SCINTILLÆ JURIS.

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Edward Martin
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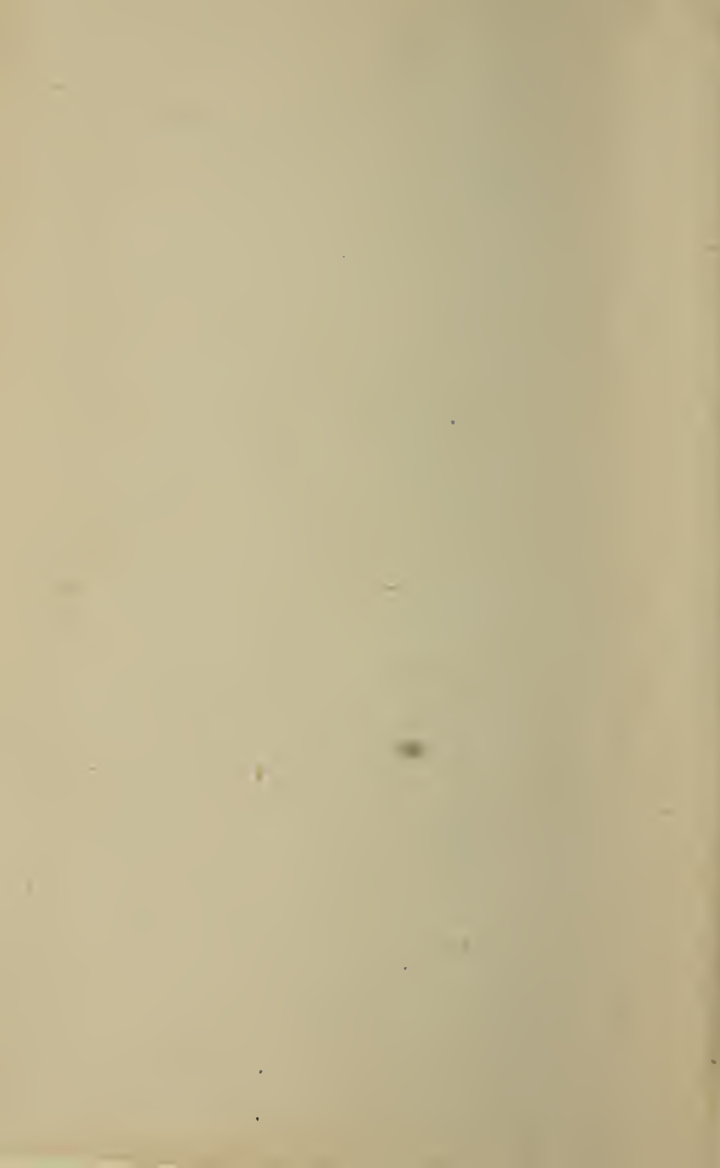

SCINTILLÆ JURIS.

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SCINTILLÆ JURIS.

BY

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ESQUIRE, OF THE INNER TEMPLE,
BARRISTER-AT-LAW.

SECOND EDITION
(*Enlarged*).

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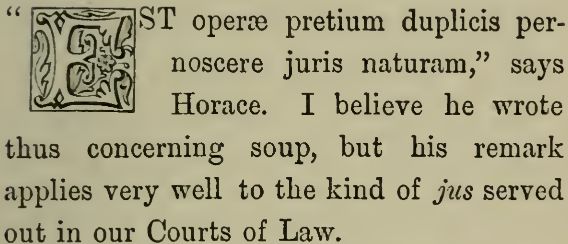
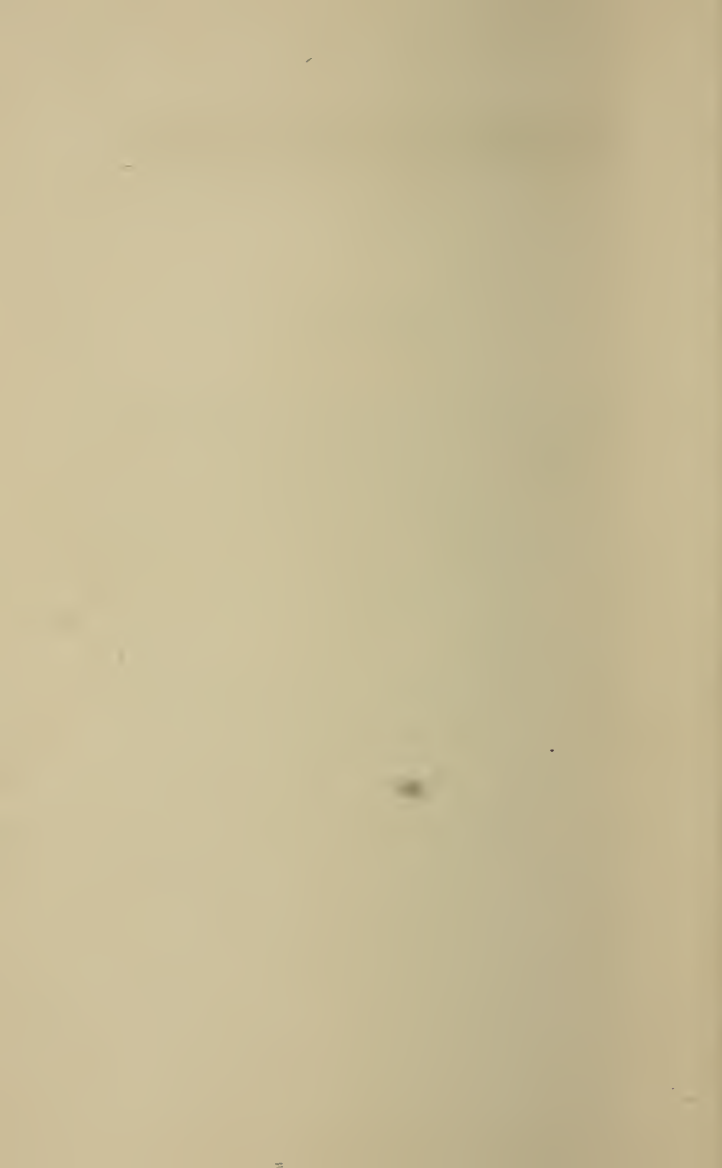
Preface.



"EST operæ pretium duplicis pernoscere juris naturam," says Horace. I believe he wrote thus concerning soup, but his remark applies very well to the kind of *jus* served out in our Courts of Law.

The following trifling essays are intended for no more than mere hints to facilitate the compounding of our *duplex jus* according to the most approved recipes. They are, like other culinary directions, designed for the information of the cooks only, and not for the enlightenment of those who are to partake of the broth.

S. N. G.



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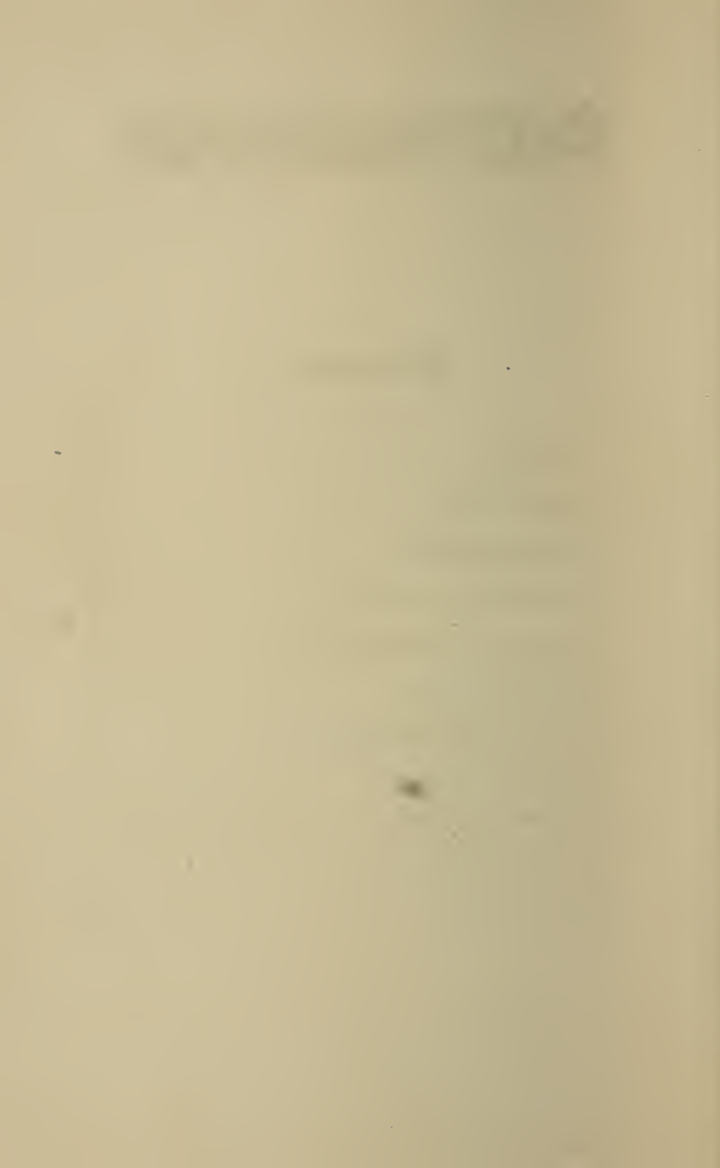


Of Laws.

WITH laws we have small concern until they have been contemned, or set at nought. Of the law of gravitation we know that it exists, and the same of the law of entail, yet a practical lawyer has little more occasion to inquire into the reasons which led to the passing of the statute *De Donis* than an artillery-man has to read Genesis. To know how restraints came to be imposed helps us but little to remove them; and a barrister spends his time to better purpose when he observes the conduct of men who infringe laws, than when he studies the motives of those who make them.

It has often happened that eminent advo-

cates have been poor lawyers, and great jurists bad advocates; and this need not seem strange to us, if we consider that many men have broken a hundred laws, who, nevertheless, have not understood one. It is in getting a verdict, as in getting anything else; you will obtain it the more easily if you know of no reason why you should not.

As he who should write on military affairs would speak little of quarrels, and much of weapons, strategy, and tactics, I shall devote but a short space to the examination of laws, seeing that they are to be regarded as a sort of *corpus vile* to be tugged hither and thither, like the body of Valerius, when

> . . . "Titus dragged him by the foot,
> And Aulus by the head."

Still, as Macaulay informed us of one or two matters relating to Valerius—his home, and political sympathies—I shall not neglect the nature of laws altogether.

And, first, let us notice that all laws, even the most democratic, are designed to prevent

equality—which is chaos. For, as before the elements were subjected to law, before the waters and the land were divided from one another, all was but mud, so, were it not for our customs and statutes, society would have no foundation—as we may say; no dregs or "residuum"—as it has pleased a prominent politician to denominate those who return him to Parliament. When we call people *base*, we intend not to compliment them, but we then recognise their value; which is to us what the tortoise, on which stands the elephant who carries the world, is to the heathen philosophy which invented him.

Foundations, being indispensable, become proud of their position. The meanest hind in this kingdom delights to proclaim that "an Englishman's house is his castle;" yet what is this but saying that, for himself, he is at liberty to die in a ditch, if it be not roofed over.

To say I may possess this or that, is to forbid all the world beside to touch it till I am willing to give it away. It is like the

amusement of putting a piece of cheese on the nose of a dog, who, though all impatient and hungry, waits till I give him leave before he ventures to swallow it.

The world has long ago agreed that for each man to be able to say of *everything*, "This is mine," is not nearly so enjoyable as for all to be allowed to say of *something*, "This is not thine,"—even though the portion separately possessed be of the smallest. One of two tenants in common of a thousand acres owns every part of that thousand, yet he has not, I am sure, nearly so much pleasure from his land as he has who is separately possessed of five hundred—for although he can say, "It is my own," he cannot proceed, "and nobody else's." The pleasure of having property lies more in the excluding from it of others than in the occupation of it by ourselves.

As every enactment must, of necessity, be a check upon some passion, or predilection of human nature, it is prudent not to attribute much force to a new law, but to wait until it has been assented to by judicial interpretation

before one entertains much respect for it. There never yet was a tyrant who did not rule by the submission of his subjects. Majorities can only be enslaved when they prefer servitude to resistance; and it is to no purpose to command that men shall do what they have not a mind to. Let it be decreed to-day that all men shall be just, and by to-morrow it will have been decided that they are so "within the meaning of the Act;" for, though the contrary would be the truth, humanity could not bear to pronounce it.

The general popularity of the laws may well astonish us, when we remember that they are a restraint upon, and constant menace to, us all. They are, indeed, a kind of whips; and would, perhaps, not be endured by the community, were it not for that arrangement of ours, by which, when one of the public is to undergo the pain of a flogging, twelve of his fellows have the pleasure of laying on the lash.

I cannot avoid noticing here an error into which they fall who complain of the *uncer-*

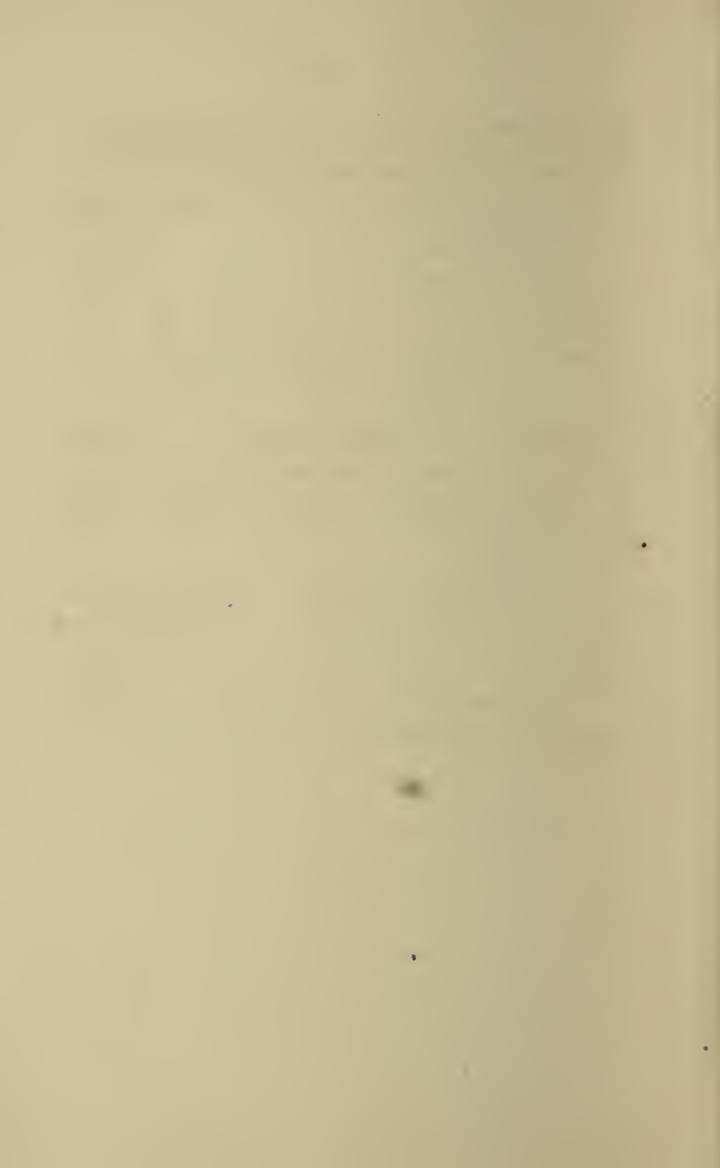
tainty of law, as though it were a weakness. Rather should it be considered the chiefest of all sanctions; for trial is often more dreadful than punishment, as sickness is painful, while death is no more than the cessation of pain. If we examine closely, I believe we shall find that all men fear to be ill, and to be dead, but that no one fears dying. Though many people do voluntarily slay themselves, yet they are always accounted mad; and that not because they have undergone the pain of extinguishing life—for they may have fled from the toothache—but because they have rushed into another state of existence, where they know not but they may be troubled with ten toothaches at once.

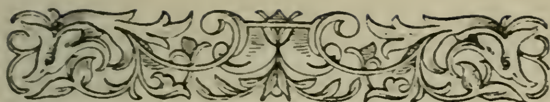
If death were simply non-entity, all would seek it who had less enjoyment than that which has no feeling; thus, unless a man delighted in unhappiness—which I think some do—he had better kill himself painlessly, to escape infelicity, than live painfully to endure it. We see then that some sanction is necessary to prevent the depopulation of a world

so full of misery as this ; and we find that the sanction provided is *uncertainty.*

This brings us back—after a circuitous, but not unprofitable, voyage—to our *terminus a quo;* for uncertainty is the direct result of ignorance, and we have seen that the continuance of life itself depends mainly on our partial want of knowledge—and that which preserves our existence promotes also the observance of our laws—many would dare to do wrong, did they know the worst that might follow.

Did I design here to enter upon a discussion of any particular laws, it is plain that from this point we might well proceed to survey that prospect which our recent Act for the increasing of knowledge expands before us.





Of Judges.

IT is a natural result of the laws not being understood by those who make them, that persons of legislative capacity should be employed in their interpretation and improvement. Wherefore, it is expedient to understand the decided cases; but this cannot be done without examining closely the personal characteristics of those who decide them.

This is admitted by the Judges themselves, who, though they would swoon or commit you, should you attempt to read a report of a speech in Parliament, in order to show what is called the intention of the legislature, will, nevertheless, in dealing with a reported case, frequently say, "Ah, I happen to know

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that my learned brother lived to repent of that judgment. It does not express his later views;" or, "My brother was hardly orthodox in railway cases."

Now, as in the Parliament there are members whose contributions to the statute book are all of one sort, so is it with the legislation of the Bench.

> "'Tis with our *judgments* as our watches, none
> Go just alike, yet each believes his own."

Any one who will may satisfy himself, by taking down any volume of reports, old or new, that any given Judge will run in a particular direction if he fairly can.

There are, however, so many who will not give themselves the trouble of looking into the books, that I shall here present a judgment or two, which I have extracted from the mass, as being peculiarly characteristic of the Judges who delivered them. It is, I think, unnecessary that I should furnish references to the sources from which these examples are drawn, since they must already be familiar to all who have the regular reports.

The following judgment was delivered by a learned Judge in *Thimblerig* v. *Hookey* :—

"This action was brought to recover damages for having been called a *villain*—and the Plaintiff alleges, somewhat boldly as I think, that on that account his friends have deserted him. But I hope I may be allowed to say that, in my humble opinion, such of his acquaintance as I had the advantage of seeing, when they came as witnesses at the trial, would rather cease to associate with the Plaintiff if they thought he did not deserve the title the Defendant had bestowed upon him than if they believed he did ; and besides, I think—I speak for myself—I think it can be no loss to any man, but rather a distinct gain, to be deprived of the consort of such friends as the Plaintiff appears to have been—ahem !—*blessed* with.

"As to the term *villain* or *villein*—for it nowhere is shown which spelling the Defendant intended—let us consider whether, as applied to the Plaintiff, it is a defamatory word or not.

"A *villein*, if I have not forgotten my Oxford learning, was one who did odd jobs—and so does the Plaintiff, *very*. A *villein* carried food to the pigs—but the Plaintiff is a tout, and supplies sporting intelligence. The *villein* was dependent on a lord, and was his 'man'—the Plaintiff hangs on to several noble peers, but I hardly call him a man—'*Homo sum; humani nihil a me alienum puto;*' but as to what I think of the Plaintiff—well, I *say* nothing.

"But, to put a, perhaps, somewhat extravagant hypothesis, even if the Plaintiff be not a villain, I cannot see evidence that the Defendant called him so of malice, for may he not well have been deceived by the Plaintiff's appearance?

"I am far, very far, from being satisfied that the Defendant maliciously called the Plaintiff what he did eventually call him. His conduct was very probably the result of sincere belief, and—if I may venture to use the words of a poet whom I, perhaps, should not name—

> 'And gentle wishes long subdued,
> Subdued and cherished long!'

"I shall assuredly not disturb the finding of the jury; not, I would say, because I have more than a becoming respect for verdicts, but because, all things considered, I have even less for the Plaintiff.

"It has been said at the bar that by this decision the Plaintiff will lose his character. Well, then, be it so. I can only say, in his own interest, that I sincerely hope he may; better were it to have no character than his present one.

"It has also been pathetically observed that he will be made a beggar; but, when that time has arrived, no one will any longer have a right to say—nor do I say it now—that his property consists of money which he has dishonestly come by.

"The Defendant must have judgment, with costs, if he can get them."

A case in the books, much less noticed than I think it deserves to be, is that of *Gules* v.

Saltire, which resulted in a judgment so interesting and important as to be a sufficient excuse for my here reproducing it.

John Sinister had died, leaving a will which contained a bequest in the following words :—

"*I give and bequeath my tortoise-shell snuff-box, and one dozen of my silver tea-spoons—videlicet the fiddle-pattern ones—to my father.*"

Now *John Sinister* was indebted for his existence to *William Saltire*—the Respondent—and a certain *Mary Chevron;* but, whether from conscientious objections, or forgetfulness, or pressing engagements, I know not, it happened that these two persons had never been married.

The question which—having first been declared by a Vice-Chancellor to be no question at all, and then decided in favour of *William Saltire*—at length came before the Court of Appeal at Lincoln's Inn, was, whether *Saltire* was entitled to the said goods as being the *father* of the testator.

The following judgment was delivered :—

"Immoral, but not unusually immoral, has

been the conduct of *William Saltire;* filial, legitimately filial, the testamentary behaviour of *John Sinister.*—A son born in wedlock is enjoined by the law to support his father, if support be necessary to his declining years.—But the solicitous generosity of *Sinister* continues beyond the threshold of the tomb; and if *Saltire* must go without this filial aid, it is because, by reason of his own unkind neglect, his genealogical tree is but *platanus cœlebs*, and must stand alone, till, covered with the hoary frosts of age, and beaten by the adverse winds of litigation, it fall, a ligneous ruin to the ground!

"It is fully admitted that if *Saltire* be in law the father of *Sinister*, he is then entitled to enjoy his substance; just as Saturn devoured his children, and as many an old man since has lived upon his son. But is the Respondent the *father* of the testator? I declare, unhesitatingly, that he is not.

"A man born in such an informal way as *John Sinister*, is said by the law to be *nullius filius;* and I, if he be the son of nobody, find

it not less difficult to point out the father of such a man than to put my finger upon the mother of Pallas Athênê.

"I have read that it is the custom in the Empire of Cathay to ennoble his ancestors where we should make a man a peer. Suppose the testator—being already *nullius filius*—to have been a Chinaman as well. Whose name then would the vermilion pencil have traced upon the roll of that antediluvian nobility? Would *William Saltire* have taken his place amongst those posthumous peers?

"It is plain, it is palpable, that we are forbidden by the law to say that the testator was the *son* of any man. 'The common law only taketh him to be a son whom the marriage proveth to be so,' to quote the words of a treatise whose high authority is hardly equalled by its even higher antiquity.

"Here, however, there was no marriage at all; and, therefore, I am of opinion, clearly and distinctly, that it is not allowable to say that *John Sinister* was a son. Consequently he was not even *nullius filius*, but rather

nullus filius. Now, though he clearly was not a son, I must proceed to consider whether, in law, he had a father.

"It is by no means sufficient that *William Saltire* was a father, as a conscript father, or a father of lies—colloquial expressions prove nothing but their own utter nonsense—he must have been *John Sinister's* father in law;* but, if this relationship were established, *Sinister* would be *Saltire's* son, and this is impossible, for he is not a son at all, as we have already very sufficiently seen.

"It is in no way material to inquire whether, in these circumstances, it was possible for the testator to have had a mother; but I am bold to declare that, were it necessary, I should most certainly hold that he was an orphan *ab initio.*

"It is gratifying, most gratifying, to know that *John Sinister* has found the conclusion

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* The learned Judge's language is here, I am afraid, open to misapprehension. This position certainly cannot be maintained if we insert two hyphens—and perhaps is not unassailable if we omit them.

to the long dilemma of his life, and that now, after the close of his isolated existence, he at last reposes in the arms of his only legitimate parent—his mother *Earth.*

"The decision of the Court below cannot be sustained. Our judgment is for the Appellant—with the usual consequences."

I shall now give a few passages from a certain judgment delivered in the well-known case *Graviped* v. *Curricle.* A man had been knocked down and run over by a horse and cart, wherefore he brought his action for damages.

After making a terrible exhibition of the pleadings, and indulging in some pleasing recollections of special demurrers, the learned Baron proceeds thus :—

"The Plaintiff must have been in the way, otherwise he would not have been run over. Now, the cart was going very fast, or it was not. If not, the Plaintiff should either have got out of the way, or never have got in. I care not which ; nor need any one else. But, if it were going at a great speed, what

must be the cause of that? Why, I say why—because it is certain—why, the impulsiveness of the horse, for no vehicle can draw itself. Now, is the Defendant to be held responsible for that? There is no evidence that he caused it; as by tying a firework to the animal's tail—which indeed was a short one; or by driving with a goad, or trident, for a whip. The impulsiveness results from the horse's being well fed; and, if Defendant did not feed it well, some one would certainly prosecute him; not that I mean to say the 'Society for Preventing Cruelty to Animals' are here responsible in damages; by no means.

"But, again; is not this a case of *vis major?* Is it to be said that Defendant is bound to hire a driver able to hold his horse, even when it is most restive? Is a mariner negligent who fails to propel his vessel against the wind? Is a soldier to blame who cannot subdue an enemy stronger than himself? If so, a Defendant would lose his action though he had employed Nelson to sail his

ships, and it would be negligent to give the command of an army to a Napoleon. As well might it be said that the Plaintiff's counsel has argued badly because he fails—as surely he will—to get my judgment in his favour. Yet he may have argued his best—though I hope not.

"A horse does not go too fast unless he cannot be pulled up; and, if he cannot be stopped, how is it negligent to let him run?

"Moreover, if the horse came at a high speed, there must, of course, have been much noise; and then the Plaintiff ought to have taken, or kept, himself out of danger.

"I think, then, that in this action, the Plaintiff cannot recover, though in the hospital he has done so—which is another reason against him; for surely as *nemo bis vexari debet pro eadem causâ*, so no one should recover twice for one injury.

"Oh yes; I wish to add that none of my brothers agree with this judgment."

In the leading case under title *Warranty*—

De Fraud v. *Snafflebit*—is to be found the following most exhaustive and authoritative exposition of the law on the subject.

"The question at present awaiting our decision is one of the very highest importance, and of the most general interest to the public. It is whether a horse warranted by the Defendant to the Plaintiff as being 'quiet in harness,' were so, or whether it were not.

"It appears from the evidence given at the trial—and which I now hold in my hand—that, immediately after the purchase of the quadruped in question, that is to say, on the twenty-ninth day of February of last year—and I may here say that I have, beyond doubt, ascertained this to have been what is usually denominated 'leap year,' which shows that the day alleged is not what I have heretofore called an 'impossible date'—the Plaintiff, with due caution and circumspection, proceeded to attach the horse to his cart, for the purpose of returning home, having been lucky enough to dispose of his own horse at the fair. Now, I find that, immediately upon

an attempt being made to put the bridle over his ears, the horse threw out his heels, and kicked the Plaintiff's groom—who must, therefore, have been present—in the left eye ; or rather in the place of that organ, for he was one '*cui lumen ademptum*,' as fortunately for him, he had already lost it by reason of an accident when shooting wild ducks in Lincolnshire ; a dangerous, and it would seem an unprofitable, pursuit.

"The Plaintiff, then, having first, very properly, inverted the collar in the ordinary manner, seems next to have tried to put it over the horse's head (purposing, I imagine, to subvert it, or turn it round, as soon as he had done so), and I should hold the collar, whichever end might be uppermost, to be harness, within the meaning of the warranty ; but the horse, actuated by some motive of which, not having felt it, I am unable to judge, bit the Plaintiff on the ear, either the right or the left, I for the moment forget which (nor indeed is it very material for the purposes of this case to determine which ear

was so injured, nor, for that matter, to ascertain whether the Plaintiff were bitten at all). After this display of his intractable temper, and his objection to conform to the conventionalities (so to speak) of equine existence, the horse galloped away—though in what direction does not appear—and has not since been discovered, or indeed heard of in any way, from that day to the present.

"Now, as I have already remarked, the matter to be decided is, was he, that is to say the horse, *quiet in harness?* And here, if, as is not the case, the law required the Defendant to prove the affirmative of that proposition, I should, most unhesitatingly, hold and forthwith proceed to declare, that he was not: and that not because he is proved in any way whatever, directly or indirectly, to have misbehaved himself, positively or negatively, in harness, but because the evidence, which I have already shortly summarised, does not satisfy me that he was ever *quiet in harness*, or that he would have been so should he at any time have happened to be there.

"But the Plaintiff must prove affirmatively, to our satisfaction, that the horse was not *quiet in harness;* and in order to do this it is advisable, and I may say it is absolutely necessary, in the first place, to show that he was harnessed, and next that he was unquiet afterwards, and while still wearing the harness. That he was most fractious, unmanageable, and recalcitrant out of harness, I hold to be demonstrated beyond all manner of doubt, question, cavil, or dispute. Yet, had he once been got into his trappings, *non constat* but he might have conducted himself soberly, quietly, and decorously, according to every rule of good behaviour, be it equine or otherwise.

"Then can it be said, either truthfully and honestly, or captiously, critically, or speciously, that the horse ever was *in harness* after the Plaintiff bought him?

"I do not think that it can, having due regard to the peculiar circumstances of this case, and remembering the fact that the bridle did not touch his ears, or possibly only one of

them, and that the collar never completely surrounded his neck, and, perhaps, was never put on beyond his nose. Had he been unquiet when habited, and indued in part of his harness only, I should not, peradventure, have held that to be sufficient to entitle the Plaintiff to our judgment in this case. But that question does not here arise; nor, unless the horse be—by means, as I would suggest, of a lasso, or by 'creasing,' or in some other manner practised by the Mexicans—again arrested, and reclaimed from its present wild and lawless state, is that question, at any time, now or hereafter, likely to present itself, here or elsewhere, before us for our consideration, in any form, fashion, or proceeding whatsoever.

"Wherefore, let the judgment of this Court be entered for the Defendant in this cause—and so be it."

The next, and last, example which I shall present, is a singularly instructive one. It differs, however, from the others in this, that

it will not be found in any of the reports, being, indeed, a summing up of the evidence in an action for breach of promise of marriage. I do not set down the names of the parties, as to do so would give needless pain, by revealing the illegitimacy of several persons who may some day come to a good position in life.

The following note was copied from the brief of a learned friend who was engaged in the case :—

" The Judge sums up—

" The learned counsel says you ought to find for the Defendant. Well, you may if you like ; but don't you go and do it because he asks you. He asked me not to leave the case to you at all ; but I mean to.

" Very well ; now, what are the facts ? The Defendant admits that he promised to marry the girl ; of course, if he's a man at all, he can't deny that ; and his counsel says he is a fool—very likely, but what then ? Lots of people are fools ; but they marry. Then that's no excuse for him. Next, the Defen-

dant says the Plaintiff wouldn't have him, she says she would ; which of 'em do you believe? He has three hundred a year—and—and—well, she's a woman ; there ! She don't dislike money, you know. This is an action to get, what? Why, money, to be sure ; and Defendant's money, too, mark that. She can't bring an action for the man ; and I can't order specific performance of the contract to marry, because the law says damages—that's money—are as good as a husband.

"First, then, there's the loss of the husband's income. Then the loss of the man ; and, when you've settled the damages on these, there's compensation for the injury to the Plaintiff's heart—her feelings, you know.

"Now, here the learned counsel says there are no particulars. He must say something, of course ; that's what he's for. I don't know what he expects. He can hardly want a list of *regrets* at so much a dozen ; *misery* at five shillings per hour, let's say ; or an account of the number of tears, or pints of 'em, that the Plaintiff has shed over this

business; the whole to be paid for at so much for the lot, with a reduction perhaps, on account of Defendant's taking a large quantity. I wonder he does not say there are no bought and sold notes to prove the contract. I should know how to deal with that.

"Well; you and I may not like this sort of action. Very likely we should prefer to whip a man of that sort down there. But we must be forensic; and so you are to find your verdict for the Plaintiff.

"Now, then, what damages? Don't give too much, for if you do the Court will set your finding aside, or the Defendant may be broken up, and the Plaintiff get nothing after all.

"What do you say?"

Of Prisoners.

T is a curious principle in our law that prisoners charged with having committed a crime, are the only people in the world presumed to be innocent of it. But this great advantage is not conceded to them for nothing, since they are also supposed to speak falsely when they deny that they are guilty of the very offence which they are presumed not to have committed; and, therefore, if they should desire to assert their innocence under the sanction of an oath, this is forbidden, because they are further presumed to be addicted to perjury.

The truth is, that, although the law pays a prisoner the compliment of supposing him to

be wrongly accused, it, nevertheless, knows very well that the probabilities are in favour of the prosecutor's accusation being well founded, and does not mean in any way to insinuate that he brings a false charge—it follows, therefore, that the presumably righteous are regarded with the greatest suspicion, and herein our law shows, perhaps, more of practical wisdom than of logic.

Every one knows that, if there be a reasonable doubt whether a prisoner be guilty or not, he must be acquitted, whereas no such concession is made to a defendant in a civil action. It might well then be imagined that more verdicts would be gained by prisoners than by defendants; but they who think thus have failed to notice that it is more important to a man to look innocent than to be *primâ facie* thought so. No defendant is brought up through a hole in the floor; he is not surrounded by a barrier; nor guarded by a keeper of thieves; he is not made to stand up alone while his actions are being judged; and his latest address is not presumably the

gaol of his county. In short, it is known that a defendant appears voluntarily, while no one doubts that a prisoner would run away if he could.

It seems, then, to me that to profess to think all accused persons innocent can amount to no more than our attempt to make believe that monarchs are all "most gracious," and mayors of little boroughs "worshipful." I might further instance the term "reverend," which, as applied to all clergymen, has been lately declared to be a "laudatory epithet"—a fair description enough of the word "innocent" as predicated of all indicted prisoners.

Another instance of the favour with which the law professes to regard a prisoner on trial may be found in the care taken to ascertain his motives; upon which, and not upon his acts, his guilt or innocence depends.

Thus, if I give a shilling to a beggar, I am at once called a charitable man; yet I have, perhaps, bestowed it upon him well knowing that he will buy poison, and so kill himself. No one, however, considers my motive; the

action satisfies all. But, if I should take a shilling away from another, I am not instantly condemned as a thief; for it may be I thought it my own; or, perchance, I was mad—as to shillings. Here my motives are separated, questioned, reviewed, and considered; and if, among all my reasons for acquiring property, I acted upon one not "felonious"—whatever that may mean—I am acquitted; for "*non est reus nisi mens sit rea.*"

Now all this process is gone through, not because there is any real difficulty in deciding, but simply because we are going to award punishment in the one case, and do not intend to bestow any reward — or anything more valuable than approbation — in the other. Our law is, in fact, a scheme for afflicting not all offenders, but the most conspicuous; and the length of a case will generally be found to be proportioned, not to the intricacy of the inquiry, but to the magnitude of the sentence in which it is expected to result.

For my own part, I will not venture to consider whether or not too much attention

is paid to the motives of men when we are about to judge of their deserts ; but it is certain that many influential teachers of mankind have, looking to results only, estimated motives at nothing whatever. I do not know a better example of this than the doctrines of that Gnostic sect who call themselves *Cainites.* These people, it is said, not only worshipped the first murderer—upon the hypothesis that he must have been virtuous because he was oppressed—but they also adored Judas Iscariot, for the reason that had it not been for his perfidy there would have been no salvation for Christians.

It is said by some jurists that our law looks upon an action as a fair fight between a plaintiff and a defendant, to be conducted, not, indeed, with scrupulous fairness, but according to the rules of the forensic arena. And certain it is—as you may read in Glanvil, if you will—that both a defendant and a prisoner might at one time elect to prove his right to land in the one case, or his innocence of a crime in the other, by knocking on the

head, *coram judice*, any one having the temerity to come forward as plaintiff or accuser. But, while allowing this to have been so in the days of Henry II., we must remark that the position of a prisoner now differs from a defendant's, in this, that he is looked upon as having declared war against the State, and so must combat all society at once. His only chance now lies in his heels. He flies therefore before the multitude he cannot hope to withstand ; and thus we have a *prosecutor*, who comes, not in the place of the fighting plaintiff, but rather resembles those who give information of the whereabouts of some recognised beast of chase—a man soon passed by and forgotten when once the hunt is up.

But, if an accused person is regarded as a subject of venery, liable to be caught and killed at prescribed seasons—assizes, or sessions—he is also on that very account entitled to certain *law*, or privileges. Thus the prosecuting counsel is expected to pursue his prey not too viciously; not taking advantage of every weapon he might use—as one does

not follow a fox with guns and javelins, nor impede his flight by snares and pit-falls. He who would cross-examine a witness to character is as one who should harpoon hares, or kill salmon with a torpedo.

That a prisoner's wife may not be called, even by himself, is a beneficent provision designed by his enemies to save him from his friends.

The great gain of the prisoner in having all the community for his foe, in place of the one man he has injured, consists in the diffusion, and consequent weakening of enmity, which is its inevitable result. As Izaak Walton while impaling a frog would use him as though he loved him, so do our Courts manipulate a criminal. He is allowed to confess, if it please him: but he is no more driven to this form of suicide than a stag is purposely chased over a precipice; and, indeed, he is often gently dissuaded from admitting his guilt, and encouraged to run for his life or his liberty.

If I have taken some trouble, and given more, in order to explain the theory of our

law concerning the advantageous position of the accused when in the dock, I shall, I trust, be excused on account of the general interest of the subject; for we know not where we may be to-morrow, and, perchance, "*de te fabula narratur.*"

Of Telling a Story.

ONE of the most perplexing matters ever since the world began—and it must have been doubly difficult before—has always been how to begin. This problem daily presents itself to the barrister.

Now, in telling a story, it is abundantly clear that one cannot begin at the very beginning. If there be a heroine, her history is well started, and her path fairly marked out, before ever she is born; and yet one can hardly commence a narrative of how she was deserted by Lothario with a description of the stately amours of her grandfather and grandmother.

There is some advantage in beginning at

the end and going backwards. You thus cover all the important points, and can stop as soon as the facts become altogether irrelevant; while you elude a great difficulty, because, as you cannot commence with a fact later than the last of all, you cannot be charged with omitting necessary preliminary matters.

But it cannot be disregarded that this has never been the popular logical habit; and it would, therefore, be confusing at first, even if fairly tried. There is nothing really puzzling about such a method; indeed, it is simpler to go from what has happened back to what caused it, than to feel one's way forward from cause to effect—as we sink more easily than we rise. But what is most likely to prevail against this system is the objection that the tale will decrease in interest as it proceeds—a great fault when we remember that it is often of less importance to reason well than to argue attractively. To take an example from the novelists: "So they married, and lived happily ever after," though it is the end

of a tale, does not make a bad beginning; but the converse does not hold good, and thus no one could finish a story by recounting that, "on a balmy evening in the month of June, two horsemen might have been seen slowly crossing a moor." Should any counsel so vaguely conclude his speech, I am sure a Judge, whom I could mention, would instantly exclaim, "Might have been seen! But were they observed, and, if so, will you proceed to tell me—and as briefly as you can—by whom, and what was the date?"

Perhaps the better way is to begin your narration at the middle of the story to be told; not, of course, with the chief fact of all, but with one of some interest and importance. After this may come a digression into those events which preceded the one first noticed, and then a reverting to the course of the story.

I will illustrate my meaning by means of the tale of Enid and Geraint, as told by Mr. Tennyson.

First, he tells us that "the brave Geraint, a

knight of Arthur's Court, a tributary prince of Devon, one of that great order of the Table Round, had married Enid, Yniol's only child."

This is an attractive statement. We are at once prepared to enjoy a conjugal disagreement, and begin to wonder what it will be about. Therefore, lest we should lapse into disappointment, this is the next thing we are told; and we are just about to be informed of the result of the squabble, when the author cunningly affects to remember that he has neglected what he has chosen as the beginning of his story. Wherefore he suddenly breaks off, and says—"For Arthur, on the Whitsuntide before, held court at Old Caerleon upon Usk."

After which statement he follows the life of Geraint, before he met with his wife, through nearly forty pages; detailing his meeting with Enid, the courtship by battle—so usual in those days—and, taking "the Whitsuntide before" as his point of departure, brings down the narrative to the very moment when he began it. And he who

reads the tale must, I think, admit that he could not tell it in better order.

Yet, let me imagine my friend Hevifee, Q.C., at the telling of this simple story in a court presided over by the eminent Judge I have already alluded to. It would be more than his practice is worth to disturb chronological order as does the Laureate. He would begin at "the Whitsuntide before." If not, he would prepare an ill quarter of an hour for himself when, after his diversion, he reached that epoch! The eminent Judge would probably strike out all the notes he had taken, and compel Hevifee to tell the whole story again, from what would most likely be termed "that most venerable English festival, to which, out of all order and convenience, you have already referred as a date of importance; though you have not on that account forborne to place it subsequent to the succeeding Christmas."

Now, this custom of beginning at the beginning, as it is loosely called, is, to my thinking, a most clumsy device; for all the early part

of your narrative is taken up with that sort of tedious explanation spoken of by Mr. Shandy —if I remember rightly—as an introductory preface, or prefatory introduction; which, so far as we can see for some time, leads not more to one place than another. And, besides, many matters are, from the nature of things, contemporaneous; as youth and innocence, marriage and repentance, virtue and indigence; many events which it is necessary to detail happen unavoidably at the same moment of time; and yet, such harm has this inveterate habit of beginning with the earliest date effected, that ninety-nine people out of a hundred will conclude that what you first mentioned must have soonest occurred. The elegance of events moving along in parallel courses, or drawing gradually toward a place of meeting, is utterly destroyed by this arbitrary assumption of sequence.

Most men, I have noticed, attempt to solve the difficulties in telling a story by telling it all at once. They tell it first in a sentence before any one can stop them. They, then,

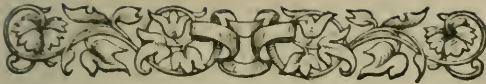
admit it to be unintelligible, and recount it at tedious length, after which they take it bit by bit, and embellish—as they think—each piece separately. This is always done through fear, first that nothing less than the whole story can command sympathy, succeeded by a further misgiving that when once told the story is too short to maintain its effects, and then comes a desperate feeling that they require emphasising.

But my friend Hevifee never sets to work in this manner. He begins at the first date and concludes with the last. Safe is he, but not ornate. This method satisfies the eminent Judge. I do not know that he admires it; but he finds that all can follow it, and needs must, if he stands in the way of wanderers as with a flaming sword, or with a vigorous thwack or two urges the loiterer along the straight but narrow path. Many pleasant and profitable pastures are neglected; many a flower by the wayside is passed by unheeded: arid is the road, and dusty with the dust of dismal folios, yet is it the highway

which all may walk who will. The system I know is like the Yorkshire way of making coats, whereby a score of pieces of shoddy are cut at once to one pattern by a rotary saw. It adorns no one; but it covers the nakedness of hundreds.

I could wish that the opening of a case were not quite so like the reading of a file of old almanacs, supplemented by an aggregation of comment which has for the most part got stale by the time it is presented. No doubt the dates are the bones, without which there were no coherence in the figure; but, as nothing in nature grows first to a skeleton and afterwards is clothed upon with form, so I think an account of events should come, as they come themselves, each imperceptibly to perfect the last, not merely to be supported by it.

What I have here set down I have written with no intent to incite any one to depart from the common usage in our Courts. For my own part if, haply, I may say "*Video meliora proboque,*" I must sadly conclude "*deteriora sequor.*'



Of Examining in Chief.

ONCE heard it said by a skilful and successful advocate, now a Judge, that it is less difficult to cross-examine than to examine in chief; and, although I fancy that few would have come to this conclusion, yet I think it a just one; for it is far easier to put questions which may place a man in an unattractive position than so to conduct his examination as to make him show to the greatest advantage. And, indeed, the gift required seems to me to partake somewhat of that constructivity said to be so rare among our politicians. Many a ragged fellow has broken painted windows, though

none but Albert Dürer could have made them.

It is true, nevertheless, that but little attention is bestowed upon the examining in chief of a witness, while many arts are exercised to produce an effect in cross-examining; and this, because the one is so much more engaging to spectators than the other, and seems to have a more considerable influence upon the issue of the contest by reason of its results being more quickly perceived.

The examination in chief is, as it were, the founding of the witness; the fortifying him; the circumvallation and provisioning of him for the siege that is to follow. You place him on a hill by an allusion to his being a Justice of Peace, or an Officer in Her Majesty's Service. You surround him with the out-works of character, and barricade him with an enumeration of his clubs. His allies in peace and war are delicately suggested by a chance allusion to his uncle's being a duke, or to his banking at Coutts's. Around him you may draw the defences of

holy orders, and before him erect the sally-port of the pulpit. You may conceal his weaknesses, or skilfully turn them to his benefit, by the exercise of calculating caution, or opportune audacity. If he be of a hot temper, and prone to attack, you may even gain him credit for his violence by recalling to him some object generally disapproved, that he may be thought honourable when he rushes out to condemn it. You may gain for a man sympathy by putting to him in a leading question a list of all the misfortunes he has suffered, while he would tire and disgust every one should you leave him to relate them, as he would certainly do at the first opportunity.

A plaintiff or defendant should be examined with more deference and ceremony than any other witness in the case. They always feel that they are the chief actors, and are somewhat proud of having so behaved themselves as to have brought together a large number of people to listen to their mutual complaints and recriminations, and parti-

cularly of having afforded their counsel an opportunity of display. For all these reasons —in addition to their everyday ones—they are filled with a huge notion of their own extreme importance; as was that highwayman of whom it is related that, when the chaplain, on the way with him to Tyburn, said he feared they were late, he answered, "Never trouble about that, sir; they can't begin without us." It is so much the habit of those in high positions to give trouble that any one who succeeds in being tiresome thinks himself entitled to consideration.

Let a witness mention his hereditary advantages, for they will gain him respect; but such as he has acquired for himself should not be enlarged on, since they shew him to be a dangerous competitor, whom no one cares to assist.

It is often of advantage to question an honest witness on matters concerning which you know him to be uncertain, although you have the means of proving them by other evidence. He will answer that he "believes it to

be so and so," but will not swear it "positively." So, when you afterwards prove the facts independently, every one will think well of him for being so scrupulous in speaking of what nearly concerned his interest.

In examining a witness whom you believe to be of easy virtue—as must often happen to you—it is well to give him no more than the unavoidable openings for the exercise of disingenuousness, that the chances of his detection in the fact may be thereby diminished.

A very conscientious witness is always tiresome, and never impressive. Any *data* are a great help to him ; and a few letters given one at a time, or a thick ledger opportunely supplied, will often enable him to hesitate without being suspected of taking time to fabricate falsehoods, and to answer from his own recollection when he thinks he speaks from another's authority.

All witnesses should be kept as far as possible away from subjects with which they are specially conversant, for juries have no more relish than other people for being

instructed. In every proof the witness gives of his own knowledge they are quick to see also an unmannerly discovery of their own ignorance.

For a kindred reason I would prevent a witness from attributing his acts—as some do—to higher motives than men are used to find in their everyday affairs. There is a reproach in the contemplation of unaccustomed refinement which gains no favour from the less cultivated. We sympathise only with those who dress like ourselves, whether the habit be of ideas or broadcloth.

We always suspect the honesty of those who are actuated by motives which would not influence ourselves.

Perhaps as important a matter as any is to look at your brief as little as possible while you examine in chief; for a witness is more pleased to tell his story if he thinks it may be new to you; and is not then embarrassed by the constant fear of giving an incorrect or imperfect version of what you appear to be reading.

Of Witnesses.

ITNESSES are of two sorts: professional and accidental. And first of the professional witness.

Many have been the disputes as to whether our present juries are the historic descendants of the compurgators—those rash persons who pledged their belief in the innocence of our forefathers. For my own part, I think that the compurgator of old is to-day rather to be discovered in the professional witness.

The parallel may not be exact, but, allowing for the inevitable modifications effected by time, I think it will appear close enough to enable us to identify the one with the other.

If the compurgator always was drawn from

the vicinage, while the professional witness generally comes from Great George Street, or Brook Street, this is hardly more remarkable than localising the venue of an action for an assault committed at Minorca by alleging the injury to have occurred in Cheapside.

I cannot ascertain that the compurgators charged anything for their oaths, though the professional witness demands so much a day for his swearing; but this difference is no more than we might expect to find as the result of increased civilisation. The real similarity, after all, lies in the fact that the testimony of both is evidence of opinion; though we certainly now make this difference, that whereas the question formerly was, "Do you think Gurth murdered Diggon?" it now takes the form, "Do you consider Smith knew what he was about when he stabbed Jones?" and whereas the answer used to be, "We think Gurth was in the right on't, for Diggon had broke his head with a quarterstaff," it now runs, "I state it to be my deliberate opinion that Smith was suffering from acute cerebral dis-

turbance, such as recent contact between his skull and a brick would produce."

An intermediate link seems to me to be observable in the "common vouchee," once so useful in cases of entail. When disentailing became frequent enough to afford regular employment to witnesses, a class of persons rose to meet the requirements of the age: and I doubt not that had any man in the tenth century killed as many people in a year as a modern Railway Company does, he too would have retained a regular contingent of compurgators to excuse him. And surely they who, by means of a pocket-book and a "hypothetical tenant," ascertain that a square mile of property in a populous city is worth nothing at all, could have sworn conscientiously that Robin Hood was a profitable keeper of game to his liege lord the king, in his forest of Sherwood.

I would not be supposed to intend that all doctors who, when employed by a plaintiff, depose to the insanity of the defendant, have any desire to make a madman where they fail to

find one; and I have no doubt that many valuers are convinced by their own arguments that two and two make four and a decimal fraction; just as I think it probable that the crier of the Court of Common Bench grew to believe himself the warrantor of titles to half the land in the kingdom.

The professional witness is rather to be regarded as belonging to that class of devotees who acquired the name of stigmatists, by reason of their so persistently imagining their hands and feet to bear holy scars that at last they produced them.

Accidental witnesses, generally, are quite honest, but are hardly ever unprejudiced, even on first entering the witness-box, and they always leave it rank partizans if their evidence has been of sufficient moment to produce cross-examination. Yet, if they are not cross-examined, they more often feel slighted than grateful. For an instant, perhaps, they fancy that they looked so strong as to discourage assailants, but it soon occurs to them

that they were not thought worth the trouble of an attack.

A witness who understands the effect of his testimony on the issue seldom gives it fairly. Perhaps few men are honest designedly.

Any one who appears reluctant to speak ill of those in whom he has no peculiar interest, will not often be credited with sincerity.

Admissions are mostly made by those who do not know their importance.

Perjury is often bold and open. It is truth that is shamefaced—as, indeed, in many cases is no more than decent.

It is characteristic of women that they think everything they can say to be very material, and, therefore, they never understand why any questions should be put to them. It also passes their comprehension why they should be stopped just when they are about to inform the Court of the most important matter of all, namely, what a man's wife thinks of him.

Women are invariably angry in the witness

box; for the rules of evidence happen to be peculiarly repressive of feminine conversation; wherefore they look upon them as prominent examples of the laws designed for the subjection of their sex.

Of children, perhaps, orphans are the more truthful witnesses.

The value of all testimony is determined by a paradox; for that which costs much is worth little, while that given freely is without price.

The last sentence contains much consolation for the professional witness, if he will examine it, nor can it fail to gratify all others.

Of Cross-Examination.

IT is necessary to all who cross-examine to remember that the object of their art is to elicit that which the witness is either reluctant to reveal, or would not tell at all if he thought it to his questioner's benefit. It is clear then that your aim in cross-examination is to bring out the truth on certain points selected by yourself.

Now the thing easiest to be got in the whole world is the truth, if you set about it in the right way; for to speak truth is to relate what has happened, while to lie is to tell what has not—and this requires the imagining of what is not, and the joining of it, more or less cleverly, to what is.

In nearly all men the imagination works but slowly, and, therefore, it is well to get yourself answered quickly when you desire facts to be disclosed, but to give time if you want the witness to palter with the truth for the purpose of your showing afterwards that he did so.

If it be asked how one may get an answer quickly, I can only reply that a question suddenly put seems to hurry the utterance of the witness before it touches his faculty of reflection. Thus you may often hear a man, who has answered a question, say, "Excuse me, but I did not understand you"—an assertion which a smile of incredulity easily represents as a falsehood.

If you suggest to an adverse witness a fact in his own favour, he will often deny its existence for fear it should be to your advantage.

A suggestion which you desire a hostile witness to adopt should always be made unexpectedly, otherwise his judgment will reject it at the bidding of his interest. There

is a story told of Lord Erskine which may illustrate this position.

"Sir," said he very slowly, to a man who declined to pay for a coat, on the ground that it did not fit him, "do I understand you to say that one arm of that coat was longer than the other?"

"I swear it, most solemnly," replied the witness.

"What!" cried Erskine, with a sudden plunge into a hurried manner, "do you pledge your oath that one arm was not *shorter* than the other?"

"I do," was the answer, given as rapidly as the question was put.

It is generally well to indulge a witness against you who desires to talk much; for, when you have with affability heard all that he has to say, he will readily tell you all that you wish to hear. Moreover, his garrulity will be likely to offend the jury, since all are so fond of talking that they lavish much praise on silence in others, as poverty is

lauded for a virtue, because every one wants to be rich.

In all men we first notice their weak points; and, therefore, you should, for a time, encourage the display of those characteristics of a witness which you soonest observe; remembering always that, as there is no spot of earth where you would not find something of value, if you should dig deep enough, so will much stirring up of any man at last reveal some good quality.

It is most difficult for a wit to be agreeable; so, if you allure a witness into indulging his taste for comicality, you may be sure that he will offend at least one of a tribunal of thirteen.

A gruff man is commonly thought honest. You should, therefore, play to such an one on the pipe of politeness, that he may look ill-tempered if he will not dance, and ill-mannered if he do.

Should a witness be naturally cautious and circumspect, there is no resource but to give

him large opportunities for reticence, that it may be taken for disingenuousness.

A timid question will always receive a confident answer.

When a witness called by the other side is inclined to behave to you with marked courtesy, I think it a mistake to discourage him, as some counsel do. For, though the tenor of his evidence shall be against you, yet many will conclude, from his manner of giving it being the contrary, that he is addicted to insincerity, and will be likely to distrust him altogether.

It often happens that you have to cross-examine your own witness, by reason of the other side having called him. In such a case it is wisest to conceal as much as possible the fact of his partiality ; and I would, therefore, not cross-examine him as though he were a trusted friend, as is the common way. It is well to ask him many questions ; for he will be sure to answer favourably, and yet it looks more like a real cross-examination than if you should let him begin and finish his own story

without interruption, or with transparent assistance.

Never torture a witness longer than he will wriggle in a lively fashion; for it is not the pain, but the contortions of the victim which amuse lookers on.

A compliment is a forensic anæsthetic. Many people will complacently undergo a fatal interrogation if they be well flattered all the while; and more men are likely to be caught by a compliment to their ability than by a tribute to their virtue. Perhaps even the best of us would rather be feared than respected or beloved.

In cross-examining a claimant it is expedient to induce him to exaggerate his rights, to the end that all who hear him may feel their share in the wealth of mankind to be threatened by his large demands upon the common stock; and that thus his claims may be adjudged by his debtors.

To show that your client has, through the Defendant's conduct, lost something which he had before, will gain much favour for his suit;

but it will help him little to prove that he has been prevented from obtaining what he had a right to acquire ; for who can tell from whose store the new supply would have been drawn ?

It is almost always safe to attack a witness whom the Judge allows to be hostile, and to punish him as sharply as you can ; since the admission of an overt act of enmity is, after the oath, a declaration of his untruthfulness, and desire to deceive the Court. The jury at once feel that you are fighting, not your own enemy only, but theirs also ; and having, as it were, become combatants by champion, are anxious to see you prevail.

If you can make a witness appear ridiculous, it is never unsafe to do so ; for those in ludicrous situations receive no pity, even though they die there.

Yet I think it generally a mistake to laugh at any man for his calling in life ; as that he is a barber, a tailor, or the like. Few men do not think themselves more genteel than their business ; and it is ill joking before a jury on a common foible.

A severe manner may often be used with success toward a witness with whom the jury are inclined to agree, but never against one with whom they sympathise. And it is not wise to try to deprive a person of this sympathy; for you show the foolishness of those who bestowed it; but rather enlarge upon how much of sympathy any one has, as a reason for denying him anything more substantial. The knowledge that virtue is its own reward is reason enough for giving to the deserving nothing beside an admission of their goodness.

Sometimes it is not inartistic to affect entire belief in every statement made by an opponent's witness; since nothing sooner begets scepticism than the contemplation of credulity.

We must be very careful how we affect unbelief in statements made by even the falsest; for they themselves must speak infinitely more truth than falsehood, and every one can see it.

To prove that any man is a notorious liar

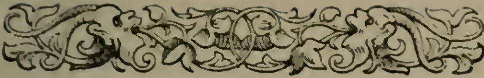
has its dangers, since it heightens the effect of every truth he tells.

Do not seek to sink a witness too low in the opinion of his judges; for it is to be observed that we hardly ever feel unkindly towards those who are incontestably and hopelessly beneath us. An aspiring man is always disliked; but the greatest sinner will meet with toleration, if only he have art enough to be abject.

A display of magnanimity in dealing with the case against you, often begets a belief in the strength of your own; for we are accustomed to generosity on the part only of those who have a superabundance for themselves.

Many counsel repeat every answer they obtain. A poor artifice for impressing a fact on the jury; because it is but telling them that they can comprehend only those things which have been said twice. And, although it is often necessary that a jury should not understand your case, it can never be advisable to show them that you think they cannot.

I have frequently heard many foolish questions put for the purpose of showing that a witness takes gin in his beer. I am sure juries generally look on that as an honest failing ; and I would suggest to those counsel who cross-examine in this way, that they would damage a man far more by eliciting his entire exemption from any conventional weakness, or commonplace vices, than by proving that he is not above them.



Of Evidence.

LL that we see and hear is but evidence, and, therefore, to be doubted by those who would reason well. This has led many to conclude that they are wisest who doubt most; and some philosophers have sought distinction by maintaining that we ourselves are no more than evidence of our own existence, and that we fail to prove it. That these inquirers are right, I will neither assert nor deny; but, seeing that such evidence as they demand for their satisfaction, concerning probabilities, would not be required by our law were the best of them on trial for their lives, we may well leave their refined speculations out of all consideration.

So far, indeed, is the law from standing disputing on the threshold of what is questionable, that it boldly steps across it by assuming something instead of going about to prove it; and this manœuvre it calls, very appropriately, I think, *presumption.*

"A presumption," says Phillips, in his work on Evidence, "is a probable inference which our common-sense draws from circumstances usually occurring in such cases."

Yet the matters presumed are often such as common sense would hardly lead us to admit. I have already instanced the presumption that every prisoner accused is innocent; and it is not easy to see how common sense came to this conclusion, when it is notorious that out of ten men who are placed in the dock nine will be convicted and punished. Surely, if common sense had the fixing of that presumption, it would be to the effect exactly contrary.

If a man stay away from his wife for seven years, the law presumes the separation to have killed him; yet, according to our

daily experience, it might well prolong his life.

The inscription on a tomb is admitted as evidence concerning the person beneath it; but I hope that this goes not upon a presumption that epitaphs are true. The effusive compliments of an heir only satisfy me that he came into possession of his estate. They are proof of the ancestor's death, but none of his other virtues.

The bearing of particular arms, or devices, was at one time held evidence that he who bore them had inherited them, as one of the family whose badge they were; but—attending to our common sense, as Mr. Phillips advises—we ought now, probably, to conclude that he who engraves griffins on his spoons stole the crest, if not the silver.

Perhaps the presumption of all most consonant with common sense is that one by which a man who has possessed land for twenty years is supposed to have a good title to it, because, if he had not, some one would have taken it from him. Such a presumption

rests on the fact of human rapacity; and is therefore well nigh irrebuttable.

The chief difficulty in arguing with most men, and, therefore, with a jury, is not to convince them, but to prevent them from too rapidly forming an opinion. And so I think it is a greater advantage to have the opening of a case than the reply; for you then more easily influence the growth of faith when you control those matters which go to promote it.

From this readiness to decide upon little evidence, or none, arises a serious danger, that of wearying the jury by continuing to call witnesses, and the inducing a suspicion of weakness by improving your fortifications. It is notorious that nothing likely to be true stands in need of much evidence; from which it is argued that what is supported by many proofs is felt to be improbable. Moreover, it is a consequence of the fallibility of all human affairs that the more reasons we bring, the greater chance is there of a bad one's being among them. Hereabouts lies the

sole merit of temperance. The last glass of wine may be no more dangerous than the first one, but without it there were no mischief.

There is another disadvantage in too soon convincing the Court; for it is well to bear in mind that what we gain quickly we part with on slight provocation, while we relinquish reluctantly those things which cost time and trouble to obtain. Many a worthless opinion is obstinately maintained because it has been laboriously come by. Whole races of men live in miserable situations, for no conceivable reason, except that it cost them much trouble to get there; but the tourist, who travels at his ease, leaves Naples without regret, though he is *en route* for Siberia.

It is then well not to be content with creating a favourable opinion only, but to aim at producing it gradually, to the end that it may endure.

Proofs should not come as violent winds which bend down the trees before them, only

that they may spring up again behind; rather should they come, like a gentle fall of snow, to add their weight unperceived, to overwhelm silently, but to crush and smother all beneath them.

What is called *real* evidence—mostly bullets, bad florins, and old boots—is of much value for securing attention.

> "*Segnius irritant animos demissa per aures,*
> *Quam quæ sunt oculis subjecta fidelibus.*"

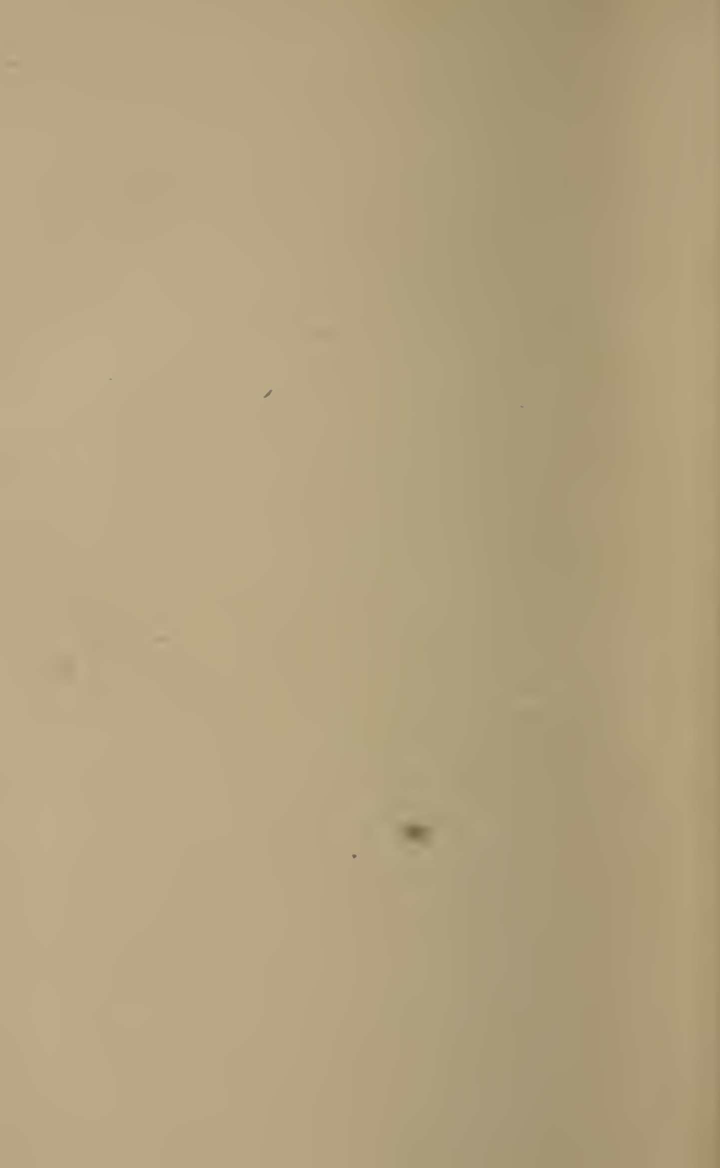
This is true even when these exhibits prove nothing—as is generally the case. They look so solid and important that they give stability to the rest of the story. The mind in doubt ever turns to tangible objects. They who first carved for themselves a Jupiter from a log of wood knew very well that the idol could do nothing for them, but it enabled them easily to realise a power who could. A rusty knife is now to an English juryman just what a *scarabœus* was to an Egyptian of old. I have seen a crooked nail and a broken charity-box treated with all the reverence due to relics of the holiest martyrs.

It seems a pity that what is called "hearsay evidence" is not allowed to be given in our Courts for what it is worth; for though it may be freely admitted that what a man hears said of him, without denying it, may be assumed to be true, it is none the less likely that a good deal more truth will be spoken of him when he is away, than when he is present to be offended at the candour of his friends, and, possibly, to vigorously resent it.

And, though I am not prepared to say with "the Jacobin,"

> "*Whatever is, in France, is right,*"

yet there is much more to be said for gossip than that the French Courts attend to it.



Of Sentences.

LL men have ever shown great respect to him who has power to kill them, and they exhibit much tenderness towards those who have been distinguished by the magnitude of their sacrifices—as Napoleon I. and Chief Justice Jeffreys. It is, I know, usual and conventional to pretend that these homicides are spoken of "with execration;" but the fact that we are pleased to remember them so well goes far to disprove the sincerity of such professions of dislike.

The right to give judgment of death is—like riches, and all else that we value highly—conceded to few. Whenever there is a considerable insurrection for the division of

property, the insurgents assert their title to all the good things of this earth, not less by plundering their fellows than by hanging and shooting them.

> "Some sacked his house and cellars,
> While others cut his head off,"

says Peacock, with a nice appreciation of the rights of man.

Now, the people have never allowed a popular right to become a privilege without insisting that it shall be administered according to their liking. It happens that the mediæval taste was—as the English is still—all for hanging by the neck; and this was to be done with ceremony on behalf of the public. And, therefore, though it was a small matter if one man killed another, it became a serious affair if he made use of a gallows to do it.

So carefully, indeed, were these things regulated in some countries, that you knew exactly how low a bow to make to a nobleman by noticing the number of posts to his gallows. A four-legged gibbet was distinc-

tive of a very great baron indeed, and a two-posted one proclaimed a man a superior person even among lords.

This extreme punctiliousness was often embarrassing to the less-exalted aristocracy; for he was sure to have plenty of enemies who was not permitted to hang them. Nor did these unfortunate nobles venture to contemn the rules of the shambles by killing men in high baronial fashion, but sought by roundabout methods to get rid of those that troubled them, without in any way encroaching on the privileges of their betters. Thus the lords of Aragon hit on the ingenious device of starving to death those whom they might not strangle; and this scrupulous observance of the law was by law rewarded, for in 1247 it was, as Du Cange records, thus enacted for the benefit of those who had kept the commandments, in word. "*Si vassallus domini non habentis merum nec mixtum imperium, in loco occideret vassallum, dominus loci potest eum occidere fame, frigore et siti. Et quilibet dominus loci habet hanc jurisdictionem necandi*

fame, frigore et siti in suo loco, licet nullam aliam jurisdictionem criminalem habeat."

These noblemen of Aragon, it will be observed, amended the defects of their feudal customs in precisely the same way as our Courts of Equity were wont to improve upon the Common and Statute Law of England. "*Fame, frigore et siti*"—these also were the methods by which suitors in Chancery were put into possession of their inheritance.

It has always been considered that those tribunals which impose sentences of death, fine, or imprisonment, provide satisfaction for the revenge of the public at large; and, for that reason, probably, our law does not in criminal cases allow the many appeals permitted in civil matters. He who had lost his bow or quiver by theft, might, with some calmness, submit to delay in getting it back, but he would certainly not have borne that the thief should be long withheld from his vengeance. Punishment for the guilty will not appease the injured man if it come not while his blood is hot with his wrongs.

Lynch-law would never have been surrendered to a dilatory Court; for the object of punishment is more to allay anger than to effect reformation. If I shoot in the leg a housebreaker as he jumps out at my window, I shall be contented, though neither society nor the burglar is the better for my act.

But when a judge is allowed by one unquestionable decree to send a man to the gallows, it is necessary to provide him with cogent motives for the exercise of discrimination; and surely no one can read without admiration the provisions of our early law upon this subject.

"It is abuse," says *The Mirror of Justice*, "that justices and their officers, who kill people by false judgment, be not destroyed as other murderers, which King Alfred caused to be done, who caused forty-four justices in one year to be hanged as murderers for their false judgments.

"1. He hanged *Darling* because he had judged *Sidulf* to death for the retreat of his son, who afterwards acquitted him of the fact."

The *Mirror* then displays one by one the offences of other thirty-nine hasty or perverse justices, and throws in the names of another half-dozen or so, who also received severe lessons from their careful and humane king.

Some there are who, observing how light are the sentences now given, as compared with those formerly in fashion, are apt to congratulate themselves on the amelioration of human nature in these later days, and contrast their gentle selves with their harsh ancestors. Yet I rather find the reasons of our present lenity in the greater certainty and rapidity with which we now bring our criminals to judgment—for, if it be true that he gives twice who gives quickly, a year in gaol now is as two were not long since.

Criminals of a class seldom caught always receive severe sentences; partly for example, but chiefly because they are individually supposed to have long broken and evaded the law. Punishments seem to have been ever proportioned not more to the enormity of the

offence than to the difficulty of exacting the penalty.

The chief difference between prisoners and other people is, perhaps, captivity.

He who commits a crime incurs a debt to society; and he escapes easiest who makes repayment at once.

There is reason to think that we regard a felon, who has been punished, as an honest man with an exceptional claim on the public.

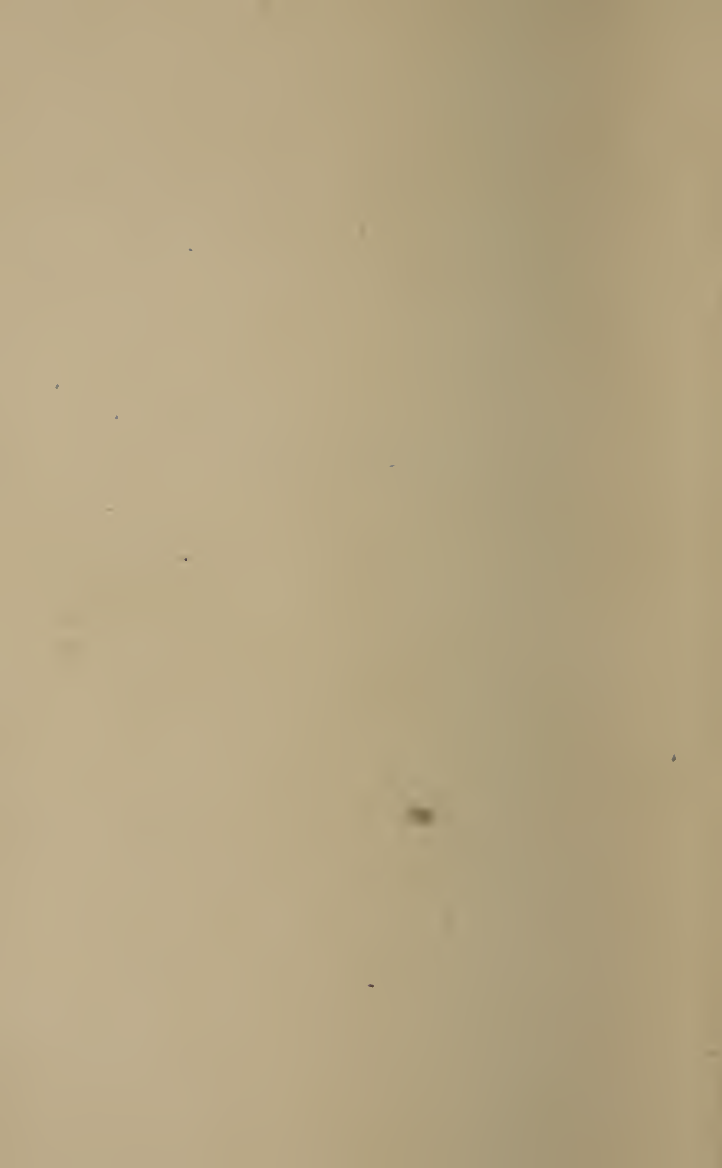
A good character precludes a man from taking advantage of many opportunities by which others might profit without being blamed.

A criminal compounds with his creditors, the public, by showing a fraudulent preference for the prison chaplain.

An habitual criminal is one who pays compound interest.

Reformatories serve two ends; they clear the streets, and fill the prisons.

The highest penalty known to our law is in the nature of a *post obit* on one's own life.



Of Advocacy.

LTHOUGH it may be said that the object of a lawsuit is to obtain for some one his rights, according to the law of the land, yet, when we come to consider in what manner an action may best be conducted at the trial, it is necessary to remember on what grounds the laws themselves must ultimately rest; for a confusion in the reasons for our complaints must inevitably lead to our stating them ineffectively.

"The only true and natural foundations of society," says Blackstone, "are the wants and fears of individuals." Were there, then, no wants and fears, society would be useless, and

would soon cease to exist, but of this I see no immediate prospect.

Now, an action must be brought for the purpose of satisfying the wants of some individual by operating on the fears of another. This, therefore, should be borne steadily in mind during the conduct of the case in Court.

And, first, the demands of the plaintiff must be stated, as formidably as possible as against the defendant, but not with such extravagance as to seem to jeopardise the rights of the public at large. The defendant alone is to be put in fear, not the judges themselves—as I think I have already pointed out.

Moderation in those who supplicate us for favours seems a merit, because it is the equivalent to generosity in those we beg of.

In relating the misfortunes of clients, one must never forget that if he is to gain by his pathos he must not long be pathetic. Our own troubles interest us always, but we soon tire of the woful chances of others.

It is also to be noticed that, while we all pity the victim of a sudden calamity, we

rarely sympathise with those whose ill-luck is persistent.

Even when you are enlarging upon everything you are able to urge in your client's favour, it is well to convey by your manner that you are under-stating your case; for by means of this artifice you gain credit for all that you are entitled to, and something more. This may be easily done in many ways; as, for instance, by omitting to state some favourable fact in opening your case, but taking care to prove it afterwards by evidence of your own, or to extract it from the opposite party himself.

If you at once admit those weak points in your case which you cannot hope long to conceal, they will do you less harm than if you should allow the other side to discover and reveal them. I know that it is the theory of the law that what any one says against his interest must be taken most strongly against him; but this doctrine itself rather diminishes the force of admissions, because the severity of the penalty on candour is likely to repress it,

if it may be so disadvantageous in its effects; and, therefore, they who confess willingly always meet with indulgence.

Since we are seldom allowed to choose what cases we are to conduct, it becomes necessary to determine how best to push forward an undeserving claim, or to submit an ill-founded defence. Now, it is of little use to have a good case if you do not take care to support it, not with plausible or ingenious arguments, but with just ones—for there is nothing so true that it may not be discredited by suspicious reasons being adduced to prove it. A proposition, however, which is essentially wrong may often be well maintained by unsound contentions, though it would be ruined by such as take truth for their basis. "It is an observation," writes Burke, "which I think Isocrates makes in one of his orations against the Sophists, that it is far more easy to maintain a wrong cause, and to support paradoxical opinions to the satisfaction of a common auditory, than to establish a doubtful truth by solid and

conclusive arguments. When men find that something can be said in favour of what, on the very proposal, they have thought utterly indefensible, they grow doubtful of their own reason; they are thrown into a sort of pleasing surprise; they run along with the speaker, charmed and captivated to find such a plentiful harvest of reasoning where all seemed barren and unpromising. This is the fairy-land of philosophy. And it very frequently happens that those pleasing impressions on the imagination subsist and produce their effect, even after the understanding has been satisfied of their unsubstantial nature. There is a sort of gloss upon ingenious falsehoods that dazzles the imagination, but which neither belongs to, nor becomes the sober aspect of, truth. I have met with a quotation in Lord Coke's Reports that pleased me very much, though I do not know from whence he has taken it:—*Interdum fucata falsitas* (says he), *in multis est probabilior, et sæpe rationibus vincit nudam veritatem.*"

The above passage should ever be remem-

bered, as helping us to discriminate between the manner and methods suitable to be adopted when arguing before a jury, and those which it becomes us to assume and use in order to convince the mind of a judge—at all events, if he be of the Superior Courts.

I have heard counsel, and that often, who make no difference between their speeches at Quarter Sessions, or Nisi Prius, and their arguments in Banc, except that they somewhat modulate their voices, and clumsily affect to move to Lydian measures in the latter circumstances, but the process of their argument remains the same. The only distinction they seem capable of making between learned and unlearned tribunals is this, that they lay fewer propositions before the smaller assembly, altering the quantity of their talk, without taking the trouble to improve it in quality.

And yet, although a mastery of the various well-known arguments, as *ad baculum*, *ad hominem*, and the like, is a very serviceable accomplishment, I regret that no one has yet

discovered an effective *argumentum ad fœminam;* which, perhaps, would be of not less value, forensically considered, than any of the others.

It is doubtless of great moment that an advocate should appear to believe in his case, as he is then more likely to convert others; but I think that most counsel would be better advocates did they content themselves with simulating belief instead of actually embracing it. The manifest appearance of a believer is all that is wanted; and this can well be acted after a little study, and will not interfere with that calmness of judgment which it is well to preserve in the midst of uncertainties, and which does not appear to be consistent with much faith.

It is a common practice to conclude speeches with a burst of indignation; but such a feeling concerning the wrongs of others is the shortest lived of all the passions. I would rather touch last upon prejudice, for it endures like bronze, and is easily written on with the acid of epigram.

Of Maxims.

I SHALL conclude with a word or two on Maxims, which are for centres having many doctrines revolving around them. It becomes them, therefore, to be fixed and certain; but, for my own part, I can think them of not much more use in law than the proverbs of country people are in husbandry. Like "index learning," they may "hold the eel of science by the tail," yet the eel will find such means to wriggle that it were almost as well not to restrain him in any way as to hold him by one end only.

It is magnificently declared by our law that *there is no wrong without a remedy*; but,

perhaps, it were as just to remark that no remedy is given to him who has not a right to it. This manner of stating the rule is not, however, so attractive as that which the law adopts. It may often be imagined by litigants that they may get what they have no title to, because they read *ubi jus, ibi remedium*, as being a complete proposition which does not negative there being some *remedium* where there is no *jus*. And, indeed, it has often happened that where one has shown himself in want of some remedial treatment, which he cannot specify, the law has found that he has a right of some sort, and then it follows from the maxim that there must be given a *solatium* of one kind or another. It might be thought that if one could devise a new means of hurting another, it would be safe to exercise it; but, as you will produce fruit by beating and bruising a walnut tree, so if you do harm you will cause rights to spring up where before none were to be found. Or, as Lord Holt beautifully has it, if men will multiply injuries, actions must be multi-

plied too, for every man that is injured ought to have his recompense.

The maxim which, though rarely quoted, most concerns all who go to law, is "*caveat viator.*"

"*Actus legis,*" it is written, "*nemini est damnosus.*"—Yet such is the ignorance of some who come to be hanged that they see not it is for their own benefit.

"*Rex non potest peccare*"—Ahem!

It is said that *he who comes into equity must come with clean hands;* and I suppose that the same rule must now apply in Law. The utility of the maxim is, that he who goes in clean will come out less dirty than he who is soiled from the first; but, perhaps, having clean hands, it were better not to go into Equity at all.

The maxim, "*Boni judicis est ampliare jurisdictionem,*" was probably invented to comfort the conscience when Judges were paid by fees on the cases brought before them. It is characteristic of a good general to extend the area of the country he can hold and plunder.

"*Debitores non presumuntur donare.*" Yet debtors do make gifts, and large ones; often giving away the whole of their estates. I have noticed that bankrupts are men of very tender affections where their relations are concerned; and they are so far unprejudiced that they often *prefer* a creditor.

It is a wise saying that "*Socii mei socius, meus socius non est.*" Persons of the sort here indicated are frequently to be found in our Courts as co-respondents.

"*Dona clandestina sunt semper suspiciosa.*" Generosity is sure of so much praise that it is considered that no one will give away in the dark what he may lawfully part with. I mean not to say that there is not much secret giving in charity, but these donations are by nature a sort of bribes, and lose something of their effect by being bestowed openly.

"*Summum jus, summa injuria.*" This is a more candid statement concerning law than one might expect to find in a law book; but it is useful, should any one complain of the imperfection of our law, to be able to point

out that in its integrity it is even more hurtful. If we find "partial evil universal good," then it is right to redress wrongs imperfectly.

The books contain the maxim, "*Via trita, via tuta.*" I do not know that this has yet been alleged as a reason for not repairing a highway. But it would make as good a defence as many I have heard.

Much comment has ever been bestowed upon the legal maxims, and even now, perhaps, they are not all fully and clearly understood. I shall not here give further examples of them, as their elucidation is a matter of great nicety; and I do not feel sure that I rightly interpret one or two of the few I have already presented.

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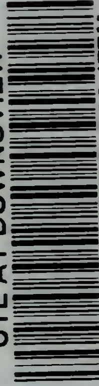
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