeed, doubts have been started from high authority, whether the Act applies at all to this country; there appears, however, a necessity to meet the wishes of officers of ships wishing to be relieved of parties disposed to part with them, and I have not hesitated to act upon it. The sanction of Government to the arrangement would, however, seem desirable.

I have, &c.
(signed) *D. M'Farlan*,
Chief Magistrate.

Calcutta Police Office, 3 February 1837.

(No. 283.)

From *R. D. Mangles*, Esq., Secretary to the Government of Bengal, to *John Pearson*, Esq., Advocate-general; dated 7 February 1837.

Sir,

I AM directed by the Right honourable the Governor of Bengal to transmit to you the accompanying copy of a letter from the chief magistrate of Calcutta, dated the 3d instant, and to request that you will favour his Lordship with your opinion on the subject of it. Judicial Dep.

I have, &c.
(signed) *R. D. Mangles*,
Secretary to the Government of Bengal.

Fort William, 7 February 1837.

From *D. M'Farlan*, Esq., Chief Magistrate of Calcutta, to *F. J. Halliday*, Esq., Officiating Secretary to the Government of Bengal; dated 8 November 1837.

Sir,

I HAVE the honour to forward, for the information of Government, the accompanying copy of a deposition by John Geary, first officer of the ship "Repulse," and to state, that the doubt under which we labour as to the applicability of the Act 5 & 6 Will. 4, c. 19, s. 38, stands in the way of the prompt administration of justice.

2. If that clause were applicable, we could save the complainants from the delay and expense incident to a prosecution before the sessions of the Supreme Court.

3. The Act of this Government, No. IV. of 1835, giving power to one justice, will not apply to this law, even if made applicable to Calcutta, for it was passed before the English.

4. I have the honour respectfully to state, that I have not been favoured with any reply to communications from this office of 19th August 1836, 22d November 1836, and 3d February 1837.

I have, &c.

Calcutta Police Office, 8 Nov. 1837.
(signed) *D. M'Farlan*,
Chief Magistrate.

THE information and deposition of *John Geary*, taken upon oath by me, David M'Farlan, one of Her Majesty's Justices of the Peace in and for the town of Calcutta, at Fort William, in Bengal, the 4th day of November 1837, who, on his oath, saith:—I am first officer of the "Repulse," the defendant, John Hunter, is boatswain's chief mate. On Sunday last, about four in the morning, all hands were called to make sail; we were then at the Sand Heads. The hammocks were piped up; the boatswain; reported 50 hammocks not brought up; I went below with the boatswain; a hammock was hanging lashed up; Hunter answered, that it was his; I desired him to take it down; he said he would not take it on

No. 2.
On giving Power to Commissioners of Court of Requests relating to Recovery of Merchant Seamen's Wages.

deck, though he would take it down. He used abusive language, very offensive; I do not recollect the exact words; I was excited; I called out to the officer to cut down the hammocks, if they could not find owners; defendant lowered his hammock, and took it five yards, throwing it behind the main ladder on the carpenter's bench; I ordered him to take it on deck; he said, he would be damned if he would; I ordered him on deck; Roberts stowed the hammock in the netting; the defendant was on the quarter deck, using violent abusive language towards me; I ordered him on the poop, where he would not go; I attempted to force him; I did not strike him, I merely shoved him; he then struck me on the left side of the head, seizing me by my clothes; I threw him down on the deck; Major Trelawney sent his recruits to seize him; he was then taken aft, and both legs put in irons; I know of no cause to lead to this, except that defendant abused me for ordering an anchor watch the evening before.

(True copy.)

(signed *D. M'Farlan*,
Chief Magistrate.

No. (2313.)

From *F. J. Halliday*, Esq., Officiating Secretary to the Government of Bengal, to *John Pearson*, Esq., Advocate-general; dated 27 Nov. 1837.

Sir,

Judicial Dep.

In continuation of my predecessor's letter to your address, No. 283, of the 7th of February last (to which no reply has been received), I am directed by the Honourable the Deputy-governor of Bengal to transmit to you, in original, the accompanying letter from the chief magistrate of Calcutta, dated the 8th instant, with its enclosure, and to request that you will favour his Honour with your opinion as to whether Act 5 & 6 Will. 4, c. 19, s. 35, is applicable to Calcutta.

2. With your opinion, the return of the chief magistrate's letter is requested.

I have, &c.

(signed) *F. J. Halliday*,
Officiating Secretary to the Government of Bengal.

Fort William, 27 Nov. 1837.

From *J. Pearson*, Esq., Advocate-general, to *F. J. Halliday*, Esq., Officiating Secretary to the Government of Bengal; dated 28 Nov. 1837.

Sir,

I have the honour to acknowledge the receipt of your letter relative to the statute 5 & 6 Will. 4, c. 19.

2. It is quite clear that many of the clauses of the statute are applicable only to the ports of the British islands, and some of them only to those of England; I need only instance those which relate to parish apprentices; some of them, however, are of wider application. The 38th section, indeed, speaks merely of ships "belonging to any subject of the United Kingdom," but it gives the power of punishing for an assault committed in them, to "any two justices of the peace in any part of his Majesty's dominions." I certainly think this section is so far applicable to India, that two justices of the peace in Calcutta have authority given them to interfere "upon complaint of the party aggrieved;" I do not think that a single justice will be sufficient. The Act of the Legislative Council, No. IV. of 1835, applies only to laws then in force; it was passed 14th March 1835; the 5th & 6th Will. 4 bears date 30th July in the same year.

3. I do not remember whether I replied officially to the letter sent me in February last relative to the 41st section of the same Act, but, if not, I feel sure that I did so in some manner to the chief magistrate. It is, certainly, a question which I then did, and yet do, entertain doubts; I conceive that this clause must have been intended for India as well as for other parts of the world, yet

it

No. 2.
On giving Power to Commissioners of Court of Requests relating to Recovery of Merchant Seamen's Wages.

it hardly seems to me that the intention has been carried into effect, or that India is indeed included in it, for these territories cannot be looked upon as a "colony or plantation;" such, at least, is the opinion which has always seemed to me just upon the subject. I have also understood, that not long before my arrival in India, a question as to the navigation laws turning upon this point, was brought before the Supreme Court, and that the necessary inference from the decision was, that it held such opinion to be correct.

I have, &c.

(signed) *J. Pearson*,
Advocate-general.

Fort William,
28 November 1837.

(No. 1.)

From *R. D. Mangles*, Esq., Officiating Secretary to the Government of India, to the Officiating Secretary to the Government of Bengal, dated 29 Dec. 1837.

Legis. Cons. 29 Dec. 1837. No. 3.

Sir,

I AM directed by the honourable the President in Council to acknowledge the receipt of your letter, dated the 5th instant, with its enclosures, relative to the Act 5 & 6 Will. 4, c. 19, and to communicate as follows in reply, for the information of the honourable the Deputy-governor of Bengal.

2. His honour in Council is of opinion, that section 38 of the Act above cited is applicable to Calcutta, but its date being posterior to the date of Act No. IV. of 1835, of the Government of India, it must be administered by two justices of the peace. He concurs with the Advocate-general in thinking section 41 of the Act not applicable to the territories of the East India Company.

3. If the chief magistrate shall be of opinion that the provisions of the section last referred to are essentially necessary to the protection of the sailors frequenting this port, he will report his sentiments to that effect, with a draft of a proposed Act to extend these or similar provisions, for the consideration of the Supreme Government.

4. The original papers which accompanied your letter are herewith returned, copies having been kept for record.

I have, &c.

(signed) *R. D. Mangles*,
Officiating Secretary to the Government.

Council Chamber,
29 December 1837.

COPY of a Despatch addressed by the Government of India to the Honourable the Court of Directors, in the Legislative Department (No. 1); dated 14 January 1839.

(No. 1.)

To the Honourable the Court of Directors.

Honourable Sirs,

IN continuation of paragraphs 22 and 23 of our despatch, No. 7 (16 April), of 1838, we have the honour to lay the accompanying papers before your honourable Court.

Legis. Cons., 8 Oct. 1838, No. 7 to 17.
" 12 Nov. 1838, No. 5 to 7.
" 14 Jan. 1839, No. 14 to 16.

2. The chief magistrate of Calcutta, with reference to our communication, as noticed in the above cited despatch, submitted the draft of a law for transferring to a single justice of the peace at Calcutta the powers vested by sect. 38 of the statute 5 & 6 Will. 4, c. 19, in two such justices, and with a view as well to the protection of merchant seamen frequenting this port as to conserving the interests of the police of the town, Mr. M'Farlan, supported by the opinion of the Chamber of Commerce, with whom he had communicated on the subject, further proposed to give local effect to the provisions of section 41 of that statute.

3. The statute in question having been passed since the date of the Charter Act, our colleague, Mr. Amos, was of opinion, that we were not competent to make

No. 2.

On giving Power to Commissioners of Court of Requests relating to Recovery of Merchant Seamen's Wages.

make any alteration as respects section 38 thereof, especially as that section had been declared by the Advocate-general at the Presidency to be applicable to Calcutta.

4. With respect to section 41, Mr. Amos, satisfied with the opinion of the Advocate-general that it did not extend to the East Indies, stated, that if even a local law were passed for the territories of the East India Company in the terms of that section, it would be inoperative for the object proposed by the 5 & 6 Will. 4, that object being that in any suit for the wages of a British seaman, where such seaman has been discharged, the validity of the discharge shall be determined by a colonial certificate. Mr. Amos argued, that we could not, by any local law, give the same effect to the certificate of any officer appointed by the Indian Government, as regards suits for wages brought in England by British seamen.

5. After discussing the question in Council, and after various communications held by our colleague, Mr. Amos, with the chief magistrate and with Mr. Greenlaw, the Secretary to the Marine Board, Mr. Amos submitted the draft of a law, which having been approved by us and by the Right honourable the Governor-general, was published for general information on the 8th October last.

6. This law was designed to confer on any single justice of the peace at Calcutta the power of taking cognizance of and punishing the acts of masters of merchant ships discharging, without proper authority, seamen against their will, and before the expiration of their term of service, the acts of seamen refusing to obey the lawful orders of their masters, and all cases of assault or battery committed on board any merchant ship, provided that in all these several cases the offence is committed when the ship is on the River Hooghly, or the mouths thereof.

Vide Act XXI. of 1839, put up.

7. On the publication of this draft, we received a communication from the chief magistrate of Calcutta, suggesting the propriety of making petty felonies committed on the river between Calcutta and the sea, punishable by the Calcutta magistrates; but we determined to leave this point for consideration in connexion with a draft law for reviving the powers of the court of quarter sessions, which we expect to be soon laid before us.

8. Your honourable Court will perceive, from the papers now submitted to you, that we invited the advice of the honourable the judges of the Supreme Court at Fort William, in respect to the law which we proposed to enact, and that it is in consequence of the opinion entertained by them, that we are induced thus specially to submit the entire question for your consideration.

9. The honourable the judges agree in opinion, that the provisions of the Act 5 & 6 Will. 4, c. 19, are applicable to India, and that under section 43 of the 3 & 4 Will. 4, c. 85, we are not competent to pass the proposed Act, in so far as, in some respects, it is understood to vary the provisions of the first-cited statute.

10. We believe the proposed law to be of considerable importance, both as respects the police of the town and the navigation of the port of Calcutta. But, in consequence of the communication from the judges of the court here, we deem it expedient to suspend, for the present, the taking of any further measures in respect to it, and to submit the whole subject to the consideration of your honourable Court. It will be seen that the Advocate-general and the honourable the judges at this Presidency differ in their views as to the applicability, generally, to India of the statute 5 & 6 Will. 4, c. 19, and that we are ourselves disposed to think that the provisions we have had under our contemplation would not vary that statute, but would be collateral to it, applicable only to the remedy of local grievances not contemplated by the Imperial Legislature.

(signed) *W. Morison.*
T. C. Robertson.
W. W. Bird.
A. Amos.

Fort William,
14 January 1839.

No. 2.

(No. 1411.)

From *F. J. Halliday*, Esq. Secretary to the Government of Bengal, to *R. D. Mangles*, Esq. Officiating Secretary to the Government of India, Legislative Department; dated 10 July 1838. Legis. Cons. 8 October 1838. No. 7.

Sir,

With reference to your letter (No. 1), dated the 29th December last, I am directed by the Honourable the Deputy-governor of Bengal to request you will lay before the President in Council the accompanying copies of letters from the chief magistrate of Calcutta, dated the 2d April and 2d instant, and of its enclosures, for the purpose of being sent to the Law Commissioners for consideration. Judicial Dep.

I have, &c.

(signed) *F. J. Halliday*,
Secretary to the Government of Bengal.

Fort William,
10 July 1838.

From *D. M'Farlan*, Esq. Chief Magistrate of Calcutta, to *F. J. Halliday*, Esq. Officiating Secretary to the Government of Bengal; dated 2 April 1838. Legis. Cons. 8 October 1838. No. 8.

Sir,

With reference to your letter of the 9th January last (No. 79) I have the honour to state, that, under the opinion given therein, several convictions have taken place under the 38th clause of the Act of Parliament alluded to; the amount of fines levied has been sent to the Sailors' Home, as the institution corresponding most closely with the Merchant Seamen's Hospital, spoken of in the clause.

2. It would be desirable that the power given in that clause to two justices should be vested in one; of the soundness of that principle I have no doubt. The extent of the inconvenience arising from the present state of the clause will not be great. If possible, however, a specific law for this place should be passed; we have some trouble in finding what the law at home is;* we have no Acts of Parliament officially communicated to us. The penalty ought also to be expressed in the local currency, say 200 rupees fine, and simple imprisonment of two months in default of payment.

3. The 41st clause of the Act being declared not to be applicable, I should have apprehended that considerable inconvenience must have accrued to masters of vessels who for two years and upwards have quietly put the Act in practice, by having my certificate of discharge of seamen indorsed on their articles, as already described. It certainly is of importance to captains and their crews to have a ready means of causing the cessation of articles of agreement, and it is an undoubted matter of convenience to the town that it should not be inundated with European sailors without the knowledge of the magistracy. It is further of some little pecuniary importance to Government, that a portion of their wages should be set apart to meet the expenses that must for the sake of humanity be incurred in looking after European seamen when sick. I am strongly of opinion, therefore, that the present practice should be continued.

4. It would apparently be necessary that a law be passed here for the special case; for the master of a ship knowing that the Act is not in force here, might discharge his European crew without any form being gone through at all, and if the legal authorities at home agreed with those here, he would be liable to no legal question whatever. I add a note of such clause as I think ought to be passed.

5. The exposition now given by the Advocate-general of the applicability of certain clauses of this Act is founded, I conclude, upon the use of the words "His Majesty's dominions,"† in those clauses, and on that footing clauses 6, 10, 14, 15, 16, 38, 40, 51, 53, are probably applicable here. The provisions of clauses 10 and 14, are calculated to be useful, and I shall not hesitate to act upon them.

6. It

* Yet the sentence is guided by the home law.

† Yet the Acts passed by the Government here speak of the territories of the East India Company; so also does the Act 3 & 4 Will. 4, c. 55.

No. 2.
On giving Power to Commissioners of Court of Requests relating to Recovery of Merchant Seamen's Wages.

6. It will be observed in the letters attached to this, that I have endeavoured to get the sense of persons connected with the shipping of the port, as to whether the home apprentice laws regarding the sea service might not be beneficially introduced here. From the tenor of the reply, and the fate of the Marine School ship, it will be better to confine legislation at present to the case of British sailors.

7. I cannot help thinking that much good might accrue to the youth of the country if greater encouragement were given them to enter the sea service. As governor of the free-school I am enabled to state that such an insight into the theory of navigation might easily be given to the boys of that institution, as would render them most useful apprentices, and enable them at a future period, to take their share in the large coasting trade of the country. The difficulty in cases of this kind is to make a beginning. This might perhaps be done by requiring the masters of the Honourable Company's pilot vessels to take two or more boys, and to teach them the rudiments of sailorship; the system might be left to extend itself. The unsound and wretched practice under which parents here look to posts for their children as mere clerks, might gradually give way to the more wholesome practice of educating them for the sea.

I have, &c.
(signed) *D. M'Farlan*,
Chief Magistrate.

Calcutta Police Office,
2 April 1838.

ACT.

It is hereby Enacted, That if after the date of the publication of this Act any master of any British or foreign vessel shall discharge or permit to abscond, at any of the ports in the British possessions in India, under the government of the East India Company, any one or more of the crew of the said vessel being British or foreign mariners, without the sanction in writing of an officer to be appointed in that behalf by publication in the official Gazette of the Presidency in which such port may be situated, by the Governor of the said Presidency, the said master shall, on conviction of the above offence before any justice of the peace, forfeit to the use of the nearest hospital or other place of refuge for European seamen, a sum not exceeding 200 rupees on account of each mariner so discharged or permitted to abscond, to be levied by distress of goods, and failing such distress the said master shall be liable to a period of imprisonment in the nearest common goal, not exceeding two months.

From *D. M'Farlan*, Esq., Chief Magistrate of Calcutta, to *W. Limond*, Esq., Secretary to the Bengal Chamber of Commerce; dated 15 Feb. 1838.

Sir,

Doubts having arisen as to whether certain provisions of the Merchant Seamen's Act, 5 & 6 Will. 4, c. 19, are in force in Calcutta, I have obtained an official opinion, as detailed in the accompanying copy of a letter from Mr. Halliday, that section 38 of the above Act, giving power to two justices to punish common assaults committed at sea, is applicable, and that section 41 is not applicable.

2. The removal of any doubt that existed in regard to the clause first abovementioned is so far satisfactory. It is desirable also, that we should know that the 41st section is not applicable. I am not aware, however, that the decision on these two point gives any criterion which we can safely apply to the other clauses of the Act.

3. It will be seen that the Government here propose to enact any such provisions as may be calculated to give protection to the seamen, and the object of the present reference is to have the benefit of the opinion of the Chamber of Commerce on the subject.

4. I am very anxious that the spirit of the 41st clause should be maintained here; considerable advantage to the police has attended the simple course described in my letter to Mr. Mangles of the 3d February 1837, and the readiness with

No. 2.
On giving Power to Commissioners of Court of Requests relating to Recovery of Merchant Seamen's Wages.

with which captains of ships avail themselves of it (no inconvenience having resulted to them at home), renders me exceedingly averse to discontinue it. The practice enables us to keep for the poor sailor a part of his wages to answer calls in sickness, or to provide him with an outfit when he gets a new ship, and we know that he is authorized to be here. Under it, we are sure that seamen cannot be turned adrift without their full consent, or without the claims of justice being considered.

5. It is obvious that the Act not being applicable here, there can be no provision in it to make what I do illegal, for that is a mere assertion of a fact; but I should regret exceedingly if any opinion held by me should lead captains of ships to do any thing which might involve them in trouble at home; with this view, I venture to bring the matter to your notice, both that full publicity may be given to the state of the law, and practice under it, and that the opinion of the Chamber should be obtained as to whether it would be expedient to pass any law here enabling captains and seamen to part when so disposed.

6. There is another point of some consequence on which the opinion of the Chamber would be useful; viz. whether ships belonging to this port should not be required to take Christian apprentices, say from the free-school.

7. The phraseology of the 38th clause, is similar to that of the 10th, both using the words "His Majesty's dominions," I conclude we might act upon it here.

8. If agreeable to the Chamber to furnish me with any opinion as to the desirableness of passing any legislative enactment on these subjects, I should be happy to receive it for the ultimate consideration of Government.

I have, &c.

(signed) *D. M'Farlan*,
Chief Magistrate.

Calcutta Police Office,
15 February 1838.

From *W. Limond*, Esq., Secretary Bengal Chamber of Commerce, to *D. M'Farlan*, Esq., Chief Magistrate of Calcutta; dated 21 February 1838.

Sir,

YOUR communication of the 15th instant has been laid before the committee of the Chamber of Commerce, and, in reply, I am desired to intimate that the Chamber is distinctly of opinion that section 41, of 5 & 6 Will. 4, c. 19, is applicable to India, and cannot understand on what grounds it is held that it was not meant to be so applicable. However, as such high authorities have embraced a different opinion, the Chamber, appreciating with you the salutary provisions of said section, would presume to recommend that these be extended to the territories of the East India Company, by an enactment of the Supreme Government.

The Chamber also concurs with you in wishing to see Christian apprentices, say, from the free-school, employed in ships belonging to this port, but it would be diffident of the expedience of resorting to a coercive measure on the subject, unless it is customary in England to do so in analogous circumstances.

I have, &c.

(signed) *W. Limond*,
Secretary.

Bengal Chamber of Commerce,
21 February 1838.

From *D. M'Farlan*, Esq., Chief Magistrate of Calcutta, to Captain *T. T. Harington*, Master Attendant, Fort William; dated 27 February 1838.

Sir,

I HAVE the pleasure to forward to you a correspondence that has taken place between this office and Government on the subject of the Merchant Seamen's Act passed by the home Legislature in 1835.

No. 2.
On giving Power to Commissioners of Court of Requests relating to Recovery of Merchant Seamen's Wages.

2. You will observe that Government express their readiness to pass an enactment having for its object the protection of seamen, and I have no doubt that they would willingly enact any other clauses that could be shown to be for the advantage of the country.

3. In the letter of Government there is no very clear index given of the reasons why one clause of the above Act is to be applicable to India, and another not; but I presume the point turns upon the use of the words "His Majesty's dominions;" wherever such phrase is used, the clause is understood to apply here in common with all other parts of such dominions.

4. On this rule of interpretation it is clear that the clauses 2 to 5 inclusive are not at present applicable, nor are clauses 7 to 9, 11 to 13, 17 to 37; clause 39; also clauses 41, 51; and the question occurs how far it would be desirable to urge Government to enact them, or any of them.

5. I should be very much obliged by your giving me your own opinion, and obtaining that of as many persons experienced in nautical affairs as you can command, as to whether all or any of these dormant clauses should be re-enacted here.

6. Obtaining this kind of evidence is certainly not within the proper sphere of my duty, but I am very averse to press upon Government the enactment of any laws which, in the opinion of competent judges, might not be necessary or be hurtful.

7. I have also the pleasure to annex copies of a letter from myself to the Chamber of Commerce on the subject of the present reference, and of their reply.

I have, &c.

(signed) *D. M'Farlan.*

Calcutta Police Office,
27 February 1838.

(True copies.)
(signed) *D. M'Farlan,*
Chief Magistrate.

No answer to this officially received.

From *D. M'Farlan*, Esq., Chief Magistrate of Calcutta, to *F. J. Halliday*, Esq. Secretary to the Government of Bengal; dated 2 July 1838.

Sir,

I HAVE, since writing the letter of the 2d April last, to which this is tacked, had occasion to communicate with the Chief Justice on the provisions of the Act alluded to in that letter, and I find that he "is of opinion that the Act extends to India, and that many of its provisions are in force here." Thus far I am authorized by him to say, and my own impression is, that he thinks that the Act applies here to British registered ships having crews on board articled in England. Much of what I have written above is therefore misplaced; I think it better however that it should stand, in order that Government may see how difficult it is for us to follow the directions of a law when we cannot tell, and the most learned have doubts whether the law is meant to be followed by us at all.

2. I take this occasion to trespass upon you with a short review of the several clauses of the above Act, and to suggest that it may be submitted to the Legislative Council whether such amendments might not be made on certain clauses of the Act, as would (not repeal but) adapt them to the circumstances of the place.

3. It seems clear that the 2d clause, and part of the 4th, do not apply here. Take the case of a British registered ship discharging its European crew and proceeding to China or the Mauritius manned by Lascars; the captain would not by the Act be compelled to go through the process therein described in regard to these Lascars. Again, it seems plain that the clause would not apply to Indian* registered ships; they are the most generally engaged in what is called the country trade. It may no doubt be said, that if the enforcement of the provision

* *See* Act 3 & 4 Will. 4, c. 35.

No. 2.
On giving Power to Commissioners of Court of Requests relating to Recovery of Merchant Seamen's Wages.

provision be just and wise as against British ships, it would most certainly be just and wise in regard to Asiatic ships, which are the most numerous, and, generally speaking, commanded by men in no way superior in education and habits to commanders of large British vessels. For this class of ships it is clear that an Act of this Legislature would be necessary.

4. There is the class of foreign ships, Dutch, American, French; they often take in crews, or at least seamen, here; they are not to be compelled to adhere to these clauses. If the protection of seamen be the object of the Act, they should go through the process equally with British ships.

5. Clause 3, is plainly inapplicable here, but we might well consider whether the Legislature here should not enact it for country ships.

6. Clause 5 would seem capable of being applied here, but the provision appears the dictate of common justice, which the courts here would attend to without it.

7. Clause 6; we have abundant law similar to this in our bye-law; but the 3d clause of this Act makes a chief mate a seaman, and I have been called upon to commit one to the house of correction under it; whether that is a wise provision would seem to require consideration. It certainly does not apply to any but ships described in the 1st paragraph of this letter.

8. Clause 7 to 13 seem very just, and the principles ought to be applicable in all cases.

9. Clauses 14 to 16 had better be made to apply to the petty court, who have simple and efficient rules for speedy adjustment of such cases; but in regard to seamen comprehended in the description in the first paragraph, the case seldom occurs.

10. Clauses 17 and 18 are plainly law here.

11. Clauses 19 to 24 seem inapplicable.

12. Clause 25; this also is inapplicable, but the principle might be adapted to this country very easily.

13. Clauses 26 to 37 are plainly applicable at present, but only as regards disputes occurring here between masters and apprentices duly bound in England.

14. Clause 38 I have remarked on above, in paras. 1 and 2 of the preceding letter.

15. Clause 39; on this no remark seems necessary.

16. Clauses 40 and 43; for these we have a law in the Indian Criminal Act, at clause 71.

17. Clause 41; on this clause I have remarked above, in paragraph 3 and 4 of the preceding letter. If it is now law here, then my proceedings have been wrong for two years and upwards, and I ought instantly to tell any master of a ship who comes to me to cancel his articles, to go to any "two merchants" to get it done.

The inconvenience of this course would be very great, as I have explained in the paragraphs just quoted, and as no inconvenience has resulted to masters at home from following the present course, I beg to suggest that I be allowed to go on until the Legislature here can render the law applicable. Also 41.

18. Remaining clauses require no special note.

19. There is another important clause of the Marine Law under which I have lately been called upon to act; viz. Act 3 & 4 Will. 4, c. 55, s. 27;* whether that clause applies to India generally is not clear, from the use of the word "territory to His Majesty belonging,"† but I presume it would apply in the case of British registered ships, and ships registered in Calcutta British, and does the clause apply to them? Suppose the mate of a French ship to keep the register of that ship, he having been discharged, would the law apply to him? In reason, perhaps, it ought, but the letter of the law would not help us; I beg to suggest that this clause be made generally applicable.

20. I have

* Giving power to magistrate to try charges against persons for retaining Ships' Registers, and to sentence them to a fine of 100 *l.* commutable, if not paid, 12 months' imprisonment.

† *See* also the 3d clause, where the territories under the Government of the East India Company are specially alluded to as something different from the British Possessions in Asia.

No. 2.
On giving Power to Commissioners of Court of Requests relating to Recovery of Merchant Seamen's Wages.

20. I have thus, at the risk of being thought tedious, and trespassing beyond my proper sphere, brought the questions connected with this Act as fully before Government as my limited time will allow of; I have only again to call attention to what is stated in the 2d paragraph of this letter.

I have, &c.

Calcutta, Police Office, 2 July 1838.

(signed) *D. M'Farlan*, Chief Magistrate.

P.S.—This subject appears to have engaged the attention of the authorities at Bombay, and to have led to a reference to the Law Commission.

Judicial Department, 10 July 1838.

(True copy.)

(signed) *F. J. Halliday*,
Secretary to the Government of Bengal.

MINUTE by the Honourable *A. Amos*, Esq.; (not dated.)

Legis. Cons. 8 Oct. 1838. No. 9.

I HAVE conferred with Mr. M'Farlan upon the subject of the Merchant Seamen's Act, and have satisfied him that the only answer we can give is as follows:

We think that we cannot adopt the proposed draft for transferring the powers given by the 38th sect. of 5 & 6 Will. 4, c. 19, from two to one justice, as it would be deemed to "vary or affect" that Act, which the Government is not enabled to do, the Act having been passed since the last Charter Act.

With respect to the 41st section, we are advised by the Advocate-general that it does not apply to the East Indies, and his reasons appear to us satisfactory; we cannot, therefore, recommend to the Governor-general in Council, in his executive capacity, to grant you any authority under that section. We also think, that if we were to pass an Act for the East India Company's territories in the terms of the 41st section, it would be inoperative for the purpose proposed by the 5 & 6 Will. 4, which is, that in any suit for British seamen's wages, where the seaman has been discharged, the validity of the discharge shall be determined by a colonial certificate; we think that we could not, by any local law, give the same effect to the certificate of any officer appointed by the Indian Government, as regards suits for wages brought in England by British seamen.

We shall be happy to consider any propositions made by yourself or by the Chamber of Commerce, for applying to the East Indies such clauses of the 5 & 6 Will. 4, with or without modifications, as are clearly not at present applicable to those territories, as also for applying the statute to seamen not being British seamen, on sufficient grounds for legislating being shown, and the desired enactments being specifically pointed out.

NOTE by the Honourable *A. Ross*.

IF the Act 5 & 6 Will. 4, c. 19, does not apply to India, I do not see why the Legislative Council of India should not be competent to pass an Act for the protection of merchant seamen in the port of Calcutta, adopting the provisions of the Act above mentioned, or any other provisions which might be deemed better adapted for the end in view.

(signed) *A. Ross.*

Legis. Cons. 8 Oct. 1838. No. 10.

MINUTE by the Honourable *A. Amos*, Esq.; dated 3 August 1838.

THE original application made to Government was for transferring the powers of the 38th section of c. 19, 5 & 6 Will. 4, from two to one justice, and for applying the 41st and some other sections, to the East Indies. We have no power to alter the 38th section, and after various communications with Mr. Greenlaw and Mr. M'Farlan, I am led to conclude that the accompanying draft will be satisfactory to the parties requesting our interference, and will be useful and proper as a legislative measure, subject to such objections as may possibly be urged upon the draft being published.

It

No. 2.
On giving Power to Commissioners of Court of Requests relating to Recovery of Merchant Seamen's Wages.

It will be observed, that when sailors refuse to work, and oblige a captain to put back, it is usually done out of the port of Calcutta, though before the ship quits the territories of the East India Company.

The recent instance suggested, of the captain of the "Kellie Castle" having dismissed about 80 English sailors at Calcutta, in consequence of being able to procure native sailors who could navigate his ship to China, may or may not, upon inquiry, be found to be strictly correct, but the suggestion illustrates the manner in which the town may be injured by the conduct of captains under similar circumstances, and the mischief is said by competent authorities to be a very common one.

(signed) *A. Amos.*

DRAFT ACT.

Legis. Cons. 8 Oct. 1838. No. 11.

1. IT is hereby enacted, that if any master of any merchant ship employed on sea voyages shall, during such time as such ship shall be in the river Hooghly, or mouths thereof, being part of the territories of the East India Company, without the sanction of a magistrate or justice of the peace first had and obtained, discharge any seaman against his will before the time of the expiration of the service of such seaman, he shall be liable, on conviction before any justice of the peace exercising jurisdiction within the town of Calcutta, to be punished with a fine not exceeding 100 rupees.

2. And it is hereby enacted, that if any seaman belonging to any merchant ship employed on sea voyages shall, during such time as such ship shall be in the river Hooghly, or the mouths thereof, being part of the territories of the East India Company, without justifiable cause to be proved to the satisfaction of the justice of the peace before whom he may be charged, refuse or wilfully omit to obey the lawful orders of the master of such ship, he shall be liable, on conviction before a justice of the peace exercising jurisdiction within the town of Calcutta, to be imprisoned with or without hard labour for any term not exceeding three months, if the offence be committed whilst the ship is in progress either to or from the sea, or for any term not exceeding one month, if the ship be lying at anchor off the town of Calcutta or Kidderpore.

3. And it is hereby enacted, that in the case of any assault or battery which shall be committed on board any merchant ship employed on sea voyages in the river Hooghly, or the mouths thereof, being part of the territories of the East India Company, it shall be lawful for any justice of the peace exercising jurisdiction within the town of Calcutta to hear and determine any such complaint, and to punish the offender by a fine not exceeding 100 rupees.

(signed) *T. H. Maddock,*
Officiating Secretary to the Government of India.

(No. 487.)

Legis. Cons. 8 Oct. 1838. No. 12.

From *T. H. Maddock*, Esq., Officiating Secretary to the Government of India, to *W. H. Macnaghten*, Esq., Secretary to the Government of India with the Governor-General; dated 20 August 1838.

Sir,

I AM directed by the honourable the President in Council, to forward to you, to be laid before the Right honourable the Governor-general of India, the accompanying papers in original, as noted on the margin,* together with the draft

* Letter from Chief Magistrate of Calcutta, dated 22d November 1836, to the address of the Secretary to the Government of Bengal, with one Enclosure. Letter from Officiating Secretary to the Government of Bengal, dated 5th December 1837, with one Enclosure. Letter to Officiating Secretary to the Government of Bengal, dated 25th December 1837. Letter from Officiating Secretary to the Government of Bengal, dated 10th July 1838, with one Enclosure. Notes by the Honourable A. Amos, Esq., without date, and by the President in Council. Minute by the Honourable A. Amos, Esq., dated 13th August 1838. Private Correspondence with Mr. Greenlaw and Mr. M'Farlan, with one Enclosure.

No. 2.
On giving Power to Commissioners of Court of Requests relating to Recovery of Merchant Seamen's Wages.

draft of a proposed Act for the protection of merchant seamen in the port of Calcutta.

2. His honour in Council solicits the sanction of the Governor-general to the draft of Act being published for general information, and requests, that if his Lordship should approve of the provisions of the proposed Act, his assent to its being passed without any essential alteration, may at the same time be communicated.

3. You will be pleased to return the draft of Act sent herewith, with your reply.

I have, &c.
(signed) *T. H. Maddock*,
Officiating Secretary to Government of India.

Fort William,
20 August 1838.

Legis. Cons. 8 Oct. 1838. No. 13.

From *W. H. Macnaghten*, Esq., Secretary to the Government of India with the Governor-general, to *T. H. Maddock*, Esq., Officiating Secretary to the Government of India; dated 13 September 1838.

Sir,

Legislative.

I AM directed to acknowledge the receipt of your letter (No. 487), dated the 20th ultimo, transmitting draft of a proposed Act, for the protection of merchant seamen in the port of Calcutta, and soliciting the Governor-general's sanction for its publication, and assent for passing it into law, if its provisions are approved, and, in reply, to enclose a copy of his Lordship's assent in the usual form.

2. I am desired to add, that the Act of 5 & 6 Will. 4, c. 19, is not available to the Governor-general for reference, but his Lordship has no hesitation in placing full confidence in the opinion of the President in Council, as to the legality of the proposed enactment, and its consistency with the provisions of the Act referred to.

3. The original enclosures of your letter are returned herewith.

I have, &c.
(signed) *W. H. Macnaghten*,
Secretary to the Government of India with the Governor-general.

Simla, 13 September 1838.

(Copy.)

Legis. Cons. 8 Oct. 1838. No. 14. Legislative.

I DO hereby, under section 70, 3 & 4 Will. 4, c. 85, give my assent to the proposed Act, for the protection of merchant seamen in the port of Calcutta, received from the honourable the President in Council, in Mr. Officiating Secretary Maddock's letter (No. 487), dated the 20th August last.

(signed) *Auckland*.

Simla, 13 September 1838.

(True copy.)
(signed) *W. H. Macnaghten*,
Secretary to the Government of India,
with the Governor-general.

Legis. Cons. 8 Oct. 1838. No. 15.

THE following Draft of a proposed Act was read in Council for the first time on the 8th October 1838.

ACT, No. of 1838.

1. IT is hereby enacted, that if any master of any merchant ship employed on sea voyages shall, during such time as such ship shall be in the river Hooghly, or mouths thereof, being part of the territories of the East India Company, without the sanction of a magistrate or justice of the peace first had and obtained, discharge any seaman against his will before the time of the expiration of

No. 2.
On giving Power to Commissioners of Court of Requests relating to Recovery of Merchant Seamen's Wages.

of the service of such seaman, he shall be liable, on conviction before any justice of the peace exercising jurisdiction within the town of Calcutta, to be punished with a fine not exceeding 100 rupees.

2. And it is hereby enacted, that if any seaman belonging to any merchant ship employed on sea voyages shall, during such time as such ship shall be in the river Hooghly, or the mouths thereof, being part of the territories of the East India Company, without justifiable cause to be proved to the satisfaction of the justice of the peace before whom he may be charged, refuse or wilfully omit to obey the lawful orders of the master of such ship, he shall be liable, on conviction before a justice of the peace exercising jurisdiction within the town of Calcutta, to be imprisoned with or without hard labour, for any term not exceeding three months, if the offence be committed whilst the ship is in progress either to or from the sea, or for any term not exceeding one month if the ship be lying at anchor off the town of Calcutta or Kidderpore.

3. And it is hereby enacted, that in the case of any assault or battery which shall be committed on board any merchant ship employed on sea voyages in the river Hooghly, or the mouths thereof, being part of the territories of the East India Company, it shall be lawful for any justice of the peace exercising jurisdiction within the town of Calcutta to hear and determine any such complaint, and to punish the offender by a fine not exceeding 100 rupees.

Ordered, That the draft now read be published for general information.

Ordered, That the said draft be re-considered at the first meeting of the Legislative Council of India after the 8th day of December next.

(signed) *T. H. Maddock*,
Officiating Secretary to Government of India.

Fort William,
8 October 1838.

(No. 407.)

From *T. H. Maddock*, Esq., Officiating Secretary to the Government of India, to *F. J. Halliday*, Esq., Secretary to the Government of Bengal; dated 8 October 1838.

Legis. Cons. 8 Oct. 1838. No. 16.

Sir,

I AM directed to acknowledge the receipt of your letter (No. 1411), of the 10th July last, with its enclosure, and, in reply, to forward to you, for the information of the Honourable the Deputy-governor of Bengal, the accompanying printed copy of draft of proposed Act for the protection of merchant seamen in the port of Calcutta, which has been read in Council for the first time on this date, and will be published for general information in the Calcutta Gazette.

I have, &c.,
(signed) *T. H. Maddock*,
Officiating Secretary to the Government of India.

Fort William,
8 October 1838.

(No. 409.)

From the Government of India to the Honourable the Judges of the Supreme Court at Fort William; dated 8 October 1838.

Legis. Cons. 8 Oct. 1838. No. 17.

Honourable Sirs,

WE have the honour to forward to you, for any observations or remarks which you may desire to offer, the accompanying printed copy of draft of proposed Act for the protection of merchant seamen in the port of Calcutta, which will be published for general information in the Calcutta Gazette.

We have, &c.
(signed) *A. Ross.*
A. Amos.
W. Morison.
T. C. Robertson.

Fort William,
8 October 1838.

No. 2.

(No. 1994.)

Legis. Cons. 12 Nov 1838. No. 5.

From *F. J. Halliday*, Esq., Secretary to the Government of Bengal, to *T. H. Maddock*, Esq., Officiating Secretary to the Government of India, Legislative Department; dated 23 October 1838.

Sir,

Judicial Dep.

With advertence to your letter (No. 407), dated the 8th instant, giving cover to the draft of a proposed Act for the protection of merchant seamen in the port of Calcutta, I am directed by the Honourable the Deputy-governor of Bengal to forward, for submission to the Supreme Government, the accompanying original letter from the chief magistrate of Calcutta dated the 19th idem, and its enclosures, containing observations in reference to the same subject.

2. I have to request the return of the original documents when no longer required.

I have, &c.

(signed) *F. J. Halliday*,
Secretary to the Government of Bengal.

Fort William,
23 October 1838.

Legis. Cons. 12 Nov. 1838. No. 6.

From *D. M'Farlan*, Esq., Chief Magistrate of Calcutta, to *F. J. Halliday*, Esq., Secretary to the Government of Bengal, Judicial Department; dated 19 October 1838.

Sir,

In connexion with the subject legislated for in the draft Act of the 8th instant, I have the honour to transmit the particulars of a case of theft on board a ship at Fulta, also of an affray, magnified into a dacoity, which occurred on a coasting sloop about the 18th ultimo, below Garden Reach.

2. I was obliged, in obedience to the existing law, to make these cases over for decision to the Allypore authorities, very greatly to the dissatisfaction of the complainants, and it may fairly be a matter for inquiry, whether it would not have tended to promote the attainment of speedy justice at the least expense to witnesses and suitors, if the cases had been triable in Calcutta.

3. To men of the class of the prosecutors and witnesses in these cases, especially that of the "Efigland," it would be an undoubted evil to have to go for justice to Allypore; under the most willing administration of the law, delays and frequent attendances will be necessary, and the means at a mofussul magistrate's command, for taking European evidence, and for translating it into the native tongues, are imperfect.

4. Had it been consistent with the law to retain the cases at Calcutta at all, it would have been necessary to make them over to the Supreme Court; this, in the great majority of shipping cases, would involve great distress to prosecutors, or else failure of justice,* but in the event of our summary jurisdiction being extended, it might be well to include cases happening on the river, as is proposed in the draft Act in regard to assaults, or perhaps the same power to punish petty thefts there committed, as is possessed by mofussil magistrates, under Regulations IX. of 1807, and XII .of 1818, might very well be entrusted to the Calcutta magistrates.

* The Sessions close in August, and do not open again till December.

5. The punishment in the case of natives could be enforced in the mofussil gaol, and an appeal might lie as at present to the commissioner.

6. Any change in the mode of trial of murders, and other serious offences not the subject of magisterial decision in the mofussil, occurring on sea-going ships on the Hooghly, is a question which possibly Government would not entertain at present.

7. It will readily be imagined that in the ships belonging to a thronged seaport like this, cases of theft and other crimes frequently occur at sea, and on the passage from the Sand Heads to the town. Over all felonies committed at sea the Supreme Court only have jurisdiction; over assaults committed at sea the magistrates of Calcutta have jurisdiction (s. 38, 5 Will. 4, c. 19); they should obviously have the power of disposing of petty felonies. Over felonies committed on ships in the river, the Supreme Court, or the courts at Midnapore, Hooghly or Allypore, have jurisdiction, according to the country of the criminal. In regard

to

No. 2.
On giving Power to Commissioners of Court of Requests relating to Recovery of Merchant Seamen's Wages.

to all classes guilty of petty felonies, the Calcutta magistrates should have jurisdiction in the same manner as the present draft Act provides in regard to assaults committed on the river.

I have, &c.

(signed) *D. M'Farlan*,
Chief Magistrate.

Calcutta Police Office,
19 October 1838.

RIVER CASE.

Chaundpaul Thannah, 15 October 1838.

Captain *Kay*, Commander Ship "England," v. *Woolfut Khidmudgar*.

DEFENDANT is charged with stealing on board the ship "England," then lying near Fultah, on the 13th instant, three coloured neckcloths, value 1 r. 8 a.; one silver watch, No. 3152, value 40 r.

Defendant was taken up yesterday out of the ship "England."

16 October 1838.

Peter Kay sworn.—I am commander of the "England;" the watch and handkerchiefs are mine; the value of the watch is about 40 rupees, the handkerchiefs one rupee eight annas; they were in a pair of drawers, and a trunk which were open; they were brought to me by Mr. Childs, near Fultah.

John Childs sworn.—Defendant is my servant; he has been so for two months; I found the handkerchiefs here produced between the frame and the canvas of my cot; they were claimed by Captain Kay; on searching my trunk, the key of which the prisoner usually kept, I found the watch here produced; he confessed to me; when I went into the cabin, he drew back alarmed; he was anxious to go ashore.

Woolfut Khidmudgar examined; refuses to give any answer.

17 October 1838.

Archibald Clark sworn.—The second and third day after the defendant came on board, he said he had a silver fork and pencil-case for sale, and asked me to buy them; he spoke in broken English.

Edward Mason sworn.—I saw two silver forks and a pencil-case in defendant's possession; he offered them to me for sale; he spoke broken English.

(True copies.)

(signed) *D. M'Farlan*,
Chief Magistrate.

MEMORANDUM.

CASE of the crew of the sloop "Juggernoth Colloo," against that of the Arab ship "Fattle Rohoman."

Charge of robbery by open violence, preferred by the crew of a small trading sloop, "Juggernoth Colloo," from the coast to Calcutta, against the crew of an Arab ship, "Fattle Rohoman," the foundation of the whole being a collision caused by the freshes, of the two vessels in the night; when the charge was preferred, both vessels were off Calcutta; the principal witnesses, viz. pilots and preventive service men, were also in the town.

(signed) *D. M'Farlan*,
Chief Magistrate.

(No. 456.)

From *T. H. Maddock*, Esq., Secretary to the Government of India, to *F. J. Halliday*, Esq., Secretary to the Government of Bengal; dated 12 November 1838.

Legis. Cons. 12 Nov. 1838. No. 7.

Sir,

I AM directed to acknowledge the receipt of your letter (No. 1994) of the 23d ultimo, with one to your address from the chief magistrate of Calcutta, containing

No. 2.
On giving Power to Commissioners of Court of Requests relating to Recovery of Merchant Seamen's Wages.

ing observations on the proposed Merchant Seamen's Act, and to state in reply, that the point to which Mr. M'Farlan's remarks apply, namely, the propriety of making petty felonies committed on the river between Calcutta and the sea punishable by the Calcutta magistrates, had better, in the opinion of the Presiden in Council, be left for consideration in conjunction with the Quarter Sessions Bill, about to come before the Legislative Council.

2. The original papers which accompanied your letter are herewith returned.

I have, &c.

(signed) *T. H. Maddock*,
Secretary to the Government.

Council Chamber,
12 November 1838.

Legis. Cons. 20 Sept. 1841. No. 1 to 4.

Copy of a Despatch addressed by the Government of India to the Honourable the Court of Directors, in the Legislative Department (No. 21); dated 27 September 1841.

To the Court of Directors.

Honourable Sirs,

In continuation of our despatch (No. 1) of 1839, dated the 14th January, we have the honour to forward the accompanying correspondence with the Government of Bengal, on an application from the Chamber of Commerce, noticing the difficulty experienced in preventing European seamen shipped in England, from deserting their ships, and in manning such ships afresh in this port.

(signed) *Auckland.*
W. W. Bird.
W. Casement.
H. T. Prinsep.
A. Amos.

Fort William,
27 September 1841.

(No. 1336.)

Legis. Cons. 20 Sept. 1841. No. 1.

From *F. J. Halliday*, Esq., Secretary to the Government of Bengal, to *T. H. Maddock*, Esq., Secretary to the Government of India, Legislative Department; dated 31 August 1841.

Sir,

I am directed by the Right honourable the Governor of Bengal to request that you will submit, for the consideration and orders of the Supreme Government, the accompanying extract (No. 194) from the proceedings of the Governor of Bengal in the General Department, dated the 11th instant, with its enclosure, relative to the difficulty experienced in preventing European seamen shipped in England, from deserting their ships, and in manning such ships afresh in this port.

2. You will be pleased to return the original document, with your reply.

I have, &c.

(signed) *F. J. Halliday*,
Secretary to the Government of Bengal.

Fort William,
31 August 1841.

(No. 194.)

Legis. Cons. 20 Sept. 1841. No. 2.

Extract from the Proceedings of the Right honourable the Governor of Bengal, in the General Department, under date the 11th August 1841.

Read a letter from the Secretary to the Bengal Chamber of Commerce, dated the 7th instant, soliciting attention to the increased difficulty experienced in preventing European seamen shipped in England, from deserting their ships, and in manning their ships afresh in this port, and suggesting the expediency of vesting the magistracy with fuller authority than is now possessed, to inflict commensurate punishment on sailors who shall be proved to have broken their articles, or to have wantonly deserted their ships after having received their wages in advance.

Ordered

No. 2.
Order.

Ordered, That the above letter be sent in original to the Judicial Department of the Government of Bengal, for consideration in that department.

(True extract.)

(signed) *G. A. Bushby*,
Secretary to the Government of Bengal.

From *W. Limond*, Esq., Secretary Bengal Chamber of Commerce, to *G. A. Bushby*, Esq., Secretary to the Government of Bengal, Fort William; dated 7 August 1841.

Sir,

The Chamber of Commerce desires me most respectfully to solicit the attention of the Right honourable the Governor to the increased difficulty experienced in preventing European seamen shipped in England, from deserting their ships, and in manning them afresh in this port, proceeding, the Chamber feels assured, from the insufficiency of the punishment which awaits seamen who break their articles; finding the rate of wages here higher than that at which they were shipped, they do not hesitate to set those articles at nought, when new crews have to be engaged, and often these, at the last hour, stand on no ceremony in deserting from groundless objections, even after steamers are employed and the ships are actually under weigh, encouraged in such misconduct by the proved inefficiency of the law, and thus great loss is caused to trade by the additional expense which has to be incurred, and still more by the delay.

If required by his Lordship, the Chamber will readily furnish particular instances and proofs of what is advanced; at present, it may suffice to point to two cases of very recent occurrence.

The brig "Lena," after having proceeded down as far as Moyapore, was obliged to return to town, because the crew engaged refused to work the ship, being thus subjected to double pilotage and other charges. These men had received their advance of wages in cash before going on board. They were handed over to the police, and have been put into confinement for 30 days, after which they will come out with money in their pockets ready to repeat the trick so lightly punished.

The "Devon" shipped eight men, and, on proceeding next morning down the river by steam, they refused to go to sea in her, in consequence of which she was obliged to stop at Diamond Harbour; police officers went down and brought them up, and they were sentenced to confinement in the house of correction. Eight fresh hands had to be engaged, four of whom received advance from the agents in hard cash under promise of joining the boat next day to go down to the ship. These were seen in the bazaar next morning, but the crimps got hold of them, and got three out of the way; the fourth one, indeed joined the boat, but in such a sad state of intoxication, that he laid himself down and died. The money advanced to these men was lost, and ultimately the agents were obliged to hire other hands through the instrumentality of crimps. The ship was thus detained a number of days.'

These two instances we cited, as being very recent, but by no means as being of an aggravated nature, and in neither these nor any other instances, have any sufficient reasons been assigned for declining to go to sea in the vessels they had shipped by.

It will rest with the wisdom of his Lordship to apply some remedial measure to the wide-spread evil. With every deference, the Chamber would presume to suggest to his Lordship's consideration the expediency of arming the magistracy with fuller authority than they now possess, by some legislative enactment, empowering them to inflict commensurate punishment on sailors who shall be proved to have broken their articles, or to have wantonly deserted their ships after having received their wages in advance, the short confinement with light labour, the extent of the punishment the magistrates can inflict, being, in practical operation, scarcely any punishment at all.

I have, &c.

Calcutta, Bengal Chamber of Commerce, 7 August 1841. (signed) *W. Limond*, Secretary.

Legis. Cons. 20 Sept. 1841. No. 3. Chamber of Commerce; Seamen.

MINUTE by the Honourable *A. Amos*, Esq.; dated 15 September 1841.

IT will appear from the draft Act sent herewith, which we published, that the second section is precisely what the Chamber of Commerce are now asking for. Possibly the judges might not think us precluded from legislating in the cases of seamen hired in Calcutta, and not under English articles, but an Act so confined would, perhaps, not be worth passing. We can refer the Chamber of Commerce to the second section of our published draft, and observe, that we have sent the papers home, in consequence of some legal difficulties arising out of the Merchant Seamen's Act, but that we will draw attention to the subject again.

(signed) *A. Amos.*

15 September 1841.

(No. 128.)

Legis. Cons. 20 Sept. 1841. No. 4.

From *T. H. Maddock*, Esq., Secretary to the Government of India, to *F. J. Halliday*, Esq., Secretary to the Government of Bengal; dated 20 September 1841.

Sir,

I AM directed to acknowledge the receipt of your letter, No. (1336), dated the 31st ultimo, with enclosure, relative to the difficulty experienced in preventing European seamen shipped in England from deserting their ships, and in manning such ships afresh in this port.

2. In reply, I am desired to request that you will submit to the Right honourable the Governor of Bengal the accompanying copy of a draft of proposed Act (which was published for general information), dated the 8th October 1838. His Lordship will observe that the second section of the draft Act provides measures to remedy the evil complained of by the Chamber of Commerce; but in consequence of some legal difficulties arising out of the Merchant Seamen's Act, his Lordship in Council has considered it expedient to refer the subject to the Honourable the Court of Directors, and their attention will be again drawn to it.

3. The original enclosures of your letter are herewith returned.

I have, &c.

Council Chamber, 20 September 1841.

(signed) *T. H. Maddock.*
Secretary to the Government of India.

Legis. Cons. 11 May 1844. No. 4.

EXTRACT from a Despatch addressed by the Government of India to the Honourable the Court of Directors, in the Legislative Department (No. 29); dated 20 December 1844.

Law Commissioners' Report relative to English Act anent Wages due to Merchant Seamen.

12. THE Law Commissioners furnished a Report, recorded on the annexed date, in reply to the reference made to them as reported in paragraphs 61 and 62 of the despatch from this department, dated 2d January 1837 (No. 1), on the subject of conferring upon the commissioners of the court of requests so much of the power given by the statute 5 & 6 Will. 4, c. 19, to justices of the peace in England, as relates to the recovery of wages due to merchant seamen. The matter did not claim our immediate attention.

(No. 10.)

Legis. Cons. 11 May 1844. No. 4.

From the Indian Law Commissioners to the Right honourable *Edward* Lord *Ellenborough*, Governor-general of India in Council; dated 25 April 1844.

Letter from Secretary to Government of India, dated 18 July 1836.

WHEN it was in contemplation to make a new enactment touching the jurisdiction of the court of requests, it occurred to the Governor-general of India in Council, that it would be expedient to confer upon the commissioners of that court

No. 2.

court so much of the power given by the statute 5 & 6 Will. 4, c. 19,* to justices of the peace in England, as relates to the recovery of wages due to seamen, and the Law Commissioners were requested to insert provision to that effect in any draft of an enactment relating to the said court which might be prepared by them.

* An Act to amend and consolidate the Laws relating to the Merchant Seamen of the United Kingdom.

2. As we have not thought it advisable to recommend an enactment for extending the jurisdiction of the court of requests, we have considered whether it is necessary to make any special provision for the summary determination of the claims of merchant seamen for wages due to them; and, according to the direction of Government, we have given our attention to the whole subject of the jurisdiction over merchant seamen in India under the statute in question.

Enclosure in Letter from Secretary to Government of India, dated 18 July 1836.

3. Among the papers formerly communicated to us, we find a letter from the acting Advocate-general at Bombay (now the Chief Justice), in which, in answer to a reference from the Government of that Presidency, he observed that the statute under consideration was drawn up in so loose a manner, that he was unable to give a decided or satisfactory opinion as to its general applicability to British India, but that "the powers given by several clauses in the statute to one or more justices of the peace in any part of His Majesty's dominions, and the powers given by the 51st section to collectors or other chief officers of the customs at the several ports of the United Kingdom, and of the British possessions abroad, unquestionably are conferred on justices of the peace, collectors and chief officers of customs respectively in British India."

4. We think that there can be no doubt of the correctness of this opinion, seeing that the territories under the government of the East India Company are described in the title of the statute 3 & 4 Will. 4. c. 85, as "His Majesty's Indian territories;" and with respect to the term "British possessions," it is prescribed in section 119 of the statute 3 & 4 Will. 4, c. 52, that whenever it shall occur in that statute, or in any other Act relating to the customs, or to trade and navigation," it shall be construed to mean colony, plantation, island, territory or settlement belonging to His Majesty."

5. Among the provisions of the statute in question, to which effect is to be given "by any justice in any part of His Majesty's dominions," are those for enforcing the immediate payment of wages due to seamen. We think it competent to any justice of the peace in any part of British India to act upon the applications and complaints of seamen in regard to their wages, under sections 14 and 15 of the statute, in the manner therein directed; and we do not see any reason for making a different provision in India from that which obtains in the United Kingdom, and other parts of Her Majesty's dominions, in respect to such matters.

Seamen refusing to join their ships, or absenting themselves; harbouring deserters; claims of seamen for wages in certain cases.

6. We think, also, that it is competent to any justice, in any part of British India, to exercise jurisdiction in the cases provided for by sections 6 to 13 of this statute, and under section 53, to adjuge penalties and forfeitures for contraventions of the Act, and to levy the same.

7. We conceive that justices in India, under section 37, may determine claims or complaints of sea apprentices upon or against their masters, and of masters against their apprentices, provided that the apprentices are under indentures agreeably to the Act.

8. Also, that justices in India, under section 38, may take cognizance of common assaults committed on board ship, at sea or out of Her Majesty's dominions.

9. In Bengal, we apprehend, that one justice, by virtue of Act XXXII. of 1838, may exercise jurisdiction under the two sections last mentioned. In other parts of British India, two justices must sit in such cases.

10. Section 41 enacts, that seamen shall not be discharged at any of His Majesty's colonies or plantations, without sanction of the Governor or some functionary appointed by the Government in that behalf.

11. We think there is reason for the doubt expressed by a former Advocate-general, Mr. Pearson, as to the authority of Government to appoint officers to give effect to this section within these territories, inasmuch as they cannot be looked upon as a "colony or plantation," for although it is prescribed by statute, as we have noticed, that the term British possession shall be construed to mean any colony or plantation belonging to His Majesty, it is not prescribed conversely, that by "His Majesty's colonies or plantations," shall be understood "British

No. 2.

On giving Power to Commissioners of Court of Requests relating to Recovery of Merchant Seamen's Wages.

possessions" generally; and as there cannot but be inconvenience at ports much resorted to by British shipping, as the principal ports in India are, from the want of authority in any of the functionaries there resident, to license the discharge of seamen when circumstances require it, we would advise that an Act be passed to remedy this defect.

12. We have already intimated, that we concur in the opinion formerly given by the acting Advocate-general at Bombay, that the collector or chief officer of the customs at any port in British India is empowered to act under section 51.

13. It is enacted in section 53, that all penalties and forfeitures incurred under the Act exceeding 20 *l.*, may be recovered "in any of His Majesty's courts of record at Westminster, Edinburgh or Dublin, or in the colonies." We would recommend that the power of adjudging such penalties and forfeitures be extended to Her Majesty's courts in India, and to the courts of the East India Company in places out of the jurisdiction of Her Majesty's court.

14. It has been questioned whether section 2 of this statute, which enacts that no seaman shall be taken to sea without a written agreement, is applicable to British ships proceeding on voyages from ports in British India, with crews engaged there.

15. By the said section, the master of a British registered ship is forbidden "to carry to sea on any voyage, either from this kingdom or from any other place, any seaman or other person, as one of his crew or complement, without first entering into an agreement in writing with every such seaman." We see no reason to doubt that ports in British India are among the "other places" intended by this enactment, and we conclude that the master of a British registered vessel carrying seamen from Calcutta, without having first entered into agreements with them as required, will be liable to the penalty prescribed by section 4.

4 Geo. 4, c. 80.

16. As Lascars are specially provided for by a particular statute, and Regulations made by the Government of India in pursuance of such statute, it may be presumed that seamen of this class are not within the scope of the enactment in question. But we apprehend that it is applicable to all seamen who are to be deemed or taken to be British seamen within the intent and meaning of the navigation laws.

17. The Advocate-general at Bombay was inclined to think that vessels belonging to Bombay or registered there, and the crews of such vessels, are not within the 2d section, because section 54 provides that the Act shall not extend to any ship registered in or belonging to any British colony having a legislative assembly, or to the crew of such ship, while it shall be within the precincts of such colony. He observed that India, strictly speaking, is not a British colony, and has not a legislative assembly, but that the Supreme Government can now make laws, and therefore, and because 2 Geo. 2, c. 36, 2 Geo. 3, c. 31, and 31 Geo. 3, c. 39, did not apply to vessels belonging to or registered in any port in India, and to the crews of such vessels, he concluded that the new Act was not intended to affect them.

18. It is to be observed, that the last of the statutes here referred to applied only to the coasting trade of Great Britain, and that the first, relating to ships trading to foreign parts, which was renewed and made permanent by the second, had not so wide a scope as the present Act, as it did not provide for vessels proceeding to sea from other places than the United Kingdom, but only for vessels beginning and ending their voyages at ports of the United Kingdom.

19. The new Act is extended so as to provide for all vessels belonging to subjects of Her Majesty, of the United Kingdom, and all British registered ships of 80 tons and upwards, proceeding to sea on voyages from the United Kingdom, or other places, and we think it comprehends all ships which, as belonging to or being registered in ports of the British territories in India, are entitled by law to the privileges of British registered ships. With respect to clause 54, we think the description of "colonies having legislative assemblies," was not meant to include the territories under the Government of the East India Company, to which that description is inapplicable, for a "legislative assembly" is a term which seems intended to describe those copies of the British Parliament which exist in British America and in the West Indies, to which there is nothing answerable in the Company's territories.

20. The

No. 2.
On giving Power to Commissioners of Court of Requests relating to Recovery of Merchant Seamen's Wages.

20. The Advocate-general at Bombay, we observe, appears to have had no doubt of section 2 being applicable to ships registered in Great Britain proceeding on a voyage from Bombay with a crew engaged there.

We submit this our Report for the consideration of your Lordship in Council.

Indian Law Commission, 25 April 1844. (signed) *C. H. Cameron.* *D. Eliott.*

MINUTE of COUNCIL.

THE subject of the foregoing letter has been disposed of by the Governor-general in Council for the present.

11 May 1844.

From Sir *E. Ryan*, Knt., and Sir *H. W. Seton*, Knt., Judges of the Supreme Court at Fort William, to the Honourable the President of the Council of India in Council; dated 8 December 1838.

Legis. Cons. 14 Jan. 1839. No. 14.

Honourable Sirs,

WE have the honour to acknowledge the receipt of your letter, dated the 8th of October, enclosing for any observation we may desire to offer, a printed copy of a draft of a proposed Act for the protection of merchant seamen in the port of Calcutta.

2. After a careful perusal of the provisions of this draft Act, we beg to submit, for the consideration of the President of the Council of India in Council, that, as at present advised, we are disposed to think the local legislature is not competent to pass the proposed Act. It seems to us, that the Merchant Seamen's Act of 5 & 6 Will. 4, c. 19, is one manifestly of universal policy, and intended to affect all our transmarine possessions, and that it extends to India, though that country is not named.

3. The power of legislating conferred on the Governor-general in Council, by section 43 of 3 & 4 Will. 4, c. 85, provides, that the Governor-general shall not in any way repeal, vary, suspend or affect any provisions of any Act thereafter to be passed in anywise affecting the Company, or the territories, or the inhabitants thereof. We are disposed to think the proposed Act would vary the provisions of 5 & 6 Will. 4, and in so doing, as it seems to us, would exceed the powers of the local legislature.

4. The present letter must be taken to contain the opinions only of the two judges who sign it. We have had an opportunity of seeing the accompanying letter from Mr. Justice Grant to the President of the Council of India in Council; we beg only to observe, that we do not concur in the opinion stated by Mr. Justice Grant, as to the mode in which our communications may be sought in future, and that we are quite satisfied with the course which the Government have hitherto adopted.

We have, &c.

Court House, 8 December 1838. (signed) *E. Ryan.* *H. W. Seton.*

From Sir *J. P. Grant*, Knt., Judge of the Supreme Court at Fort William, to the Honourable the Vice-President and Council of India; dated 7 December 1838.

Legis. Cons. 14 Jan. 1839. No. 15.

Honourable Sirs,

I HAVE perused the letter the judges of the Supreme Court have had the honour to receive from you, dated the 8th of October, enclosing for any observation we may desire to offer a printed copy of a draft of a proposed Act for the protection of merchant seamen in the port of Calcutta.

I am duly sensible of the attention you have done the judges the honour to pay them in submitting to their perusal before its being passed into a law, the draft of a proposed Act of the Legislative Council. But I think it my duty to

No. 2.
On giving Power to Commissioners of Court of Requests relating of Recovery of Merchant Seamen's Wages.

state, that, except in matters affecting the jurisdiction or functions of the court I have the honour to sit in, with the extent and operation of which the judges must be supposed the most accurately conversant, I should consider the entertaining a desire to offer any observations upon an Act, the passing of which is contemplated by those to whom Parliament has committed the sole power and grave responsibility of making laws for this great empire, inconsistent with the duties of my office, and at variance with a just estimate of my own knowledge and ability.

Upon questions in the law which the Legislative Council of India may desire to put to me, as one of Her Majesty's judges, in reference to any new law which they may propose to make, I have, not without much consideration in a matter involved in great difficulty, and upon which no intimation has been given of the intention of Parliament, decided that it is my duty to give them any opinion, and in the present instance, although it is not so expressed in your letter, I think I may consider your transmission of the draft of the proposed Act to the judges as amounting to a demand of their opinion upon the necessity, as the law now stands, for the passing of such an Act, and upon the competency of the Legislative Council to pass it, although I hope I may be excused for saying that I think it would be more convenient, when the Legislative Council desire the opinions of the judges upon matters of law, that questions should be put in a more precise form, as is the manner adopted upon similar occasions by Parliament at home.

The two questions which I presume to be put upon this occasion, depend upon the question whether the Act of Parliament, 5 & 6 Geo. 4, c. 19, extends to the Queen's dominions under the government of the East India Company in India; I concur in opinion that it does, and that the proposed Act, of which a draft has been submitted to the judges, varies in some respects its provisions, which the statute 5 & 6 Gul. 4, c. 19, having been passed subsequently to 3 & 4 Gul. 4, c. 85, the Governor-general of India in Council is by this last-mentioned Act, sec. 43, prohibited from doing.

Reserving, therefore, to myself the right, if this Act shall be passed into a law, and any case under it shall be brought judicially before me, to alter my opinion if I shall see cause, upon a full argument, and upon further consideration, I am of opinion, as at present advised, that such law in so far as it agreed with the statute 5 & 6 Gul. 4, c. 19, would be unnecessary, and in so far as it differed from it, inoperative.

I have, &c.

Supreme Court-House, Calcutta,
7 December 1838.

(signed) *J. P. Grant.*

Legis. Cons. 14 Jan. 1839. No. 16.

MINUTE of the Honourable *A. Amos*; dated 15 December 1838.

I BELIEVE this Act to be of considerable importance, both as concerns the police of the town and the navigation of the port of Calcutta, and, therefore, it may be expedient to submit it for the consideration of the home authorities. It appears that the Advocate-general and the judges do not take the same view of the English statute. I am disposed to think that the provisions of an Act would not vary the English statute, but would be collateral to it, applying only to the remedy of local grievances not contemplated by the English legislature; however, it would not be prudent to incur the risk of the judges deciding, as it seems probable they would do, that we had exceeded our legislative functions, in which event no good would have been attained, but on the contrary, some disparagement incurred to the Government or the Supreme Court, or both.

With regard to the letter of Sir J. Grant, inasmuch as our request of his opinion has been complied with, it is perhaps, most prudent not to advert to the observations with which that opinion is accompanied; when occasion may require, I think those observations admit of a very satisfactory answer.

15 December 1838.

(signed) *A. Amos.*

EXTRACT

No. 2.

EXTRACT from a Despatch from the Honourable the Court of Directors (No. 11 of 1839); dated 24 July 1839.

19. WILL be replied to hereafter, together with the letter under date 14th January (No. 1) 1839.

61, 62. Expediency of conferring upon the Commissioners of the Court of Petty Sessions at Calcutta certain powers relating to the recovery of Seamen's Wages while in the Port of Calcutta.

ACT No. XXI. OF 1839.

Passed by the Honourable the President of the Council of India in Council, on the 26th August 1839.

AN ACT for the Trial of Prisoners charged with the commission of certain Petty Offences in the Town of Calcutta, and on the River Hooghly.

WHEREAS it is expedient to make further provision in regard to such charges of felony as have been usually determined by justices of the peace, under the authority of the bye-laws for the town of Calcutta, by preventing, as far as is consistent with the attainment of justice, any delay of trial, or inconvenience to prosecutors, witnesses and jurymen, by limiting the powers heretofore exercised by such justices, and by subjecting their proceedings upon convictions for felony to more regular control and revision: and whereas it is also expedient to provide the like remedy in cases of assaults committed in certain parts of the River Hooghly, without the limits of the town of Calcutta, as hath been provided in cases of assaults committed within such limits:

1. It is therefore hereby enacted, that it shall not be lawful for any justices or justice of the peace to sentence any person charged with the commission of any felony within the town of Calcutta, or with the possession of stolen property within the same town, by virtue of any bye-law for the town of Calcutta, or by virtue of such bye-law and under Act IV. of 1835, or otherwise than according to the provisions of this Act; and the 6th section of a certain Rule, Ordinance and Regulation, intituled, "A Rule, Ordinance and Regulation for the good Order and civil Government of the Settlement of Fort William in Bengal," passed in Council on the 26th day of July, in the year of our Lord 1814, and registered in the Supreme Court on the 11th day of November in the same year, is hereby repealed.

2. And it is hereby declared and enacted, that all persons charged with the commission of simple larceny within the town of Calcutta may be tried by any justice of the peace for the said town, provided the value of the property which the prisoner is charged with having stolen, does not, according to the belief of such justice, exceed 20 rupees.

3. And it is hereby provided, that such justice of the peace shall not have power to sentence any such person to be imprisoned with or without hard labour for a longer period than six calendar months, or to be transported.

4. And it is hereby provided, that it shall be lawful for any justice of the peace, before whom any person is charged with the commission of any simple larceny, at his discretion, instead of trying such person himself, to commit such person for trial before Her Majesty's Supreme Court of Justice in Calcutta.

5. And it is hereby enacted, that every such justice, after trying any offender charged with the commission of a simple larceny, shall cause his judgment to be drawn up in the following form of words, or in such other form of words to the same effect as the case shall require, that is to say:

"Be it remembered, that on the day of in the year of Our Lord at Calcutta, A. B. is (acquitted, or convicted) before me, J. P., a justice of the peace for the town of Calcutta, on a charge of simple larceny, for that he the said A. B. did feloniously (here specify the alleged offence, and the time and place when and where the same was committed, as the case may be), and I, the said J. P., believe the

No. 2.
On giving Power to Commissioners of Court of Requests relating to Recovery of Merchant Seamen's Wages.

the value of the property stolen to amount to a sum not exceeding 20 rupees, that is to say rupees, and I, the said J. P. adjudge the said A B. (here state that the prisoner is to be discharged, or the punishment he is to suffer, as the case may be.)

"Given under my hand, the day and year first above named."

(signed)

6. And it is hereby enacted, that once at least in every term, and oftener if required by Her Majesty's Supreme Court of Justice at Calcutta, every such justice shall transmit to Her Majesty's said Supreme Court of Justice all judgments, whether of acquittal or conviction passed by him, together with the depositions and examinations of the witnesses and prisoners, there to be kept by the proper officer among the records of the Court.

7. And it is hereby enacted, that upon the trial of any prisoner for simple larceny as aforesaid, every such justice of the peace shall require the witnesses against and on behalf of the prisoner to be sworn, or to make solemn affirmation in cases where an affirmation is by law permitted in the place of an oath, and shall cause the depositions of the witnesses and the examination of the prisoner to be reduced into writing, and every such deposition and examination shall be signed by such justice.

8. And it is hereby enacted, that upon the trial of any person charged with the commission of simple larceny before any such justice of the peace as aforesaid, if any person being duly summoned by such justice shall refuse to attend as a witness, or to give evidence, he shall be liable to be punished by Her Majesty's Supreme Court of Justice at Calcutta, in like manner as if he had refused to attend as a witness or to give evidence before Her Majesty's said Supreme Court of Justice.

9. And it is hereby enacted, that upon any conviction for simple larceny as aforesaid, the justice of the peace before whom any person shall be so committed, shall have power to order the restitution of the property stolen, if forthcoming, to the owner or his representative, and in case of its not being restored pursuant to such order, to impose on any person refusing or neglecting to restore the same, a fine not exceeding 20 rupees, and in default of payment to adjudge the person guilty of such neglect or refusal to be imprisoned for the space of one calendar month, unless the property be sooner restored.

10. And it is hereby enacted, that all persons charged with the commission of any assault or battery on board of any merchant ship employed on sea voyages, in the River Hooghly or the mouths thereof, being part of the territories of the East India Company, may be tried before any such justice of the peace, and on conviction shall be liable to be punished by a fine not exceeding 100 rupees, to be levied and enforced in manner provided by Act II. of 1839. And all the provisions of this Act made in the case of charges of simple larceny, shall, as far as they are applicable, be applied in the case of such charges of assault or battery as aforesaid.

11. And it is hereby declared, that nothing in this Act contained shall be construed to affect the remedy of any person aggrieved by the conviction of any justice of the peace, through the means of the writ of Certiorari.

— No. 3. —

No. 3.
On the binding of Apprentices, and Encouragement thereof.

ON THE BINDING OF APPRENTICES, AND THE ENCOURAGEMENT THEREOF (WITH DRAFT OF AN ACT).

Dated the 28th November 1844, with connected Papers.

From *John Pearson*, Esq., Advocate-general, to *W. H. Macnaghten*, Esq., Secretary to the Government of Bengal; dated Fort William, 5 December 1834.

Bengal Proceedings. 10 Dec. 1834. No. 69.

Sir,

I HAVE the honour to acknowledge the receipt of a letter from Mr. Macsween, respecting the case of an apprentice committed by Mr. M'Farlan and Mr. Hoseason to prison.

2. In the case referred to, the point taken was only a preliminary objection, and did not affect the principle of the law.

But on the best consideration that I can give the subject, I am of opinion that the statutes relative to apprentices, and which alone subject them to punishment by the magistrates, any more than any other servants, are not applicable to Calcutta.

3. I cannot be aware of the degree of importance which attaches to this subject; on such point the magistrates must have much better means of information than myself, both as to the evil which exists, and as to the remedy which may be required. But I should recommend that hereafter they do not in similar cases proceed to imprison the offender.

I have, &c.

Fort William, 5 December 1834. (signed) *John Pearson*, Advocate-general.

EXTRACT from a Despatch addressed by the Government of India to the Honourable the Court of Directors, in the Legislative Department (No. 18); dated 14 September 1843, paras. 122 and 123.

Legis. Cons. 6 Jan. 1843. No. 83 to 85.

122. Mr. Fulton, late officiating magistrate at Calcutta, had been induced to prepare the draft of an Act* for the binding of apprentices, in consequence of several complaints which had been made to him of apprentices leaving their masters, and from the anxiety which the patrons of schools at which the apprentices were educated had shown for the interference of the legislature. The English laws on the subject do not extend to India, and tradesmen hesitate to employ apprentices, knowing that they can have no legal hold over them.

123. We forwarded a copy of Mr. Fulton's letter, and of the draft Act, for the opinion of the Law Commissioners.

From *J. W. Fulton*, Esq., to The Honourable *W. W. Bird*, Deputy-governor of Bengal, and President of the Council; dated 12 December 1842.

Legis. Cons. 6 Jan. 1843. No. 83.

Sir,

I HAVE the honour to enclose, for your consideration, the draft of an Act relating to apprentices, which I have been induced to draw up in consequence of your having advised me to lay the matter before Government.

Since

* Proposed law for the binding of Apprentices, and for the encouragement thereof.

No. 3.
On the Binding of Apprentices, and Encouragement thereof.

Since you did me the honour to appoint me to a place upon the magisterial bench, several applications have been made to me in my official capacity by Calcutta shopkeepers, requesting my assistance to enable them to keep their apprentices in order; they have stated to me that they have, upon taking boys from the various schools in Calcutta, been in the habit of having a formal deed drawn up, for the purpose of being enabled to hold such deed in terrorem over their apprentices, though fully aware that such deeds are inoperative, and that no compulsory measures can be adopted to enforce obedience. One evil complained of is, that as soon as a boy has learned his business, and the master has taught him to be useful, the youth leaves his employer's house, and often betrays the confidence which has been reposed in him. The shopkeepers are therefore anxious for an Act, in order that a reciprocity may be established, and that the master may have a few years' gratuitous service from the apprentice, in return for the expense and trouble he has had in teaching the boy his business. The patron of the school at which the boy has been educated is also anxious for the interference of the legislature, in order that he may have some place to send the boy to, in which he knows the boy will be taken care of after he has left the school, instead of being turned adrift upon the world at an immature period of life, whereas at present he complains that the shopkeepers hesitate about employing boys, in consequence of knowing that they have no hold over their apprentices, and that when the boy attains the age at which he is obliged by the regulations to leave the school, the schoolmaster often, especially in the case of orphans, does not know what to do with him.

For the above reasons, I submit that some law should be in force, regulating the relationship of master and apprentice. The English statutes upon the subject are very numerous, but I submit that not one of these statutes extends to India, being wholly from their terms of a local nature; for instance, the fines imposed by many of them upon offenders are set forth in British currency, and in others, parishes and corporations are alluded to. The Act which I have the honour to enclose, is based upon the several Acts in force in England, but principally upon the statute passed upon the subject in the reign of Queen Elizabeth. There are many provisions in the draft which I have no doubt can be improved upon, should you think the subject worthy of consideration; and, in conclusion, I need scarcely add, that any further explanation upon the matter which lies within my power is perfectly at your command.

I have, &c.

Calcutta, 12 December 1842. (signed) *J. W. Fulton.*

Legis. Cons. 6 Jan. 1843. No. 24.

AN ACT concerning the Binding of Apprentices, and for the Encouragement thereof.

Description of Masters.

IT is hereby enacted, that every person, being an householder and 24 years old at the least, dwelling or inhabiting, or who shall dwell or inhabit in the city of Calcutta, and using any art, mystery, trade or manual occupation there, shall and may, at any time after the passing of this Act, have and retain any person or persons whatsoever coming under the description hereinafter mentioned, to serve and be bound as an apprentice or apprentices, for the purpose of learning such art, mystery, trade or manual occupation respectively.

Description of persons who may bind Apprentices; a license required from Two Justices.

2. And it is hereby enacted, that any person or persons who shall or may, from time to time, obtain a license or permission from any two of Her Majesty's justices of the peace for the city of Calcutta, shall and may be entitled, during the continuance of such license or permission, and until the same shall be cancelled or annulled, to bind out any person or persons whatsoever coming under the description in such license or permission contained, to serve an apprenticeship to any such person or persons as aforesaid, who are hereinbefore empowered to have and retain apprentices, and every apprentice so bounden shall be compellable to serve.

Apprenticeships to cease on Apprentice attaining the age of 21. In England the age is 24.

3. Provided always, and be it enacted, that no person shall, by force or colour of this Act, be bounden to serve any apprenticeship other than such as be under the age of 21 years; and that the apprenticeship of any person or persons who may or shall have been bounden to serve an apprenticeship as aforesaid, shall cease

No. 3.

cease and terminate upon such person or persons respectively attaining the age of 21 years.

The contract must be evidenced by a writing.

4. And it is hereby enacted, that the terms of every contract of apprenticeship shall be reduced to writing, that every such writing respectively shall be signed by the apprentice, by the person or persons to whom such apprentice is bound, and by the person or persons who have a license or permission to bind such apprentice as aforesaid, and every such writing shall recite the license or permission under which the person or persons binding out such apprentice acts or act, and shall also specify the art, mystery, trade or manual occupation, for the purpose of learning which such apprentice shall be bounden to serve.

And must be registered at the police office.

5. And it is hereby further enacted, that no such contract of apprenticeship shall be complete or valid, unless the same shall be registered in the office of the chief magistrate of the city of Calcutta, within one month after the same shall have been signed as aforesaid, such chief magistrate being hereby empowered to take a fee of five rupees for the registering thereof, and in his discretion to refuse to register the same.

No Apprenticeship for a shorter period than five years.

In England seven years is the minimum.

6. And it is hereby enacted, that no person shall be bound to serve an apprenticeship (excepting as hereinafter mentioned) for a shorter period than five years at the least, and that, upon the expiration of any term of apprenticeship, no master or mistress shall be at liberty to put away any such apprentice, and that no such apprentice shall depart from his said master or mistress, at the end of his or her term of apprenticeship, without one month's warning, given before the time of such putting away or departure, as the case may be, either by the said master or mistress, or by the said apprentice.

Upon death of Master before expiration of Apprenticeship, a proportionate part of fee to be returned to Apprentice.

7. And it is hereby enacted, that in the event of the death of any master or mistress of any apprentice, bound under and by virtue of the Act, before the expiration of the term for which such apprentice shall have been bound to serve, that a proportionate part of the premium or fee paid to such master or mistress for taking such apprentice to serve, shall be returned to the person or persons respectively who shall have paid the same to such master or mistress so dying as aforesaid, and the same shall be employed by such person or persons respectively in and towards the binding out of such apprentice to some other person or persons using the same art, mystery, trade or manual occupation respectively, as the master or mistress so dying as aforesaid.

Apprentice may be bound to a second Master for remainder of period unexpired on death of Master.

8. And it is hereby enacted, that any apprentice whose master or mistress shall die before the expiration of the term for which such apprentice shall have been bound to serve, may be bound to serve another apprenticeship for any period not less than the unexpired portion of the term for which such apprentice shall have been bound to serve to such master or mistress so dying as aforesaid.

Apprenticeship contract may be dissolved by Justices.

9. And it is hereby enacted, that any one or more of Her Majesty's justices of the peace in and for the city of Calcutta, may, at any time before the expiration of the term for which any apprentice shall have been bound under and by virtue of this Act, discharge such apprentice, and his or her master, from all and every the liabilities and responsibilities incurred by them respectively by such binding out as aforesaid, and wholly terminate and put an end to such apprenticeship as aforesaid.

Duties of Master and Apprentice.

10. And it is hereby enacted, that every master or mistress, to whom an apprentice shall be bound under and by virtue of this Act, shall be respectively required to lodge, feed, clothe and maintain every such apprentice during the period of his or her apprenticeship, and that every apprentice shall be required to serve and obey his or her master or mistress in all and every reasonable manner.

Upon complaint against Master, Justice to issue a summons, provided complaint is made within three months.

11. And it is hereby enacted, that if upon complaint made before any one or more of Her Majesty's justices of the peace in and for the city of Calcutta, it shall appear to such justice that any master or mistress to whom an apprentice shall be bound under and by virtue of this Act, shall have misused or evil treated any such apprentice at any time within three months before such complaint shall be made, such justice shall direct a summons to issue, calling upon such master or mistress to appear before him, in order that the cause of such complaint may be inquired into.

12. Provided

No. 3.

And to proceed ex-parte on default.

12. Provided always, that if such master or mistress shall not appear before such justice upon the day appointed in such summons, and it shall appear upon oath, or solemn affirmation in cases where a solemn affirmation is by law permitted in place of an oath, made before such justice, that such summons has been served personally upon such master or mistress, or left at the usual place of residence of such master or mistress respectively, then in such case it shall and may be lawful for such justice, and he is hereby directed to examine into such complaint ex-parte, and to determine whether such master or mistress be guilty of the charge or not.

On conviction to punish with fine not exceeding 200 Companies' Rupees, or to commit to gaol for a period not exceeding three months.

13. And it is hereby enacted, that every such justice of the peace shall have power, upon conviction of any master or mistress upon a charge of having misused or evil treated any apprentice or apprentices bound to serve such master or mistress under and by virtue of this Act, to inflict a fine not exceeding 200 rupees at the most, and in default of payment thereof to commit such master or mistress to the common gaol of Calcutta, for any period not exceeding three calendar months, and if such conviction shall have taken place after an ex-parte examination, the said justice is hereby empowered to issue his warrant under his hand and seal, for the purpose of having such offender brought before him, in order that the said penalty may be enforced, and in default of payment thereof that the said offender may be committed to prison as aforesaid.

Upon complaint against Apprentice, Justice to issue warrant, provided complaint is made within one month after offence;

and upon conviction to punish with imprisonment in house of correction for not exceeding one month, and to order a whipping (if a male).

14. And it is hereby enacted, that if any master or mistress shall make complaint upon oath, or solemn affirmation in cases where a solemn affirmation is by law permitted in the place of an oath, before any one of Her Majesty's justices of the peace in and for the town of Calcutta, that any apprentice bound under and by virtue of this Act, has been guilty of disobedience, misconduct, insolence or neglect of duty, such justice is hereby empowered in his discretion to issue his warrant under his hand and seal in the first instance, and before summons, for the purpose of having such apprentice brought before him, in order that such complaint may be inquired into; and if to such justice it shall appear that the said apprentice has been guilty of disobedience, misconduct, insolence or neglect of duty, at any time within one month before such complaint shall have been made, such justice is hereby empowered to send such apprentice to the house of correction for any period not exceeding one calendar month, to be there kept to hard labour, and whilst there (if a male) to be once, twice or thrice privately whipped, if such justice shall so order and direct.

(No. 1.)

Legis. Cons. 6 Jan, 1843. No. 35.

From *F. J. Halliday*, Esq., Officiating Secretary to the Government of India, to *J. C. C. Sutherland*, Esq., Secretary to the Indian Law Commissioners; dated 6 January 1843.

Sir,

I AM directed by the hónourable the President in Council to transmit to you the accompanying copy of a letter from Mr. J. W. Fulton, of the 12th ultimo, together with copy of a draft Act for the binding of apprentices, and for the encouragement thereof, and to request that the Law Commissioners will favour the Supreme Government with their opinion on its provisions.

I have, &c.

6 January 1843. (signed) *F. J. Halliday*,
Secretary to the Government of Bengal.

(No. 50.)

Legis. Cons. 14 Sept. 1844. No. 12.

From *T. R. Davidson*, Esq., Officiating Secretary to the Government of India, Home Department, to the Indian Law Commissioners; dated 14 September 1844.

Gentlemen,

WITH reference to Mr. Secretary Halliday's letter (No. 1.), dated 6th January 1843, and its enclosures, I am directed to request that you will report, for the information

No. 3.
On the binding of Apprentices, and Encouragement thereof.

information of the Governor-general in Council, what has been done on the subject of the proposed enactment for the binding of apprentices, and for the encouragement thereof, a draft of which accompanied the above reference.

I have, &c.

14 September 1844. (signed) *T. R. Davidson*,
Officiating Secretary to the Government of India.

(No. 24.)

From The Indian Law Commissioners to The Right Honourable Sir *Henry Hardinge*, G.C.B., Governor-general of India in Council; dated 28 November 1844.

Unrecorded.

We have the honour to report upon the subject referred to us by Mr. Secretary Halliday's letter, dated the 6th January 1843.

2. Mr. Halliday's letter contained a copy of one from Mr. Fulton, then officiating as a magistrate at Calcutta, with the draft of an Act "concerning the binding of Apprentices," which he had prepared in consequence of representations made to him, showing the necessity of some provisions on this subject, corresponding with those of the English statute law, assuming that the English law of apprenticeship does not extend to India.*

3. Mr. Fulton explained, that the draft was based upon the Acts in force in England, principally upon the Statute of Elizabeth. Its object was to regulate the relationship between master and apprentice, securing on the one hand to the master the means of enforcing the obligations of the apprentice, and on the other hand protecting the apprentice from ill-treatment by the master. It was intended to be in force in the city of Calcutta only, and to be confined to apprenticeship with persons being householders, and using any art, mystery, trade or manual occupation therein. The advantage expected was, that tradesmen, having the services of their apprentices secured to them, would be more disposed to engage young men on the condition of teaching them their craft, and thus qualifying them, after a time, to provide for themselves, and that hereby opportunities would be afforded for the advantageous employment of the youths growing up at the orphan establishments and other like institutions in Calcutta, which now find a difficulty in disposing of them.

4. On considering the subject, it appeared to us proper to inquire first, whether the inconvenience supposed to arise from the want of a law, was of such importance as to require the interference of the legislature to remedy it; and, secondly, whether, if it should be thought advisable for the legislature to interfere, the proposed enactment should not be more extensive than the draft intended, and particularly whether it might not be expedient to provide for binding apprentices to persons engaged in business in the provinces, and also to the masters or owners of sea-going vessels, and vessels employed in internal navigation, according to the rules of the English statutes in regard to parish boys, especially with a view of relieving the orphan establishments.

5. In order to obtain the desired information on these points, we entered into communication with the Chamber of Commerce, and the Trade Association of Calcutta, the Superintendent of Marine, the Comptroller of Government steamers and the Master Attendant, and with the Managers and Governors of the institutions noted in the margin.

La Martiniere Upper and Lower Orphan Asylums and the Free-school.

6. The Chamber of Commerce and the Trade Association agree in representing that a law of the nature proposed is much required, and would have a very beneficial operation.

7. The Trade Association had the subject under consideration in 1835, when they communicated with the chief magistrate, Mr. M'Farlan, upon it, and they submit a letter from that officer expressing an opinion to the same effect as that which is now given by the association.

8. The Managers of the Orphan Schools say, that if not indispensably requisite, the proposed law is extremely desirable. They intimate that they have not practically

* *Vide* opinion of Mr. Pearson, Advocate-general, in letter to Secretary to Government of Bengal, dated 5th December 1834.

No. 3.
On the binding of Apprentices, and Encouragement thereof.

practically found difficulty in procuring employment for their boys as apprentices to tradesmen; but that, on the other hand, they have occasionally felt an unwillingness to apprentice boys, from their conviction that the law does not give them power to protect those who are ill used. They deem it probable, that under the proposed law, they would find greater facilities in procuring for their wards higher descriptions of employment, and a better chance of rising in the world.

9. The Governors of the Free-school state, that for a long time they have found difficulty in apprenticing their wards, from the want of a law to secure to masters the services of apprentices.

10. The Managers of the Orphan Schools are of opinion, that the proposed Act should be extended so as to provide for binding apprentices to persons engaged in business in the provinces, and to the masters or owners of ships, and they give instances from their own experience to prove that some regulation to this effect is necessary.

11. It is stated, that in 1839 four boys of the Lower Orphan School were placed on board Her Majesty's ship "Conway," under an engagement from the commander, Captain Bethune, that so far as he had the power, they should be kept in Her Majesty's service until old enough to choose a profession. This experiment was successful, so far as was known to the managers. On the return of the "Conway" from China, the boys visited the school several times, and were observed to be in excellent health, with a fine manly appearance, and seemed to be much attached to the service. They appear to have gone to England in the "Conway," since which they have not been heard of; Captain Bethune looked to their eventual employment as able-bodied seamen in the royal navy.

12. The Master Attendant says, that if a system of apprenticing boys, such as are brought up at the orphan establishments, to the sea service could be established, it would tend to supply a want very much felt by the shipping of this country, which is badly provided with a class of men fitted to be steersmen and gunners. He thinks, however, that there would be difficulty in the way of establishing such a system, chiefly because the boys employed in country ships would not be so well fed, nor have the same comforts as at school, which at the outset would render the service disagreeable to them. Could this difficulty be overcome, the service would eventually be better for the apprentices who qualified themselves for the duties of sea cunnies and gunners, than that which is open to the boys of the Lower Orphan Establishments in the army (usually employed as drummers), the pay of sea cunnies being from 12 to 16 rupees, and the pay of a gunner from 25 to 40, with the ship's allowance of food.

13. Captain Johnston, Comptroller of the Government steamers, while he concurs with the Master Attendant in thinking the object desirable, agrees with him also in anticipating difficulties, and to illustrate his views on this point, he mentions an experiment made by the late Mr. Kyd to train boys of the class in question to serve as mariners, which failed, from the dislike of the boys to the duties they were required to perform, though under circumstances more favourable than they would meet with in sea-going country ships.

14. Captain Johnston thinks it would be feasible to have two or more apprentices attached to each of the Government steamers, both inland and sea-going, to be interchanged occasionally.

15. The Superintendent of Marine states, that, under existing rules, the "Amherst" is the only sailing vessel belonging to Government, in which apprentices can be received. He thinks that two or three apprentices might be advantageously received on board of the "Amherst," where they would have as good opportunity perhaps as could be wished, for becoming either good common seamen or officers, according to their abilities and conduct, and he is of opinion that if the Court of Directors would permit apprentices brought forward in this vessel, after due service and proper testimonies from the commander, to have some claim to fill vacancies in the pilot service, such an arrangement would be productive of much advantage to that service. The pilot vessels and other vessels connected with the navigation of the river, he says, could not, under the present rules, afford any opening for the employment of apprentices of the class intended, but he appears to think that it would be an advantage if the lads sent out from England for the pilot service, were bound as apprentices.

16. We observe that in a Rule, Ordinance and Regulation for the Settlement of Fort William in Bengal, passed by the Governor-general in Council on the 21st

No. 3.
On the binding of Apprentices, and Encouragement thereof.

21st June 1816, regarding the wages of seafaring men belonging to the port of Calcutta, and the providing of ships and vessels navigating to and from the said port, with seafaring men, provision was made,* among other things, for binding out any boys descended from European fathers and mothers, who should be chargeable to and supported by any of the orphan or charitable schools in Calcutta, or whose parents should be indebted to charity for their own support, and unable to support their said children, to be apprentices to the sea service. This Regulation was repealed on the 28th July 1825.

* Sect. 13 & 14.

17. A new Regulation, containing general rules for Lascars and other Asiatic seamen in vessels trading under the Act 4 Geo. 4, c. 80, was passed by the Governor-general in Council, in pursuance of the said Act, on the 31st January 1828, but no provision has been made since the repeal of the Regulation of 1816, for binding apprentices to the sea service.

18. We do not know whether it was an advised resolution of the Government to repeal the rules of 1816 on this subject, without any substitution for them. We are inclined rather to think that on receiving the Act 4 Geo. 4, c. 80, by which the Government was charged with the duty of making a general Regulation for Lascars and other Asiatic sailors employed in vessels trading under the Act, it was resolved at once, as a preliminary measure, to repeal all the existing Regulations containing rules relating to seafaring men, including of course the Regulation in question, without adverting to the particular provisions it contained relative to apprentices. The new Regulation being confined to the objects indicated in the Act, afforded no room for such provisions; and probably the attention of Government was not again called to the subject.

19. We are not aware that the Government of India has ever legislated on the subject of apprenticeship in any other line than that of the sea service.

20. The Regulation of 1816, regarding sea apprentices, applied only to boys descended from European fathers and mothers. We apprehend that the Act proposed by Mr. Fulton, contemplated not only children of European fathers and mothers, but generally young persons of that description, and also such as are now usually denominated East Indians, brought up according to European manners, and in the Christain religion, not however Hindoos and Mahomedans.

21. In general the communications we have received go upon the supposition that Hindoos and Mahomedans are not intended to be provided for by the proposed Act, and the suggestions contained in them are framed accordingly. But the members of the Trade Association have proposed that the law be adapted for Hindoos and Mahomedans as well as Christians.

22. We have no information to lead us to conclude that a law of apprenticeship is requisite with regard to Hindoos and Mahomedans, and we are not prepared to recommend the application of such a system to them.

23. With respect to the other classes, it appears to be the general opinion that it is expedient to encourage and promote the system of apprenticeship, which already obtains partially, as a good means for instructing young people, especially orphans and others brought up at the various charitable institutions, whose parents are unable to provide for them in arts and trades, and leading to their permanent settlement in employments in which they may find a livelihood, and become useful members of the community; and that it is owing to the want of a law to bind masters and apprentices respectively to their engagements, that this system is not so much followed here as in the circumstances of those classes is desirable.

24. We concur in the general opinion, that it is expedient, as respects young persons of the classes in question, to promote and extend the system of apprenticeship, "conceiving of it as calculated to operate in a certain degree as a source of instruction, and yet in a higher degree in the still more important function of a security for good behaviour." We regard it as supplementary to school education, a means of after discipline and training, as well as a practical method of initiation in arts and trades which require skill.

25. It has long been considered an object of high importance to induce the East Indian youth to apply themselves to trades, instead of seeking the employment of clerks in offices, to which they have hitherto been almost exclusively addicted. For this end every facility should be afforded to their entering into employments of the nature contemplated, in a way in which they may not only acquire the necessary skill, but, in attaining proficiency and expertness, may become habituated

No. 3.
On the binding of Apprentices, and Encouragement thereof.

tuated to industry, and learn the value of that steady and diligent attention to business which will most surely lead to success.

26. In England the necessity of apprenticeship, as a means of access to particular trades, has been, in general, abolished, and a perfect liberty established in this respect; but it appears that apprenticeship, though no longer absolutely necessary as before, continues to be the usual mode of learning a trade, and as such is recognized by law.

27. Still, however, the managers of the poor in England have power to bind the children of paupers as apprentices, and to compel the persons to whom they are assigned to take and keep them, or to pay for their being kept by others. Parish apprentices may also be bound to the sea service, and masters and owners of ships are obliged to take one or more, according to the tonnage of their vessels. So likewise the Regulation of 1816, above-mentioned, obliged the owners of vessels belonging to the port of Calcutta, to take apprentices.

28. The attention of the Poor Law Commissioners having been directed to the system of compulsory apprenticeship, as practised in England in the case of poor children, it has been found to be liable to serious objections. These appear to be referable chiefly to the compulsory nature of the system.

29. It is said, that the mode of allotting the children was not calculated to produce the result proposed to be accomplished by the system, since the children were allotted to rate-payers, whether able to lodge, maintain or clothe them with comfort or not; and whether they had the means of employing the children or not, in other words, without any regard to the object which it was alleged the directors and acting guardians had in view; viz. the instruction of the children in a useful trade or calling. Persons unwilling to receive children assigned to them, had the option of paying a fine towards the charge of apprenticing them elsewhere. In such cases it is said the misfortunes of the children were increased. The premiums offered with them proved an irresistible temptation to needy persons to apply for an apprentice, whether they wanted the services of the apprentice or not; and whether they could instruct him in any useful calling or not. Their sole object often was to secure the premium.

30. The system of compulsory apprenticeship having been found to work ill, it is proposed to discontinue it, and where the guardians of the poor are necessitated to interfere, as in the case of children without natural guardians, to substitute contracts of hiring and service without premium, for indentures of apprenticeship.

31. We contemplate no constraint, no forcing of apprentices upon persons engaged in trade or others; nor the interference of public bodies in binding apprentices, where the parents of children, or others their natural guardians, are in a condition to do what is necessary in this respect.

32. It is proposed by the Poor Law Commissioners to make arrangements for the industrial education of the children of the poor in district schools, in which they are to be practically trained in workshops for handicraft trades, and to be instructed and practised in the duties of seamen, &c., with the view of qualifying them to be of immediate use in those lines, and thus rendering them eligible for employment on a contract of hire, by master mechanics, masters of ships, &c. But such arrangements seem to be hardly practicable here at present, and the system of apprenticeship appears, under our actual circumstances, to be the only feasible resource.

33. We consider it desirable to render this mode of access to trades, &c. as readily available here as in England, and it appears to us, that by the help of some legal provisions to facilitate the working of the system, so that it may be reciprocally advantageous to the parties, this object will probably be attained.

34. "The master of an apprentice is at the same time master and tutor. Tutor for the art which he teaches, master as to the profit which he derives from him. The work that the apprentice does after the period at which the produce of his labour is worth more than what it costs to develop his talent, is the salary or reward of the master for his former pains and expenses." This must be secured to the master by law. But the reward should be proportioned to the difficulty of the art; the gratuitous services of the apprentice should not be given to the master for the same period of time when the art to be learned is easy as when it is difficult; the same return should not be made for instruction which, without much trouble, may be afforded in the course of a year or two, as for that which must be continued during a series of years. The settlement of terms

No. 3. On the binding of Apprentices, and Encouragement thereof.

terms of apprenticeship, therefore, should be left to private adjustment according to circumstances, subject to certain general rules and limitations. All that appears to us to be requisite in a law of apprenticeship, is to lay down such general rules and limitations, and requiring the particulars of every contract to be set forth in a written agreement, to add some easy provisions for the summary enforcement of the engagements of the respective parties.

35. We submit the draft of an Act prepared according to these views.

36. Although we do not recommend the system of apprenticeship as adapted to Hindoos and Mahomedans, and it is declared in the preamble that the Act is intended to apply particularly to the children of persons following European manners and usages, we have thought it proper not to exclude any persons from availing themselves of it, deeming it advisable to avoid as much as possible the appearance of class legislation. In the general terms of the enactment proposed in section 1, we have followed the statute 54 Geo. 3, c. 96.

37. It will be observed, that we have provided in section 6 for binding apprentices to the sea service, both to the owners of private vessels, and for employment in vessels belonging to the East India Company.

38. The English statutes provide for apprentices being bound to the owners or masters of private vessels; but, considering the connexion of a master with a vessel to be very liable to interrupture, we have thought it better that the apprentice should always be bound to the owner, and that the master should be regarded as his agent. In the case of apprentices to be employed in vessels of the East India Company, they are to be bound to the Master Attendant, or other officer appointed to represent the Company in this behalf at the port at which they enter.

39. The general enactment in section 1 will admit of apprentices being bound to serve in vessels employed in river navigation in the Company's territories. It will also admit of apprentices being bound to public officers, for employment in the public service. For such cases there is a special provision in section 5, to hold the apprentice bound to the successor of the officer with whom the contract shall have been made, in the event of the resignation or removal of the latter.

40. The restrictions proposed are, that no person shall be bound as an apprentice under the age of 10, nor, if above 13, without his own consent, nor for a term to extend beyond the age of 21, nor to serve at any place out of the Company's territories. The latter provision is meant to prevent the permanent location of an apprentice at a place where the Act could not be enforced. Sect. 3. Sect. 4.

41. Leaving the term of apprenticeship and all the conditions to be settled by the parties, the draft requires that they shall be distinctly stated in a written contract to be signed by the parties, and registered in a public office, and that any modification of the original conditions which may be subsequently agreed upon shall be certified on the contract, and registered in like manner. Sect. 8. Sect. 9. Sect. 10, 11, 12. Sect. 13.

42. It is provided that a contract of apprenticeship may be determined, and also that an apprentice may be assigned to a new master, by agreement of parties, which agreement is to be registered. Sect. 16. Sect. 17.

43. A contract of apprenticeship is to be considered as determined by the death, or by the bankruptcy or insolvency of the master, unless, in the first case, the executors or administrators of the deceased, or some member of his family, agree with the other parties to the contract to retain the apprentice; but when the contract shall be determined by any such event, if any premium shall have been paid on the binding of the apprentice, the estate of the deceased or of the insolvent, as the case may be, will be liable for a proportionate part thereof. And it is provided that an apprentice shall always be entitled to maintenance for three months after the decease of his master, if it shall happen before the expiration of the term of apprenticeship. Sect. 25-27.

44. Magistrates are empowered to hear complaints of apprentices against their masters or their agents, as the case may be, of misusage or breach of contract, and upon proof thereof to impose a fine upon the offender not exceeding 200 rupees, to be levied by distraint and sale of the goods of the offender, or if the offender shall not be the master, of the goods of the master also, as responsible for the agent under whom he shall have placed the apprentice; and if the fine is not paid, and cannot be levied by distress, to commit the offender to prison for a period not exceeding two months. Magistrates are further empowered in such cases to discharge the apprentice, and to order a refund of a proportionate part of the premium which shall have been paid on his account, and the levy thereof, if necessary, Sect. 18. Sect. 19.

No. 3.
On the binding of Apprentices, and Encouragment thereof.

necessary, by distress and sale of the goods of the master, and failing the recovery thereof, to commit the master to prison for a period not exceeding two months.

Sect. 22.

45. On the other hand, magistrates are empowered to punish apprentices on the complaint of their masters. The punishments we propose are imprisonment and hard labour for a period not exceeding three months, for which may be substituted solitary confinement in any suitable place in or out of prison, for a period not exceeding three weeks, and in the case of boys of tender years, corporal punishment to the extent authorized by section 2, Act III. of 1844; or close confinement in the house of the master, or on board the vessel to which the apprentice may belong, with a short allowance of food, for a period not exceeding one month.

46. It is held, that by the law of England a master may correct and chastise his apprentice for neglect or other misbehaviour; and by statute, magistrates are empowered to cause defaulting or offending apprentices "to be corrected," besides being kept in confinement and held to hard labour, by which it is understood that they may inflict upon such apprentices corporal punishment at their discretion. We have thought it proper to limit the power of the magistrate in this respect as above defined. We are not aware that solitary confinement is prescribed by any English statute as a punishment for offences of this sort, but it appears to us to be very suitable to such cases, as it saves the offender from the contamination which can scarcely be avoided in mixing with other prisoners, while it is likely to be very efficacious. This mode of punishment was recommended for juvenile offenders by Mr. Starkie, one of the Commissioners for Inquiry into the state of the Criminal Law, in his evidence before the Lords' Committee in 1838, for reasons which appear to us to apply exactly to the cases under consideration. "I conceive," said he, "that the most serious punishment, even as regards hardened offenders, consists in depriving them of their ordinary gratifications and intercourse with those of their own habits and mode of life. When such indulgences as society are allowed in prison, a great deal of the effect of imprisonment is done away with, indeed it almost ceases to be a punishment. There is nothing they feel so much, I am persuaded, as the prevention of their accustomed gratifications."

Minute of Evidence before Lords' Committee, on the Third Report on Criminal Law, 1838, p. 8.

47. A strong reason for preferring solitary confinement as a punishment for apprentices is, that from the shorter duration of it the master is put to less inconvenience by his absence from work.

48. Considering the unfitness of gaols, in the interior particularly, for the confinement of apprentices of the classes to which the proposed Act is meant to apply, more especially females, we have thought it proper to make a provision authorizing a magistrate, at his discretion, to sentence an offending apprentice to be confined for a short period in the house of his master, or on board of the vessel to which he belongs, and during such confinement to suffer a privation of food. This provision seems to be necessary for the purpose of enforcing discipline, and with the check which will be in the power of the magistrate, of requiring the apprentice to be brought before him at the termination of his confinement, it does not appear to us that it is likely to be abused.

49. Section 23 authorizes magistrates to dissolve a contract of apprenticeship, on proof of wilful and continual misconduct on the part of apprentice.

50. By section 24, the period for preferring complaints by masters against their apprentices is limited to one month, and by apprentices against their masters to three months. We think it necessary to make this difference in favour of apprentices, on account of their youth and inexperience, which will generally prevent them from seeking redress of themselves for injuries done to them by their masters, and to afford time to their friends to interfere.

51. By section 30, for the purpose of this Act British subjects out of the jurisdiction of Her Majesty's courts are made amenable to the magistrates of the East India Company, and by section 31, an appeal is allowed to the courts of session.

We submit this our Report for the consideration of the Right honourable the Governor-general in Council.

(signed) *C. H. Cameron.*
D. Eliott.

No. 3.
On the binding of Apprentices, and Encouragement thereof.

Draft of an Act concerning the Binding of Apprentices.

Whereas it is expedient to facilitate the setting out, and instruction of the children of persons inhabitants in the territories under the Government of the East India Company, following European manners and usages, particularly orphans and destitute children brought up by public charities, in arts, trades, crafts and employments, by which when they come to mature age, they may be enabled to gain a livelihood: And whereas it is considered proper, for this end, to promote the system of apprenticeship, which has partially obtained hitherto, by legal provisions, calculated to render the contract between master and apprentice effectual for the reciprocal benefit of the parties:

1. It is hereby enacted, that it shall be lawful for any person inhabiting in any part of the territories under the Government of the East India Company, to take, retain or become an apprentice.

2. Provided, that no person shall be bound as an apprentice except by his parent or guardian; and it is hereby declared, that an orphan or destitute person brought up by any public charity, may be bound by the governors, directors or managers thereof, as his guardians, for this purpose.

3. And provided that no person shall be bound as an apprentice who is under the age of 10 years, and that no person above the age of 13 years shall be so bound without his own consent, and that no person shall be so bound for a term to extend beyond the time at which he will attain the age of 21 years.

4. And provided that no person shall be bound to serve as an apprentice out of the territories of the East India Company, except on board a ship or vessel.

5. And it is hereby enacted, that when any person shall be bound as an apprentice to any officer of Government as such, for employment in the public service, in the event of the resignation or removal of such officer, the apprentice shall be considered as bound in the same manner to his successor.

6. And it is hereby enacted, that any boy being of the age of 13 years, may be bound as an apprentice in the sea service to any of Her Majesty's subjects, being the owner or owners of any registered ship or vessel belonging to and trading from any port in the said territories, declared to be a registering port under Act X. of 1841, to be employed in any such ship or vessel the property of such person, and while so employed, to be instructed in the craft and duties of a seaman, provided that the master of such ship or vessel shall be a British subject; or for sea service in any ship or vessel of the East India Company belonging to any such port, commanded by a British subject, in which case the contract shall be made with the Master Attendant at such port, or any officer appointed to represent the East India Company in this behalf, who shall appoint the ship or vessel in which such apprentice is to serve from time to time.

7. And it is hereby enacted, that the master or commander of any ship or vessel in which an apprentice bound under the last section, shall be appointed to serve by the party to whom he is bound, shall be deemed the agent of such party for the purposes of this Act.

8. And it is hereby enacted, that every contract of apprenticeship shall be reduced to writing, which writing shall set forth distinctly the conditions agreed upon, particularly specify the age of the apprentice, and the term for which he is bound, what he is to be taught, where and how he is to be employed, and whether, under the immediate superintendence and direction of the Master, or of an agent for him, and what provision is to be made for his maintenance, lodging and clothing, especially whether he is to be lodged and boarded in the house, and as a member of the family of the master, or of his agent or otherwise, or if the apprentice shall be bound to serve in a sea-going vessel, or in a vessel employed in river navigation, where his berth is to be on board, and how and with whom he is to mess, and what provisions, clothing and bedding are to be supplied to him, and how he is to be provided for when he is not on board.

9. And it is hereby enacted, that every such contract shall be in duplicate, and that each copy shall be signed by the person to whom the apprentice is bound, and by the person or persons by whom he is bound, and by the apprentice himself when he is above the age of 13 years, provided that when the apprentice is bound by the governors, directors or managers of a public charity, the signature

No. 3. On the binding of Apprentices, and Encouragement thereof.

ture of two of them, or of their secretary or officer on their behalf, shall be sufficient.

10. And it is hereby enacted, that no such contract shall be valid unless it be executed in the manner aforesaid, nor until it has been registered in the office of the chief magistrate of the place or district where it has been executed, or if the apprentice shall be bound to the sea service, in the office of the person appointed under Act X. of 1841, to make registry of ships and vessels at the port where the apprentice is to enter on the said service.

11. And it is hereby enacted, that when the apprentice is bound to serve at some other place than that where the contract has been executed, out of the jurisdiction of the magistrate in whose office it has been registered, the master, within one month after the arrival of the apprentice at such place, by himself or by his agent under whom the apprentice is to be employed, according to the contract, shall apply to the chief magistrate of the district to register the contract in his office.

12. And it is hereby enacted, that if the master shall fail to register the contract within one month, as directed in the last section, he shall not be entitled to apply to a magistrate to take cognizance of any cause of complaint he may have against the apprentice, in the manner herinafter provided, but it shall nevertheless be competent to any magistrate to take cognizance of complaints against the master, on application made to him on behalf of the apprentice.

13. And it is hereby enacted, that when by the contract of apprenticeship the apprentice is bound to serve at a certain place or in a certain district, or in a certain trade or business, and the master desires to remove him to some other place or district, or to employ him in some other trade or business, or in any other way than as stipulated in the contract, he shall be at liberty to do so with the consent of the person or persons by whom the apprentice was bound, and with the consent of the apprentice himself, if he is above the age of 13 years, provided that the alterations agreed to shall be expressed in writing on each copy of the contract, with the signature of the proper parties, according to section 8, and shall be registered in the office of the chief magistrate of the place or district where the apprentice shall have been employed.

14. And it is hereby enacted, that when an apprentice shall be removed under the last section, the provision of section 11 and section 12 shall be applicable.

15. And it is hereby enacted, that in the case of a sea apprentice, when the contract of apprenticeship is registered as above directed, the name and description of the vessel in which such apprentice is to serve, and the name and description of the master or commander thereof, as a British subject, shall be certified on each copy of the contract, with the signature of the master of the apprentice, and shall be entered in the book of registry; and that if the apprentice shall be transferred to any other vessel, the transfer shall be noted and registered in like manner.

16. And it is hereby enacted, that a contract of apprenticeship may be determined at any time before the expiration of the term specified in it, by the consent of all the parties, provided that such consent shall be certified in writing on each copy of the contract, with the signature of all the parties, according to section 9, and shall be registered in the office where the contract was first registered, or in that of the chief magistrate of the place or district where the apprentice shall have been last employed.

17. And it is hereby enacted, that the master of any apprentice bound under this Act may, with the consent of the persons by whom he was bound, and with the consent of the apprentice himself, and not otherwise, assign such apprentice to any other person who is willing to take him for the residue of the term mentioned in the contract of apprenticeship, and subject to the conditions thereof, provided that such person shall, by endorsement under his own hand on each copy of the contract, declare his acceptance of such apprentice, and acknowledge himself bound by the agreements and covenants therein mentioned to be performed on the part of the master, and that the consent of the other parties aforesaid shall be expressed in writing on the same, and signed by them respectively; and that such assignment shall be registered in the office where the contract was first registered, or in that of the chief magistrate of the district where the apprentice shall have been last employed.

18. And it is hereby enacted, that upon complaint made to any magistrate in the said territories, by or on behalf of any apprentice bound under this Act, of misusage,

No. 3
On the binding of Apprentices, and Encouragement thereof.

misusage, or of refusal or neglect to provide for him, or to give him instruction, according to the contract of apprenticeship, or of cruelty or other ill-treatment by his master, or by the agent under whom he shall have been placed by his master, if it shall appear to the magistrate that there is cause for the complaint, it shall be lawful for him to summon the master or his agent, as the case may be, if he shall be within his jurisdiction, to appear before him at a reasonable time, to be stated in the summons, to answer the complaint, and at such time, whether the master or his agent be present or not (service of the summons being proved), to examine into the matter of the complaint, and upon proof thereof, to impose upon the offender, whether he shall be the master or his agent, a reasonable fine, not exceeding 200 rupees, and if the offender shall not pay the fine, to levy the same by distress and sale of his goods and chattels, and in case the offender shall not be the master, but his agent, by distress and sale of the goods and chattels of the master also, and if there shall not be found sufficient goods and chattels whereon to levy the same, to commit the offender to prison until the fine shall be discharged, provided that he shall not be kept in prison for a period exceeding two months, and provided, that if sentence shall have been passed after an ex-parte investigation, the offender shall not be committed to prison until he has been brought before the magistrate, and having been personally called upon to discharge the penalty, has failed to do so.

19. And it is hereby enacted, that in a case in which a magistrate shall have passed sentence upon the master of an apprentice or agent under the last section, it shall be lawful for him, at his discretion, to adjudge that the apprentice shall be discharged, and if any premium shall have been paid on the binding of such apprentice, to make an order upon the master to refund the whole or any part thereof; and in case the sum ordered to be refunded by such master shall not be paid to the person or persons directed in every such order to receive the same, to levy the same by distress upon the goods and chattels of such master, with the costs and charges of such distress, and if there shall not be found sufficient goods and chattels whereon to levy the same, to commit such master to prison for any term not exceeding two months, unless the sum ordered to be refunded, with all costs, shall be sooner paid and satisfied.

20. Provided that when the master of an apprentice shall have been committed to prison in default of payment of a fine imposed under section 18, the imprisonment to which he may be subjected under the last section, in default of payment of the sum ordered to be refunded, shall not extend beyond the time which, in addition to the term ordered under section 18, shall make up the period of three months.

21. And it is hereby enacted, that when a magistrate shall order the discharge of an apprentice under section 19, any sum that may be levid under section 18, together with the whole or a part of any sum that may be levied under section 19, shall be applied, at the discretion of the magistrate, for the purpose of binding or placing out the discharged apprentice with a new master, or otherwise for his use and benefit.

22. And it is hereby enacted, that upon complaint made by any master of an apprentice bound to him under this Act, or by his agent, against such apprentice, to any magistrate of any place or district in the said territories where such apprentice shall be employed, or in the case of a sea apprentice, where he shall be in the course of his employment, of any misdemeanor, misconduct or ill-behaviour of such apprentice; or if such apprentice shall have absconded, upon complaint made thereof by the master or his agent, to any magistrate of the place or district where such apprentice shall be found, or where he shall have been employed, it shall be lawful for any such magistrate in the latter case to issue his warrant for apprehending such apprentice, and in either case to hear and determine the complaint, and to punish the offender by committing him to a house of correction, or to prison, there to be held to hard labour for a reasonable time, not exceeding three months, or if the offender be a boy of such tender years as to make punishment in the way of school discipline more suitable, by inflicting on him corporal punishment, not exceeding 10 stripes with a light rattan; provided that it shall be lawful for the magistrate, instead of committing such offender to a house of correction, or to prison to be held to hard labour as aforesaid, to pass an order for his being kept in solitary confinement in any suitable place, in or out of prison, for a period not exceeding three weeks, or if the magistrate deem any such punishment unfitting, to pass an order to the

No. 3.
On the binding of Apprentices, and Encouragement thereof.

master of the apprentice, or his agent, to keep the offender in close confinement in his own house, or on board the vessel to which he may belong, upon a reduced diet, for a period not exceeding one month, and at his discretion to direct that at the expiration of the stated period the apprentice shall be again brought up before him, that he may satisfy himself that he has been properly dealt with.

23. And it is hereby enacted, that it shall be lawful for the magistrate, on proof of wilful and continual misconduct on the part of the apprentice, whereby it shall appear that he is incorrigible, and on the demand of the master, to adjudge that the contract of apprenticeship shall be determined; provided that it shall be at the discretion of the magistrate, on a consideration of the circumstances, to order the refund of a part of any premium that may have been paid to the master on binding such apprentice, to the person or persons by whom it was paid on behalf of such apprentice.

24. Provided always, that no magistrate shall entertain a complaint on the part of a master against an apprentice, under this Act, unless it be preferred within one month after the cause of complaint shall have arisen, or if the cause of complaint shall have arisen on board a ship or vessel on a voyage, within one month after the arrival thereof at a port or place in the said territories; and that no magistrate shall entertain a complaint on the part of an apprentice against his master, or the agent of his master, under this Act, unless it be preferred within three months after the cause of complaint shall have arisen, or if the cause of complaint shall have arisen on board a ship or vessel on a voyage, within three months after the arrival thereof at a port or place in the said territories.

25. And it is hereby enacted, that if the master of any apprentice shall die before the expiration of the term for which such apprentice shall have been bound, the contract of apprenticeship shall be considered as determined; provided that if any premium shall have been paid to such master on the binding of the apprentice to him, a proportionate part thereof shall be returned by the executors or administrators, out of the estate of the deceased, to the person or persons who shall have paid the same, to be employed by such person or persons towards the binding out such apprentice to a new master, unless the executor or administrator of the deceased master, or some member of his family living with him at the time of his death, shall continue the business in which such apprentice shall have been employed, and shall, within three months from the decease of the late master, make offer in writing to retain the apprentice on the terms of the original contract, in which case the estate of the deceased shall be discharged from all liability on account of such premium.

26. And it is hereby enacted, that if such offer to retain the apprentice shall be made as aforesaid, and shall be consented to by such apprentice, and the person or persons by whom he shall have been bound, the same shall be fully expressed and certified on each copy of the original contract of apprenticeship, with the signatures of the parties respectively, and such certificate shall be registered in the office of the chief magistrate of the place or district where such apprentice shall have been employed, or in the case of a sea apprentice, in the office in which the original contract shall have been registered, and the apprentice shall be considered as bound to the person or persons so retaining him for the remaining part of the term specified in the said contract.

27. Provided always, that if the master of any apprentice bound under this Act shall die during the term of apprenticeship, such apprentice shall be entitled to maintenance for three months from and after the decease of his master, out of the assets left by him, provided that during such three months such apprentice shall continue to live with and serve as an apprentice the executor or administrator of such master, or of such person as he shall appoint.

28. And it is hereby enacted, that when a commission of bankruptcy shall be issued against any person to whom an apprentice shall have been bound under this Act, or when such person shall be adjudged to have committed an act of insolvency, such apprentice shall be discharged from all obligation under the contract of apprenticeship, provided that if any premium shall have been paid on binding him as an apprentice, the person or persons by whom he shall have been bound shall be entitled to claim a proportionate part thereof as a debt against the estate of the bankrupt or insolvent.

29. And it is hereby enacted, that when application shall be made to a magistrate, or other registering officer for the registration of an original contract of apprenticeship under section 10, or of a certificate of the consent of parties to the

the removal of an apprentice from the place at which he was originally bound to serve, or to any other alteration of the contract under section 14, or of a certificate of the transfer of a sea apprentice from one vessel to another under section 15, or of a certificate of the consent of parties to the determination of a contract of apprenticeship under section 16, or to the assignment of an apprentice under section 17, or to the retaining of an apprentice after the death of the master to whom he was bound, by the executor or administrator, or a member of the family of the deceased, under section 25, without which registration such acts respectively shall not be valid; it shall be at the discretion of the magistrate or officer to call for the attendance of the parties before him, to attest the contract or certificate, provided that on every such occasion the magistrate or officer shall require the apprentice to be brought before him, whether the other parties shall be required to attend in person or not; and provided that whenever any such registration shall be made, a certificate of the registration shall be made on each copy of the contract, and signed by the magistrate or other registering officer.

30. And it is hereby enacted, that for the purpose of this Act, all British subjects, as well as other persons in the territories of the East India Company, without the local limits of the jurisdiction of Her Majesty's Supreme Courts, shall be amenable to the jurisdiction of the magistrates of the East India Company.

31. And it is hereby enacted, that from any sentence or order passed by any magistrate without the local limits aforesaid, an appeal shall lie to the Court of Session, to which such magistrate shall be subordinate, provided the appeal be made within one month from the date of the sentence or order.

32. And it is hereby enacted, that the words, "master," "person" and "he" in this Act, shall be understood to include several persons, as well as one person, and females as well as males, and bodies corporate as well as individuals, unless there be something in the context repugnant to such construction.

(signed) *C. H. Cameron.*
D. Eliott.

(True copies.)

East India House,
April 1845.

T. L. Peacock,
Examiner of Indian Correspondence.