# TRANSACTIONS.

## ON SOME OBSOLETE PECULIARITIES OF ENGLISH LAW.

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AT one time or another possibly everyone of us has watched the pointer of a sundial, and has thought within himself how slowly its shadow moves. To him whose observation of it is limited to a few minutes, this ghost of sunshine—dark where other ghosts are light—is unlike them also in this respect, that while they flit to and fro like the bat or the butterfly, it creeps along so noiselessly and so stealthily, that, unconscious of its motion, you almost deem it stationary; and yet the earth, of whose motion it is born and partakes, is spinning round on her axis and whirling along in space at the rate of thousands of miles in the hour. If we would sensibly mark the advance of the shadow, we must watch it at intervals; and so it must be with all within, around, and about us. Changes in our habits, customs, and external circumstances are continually going on; nay, it is said, that once in every seven years even our whole frames are renewed, and retain no particle of their former selves. But this change is so gradual that we are unconscious of it, except by comparing the same circumstances at different periods, which thus becomes our Nilometer to mark the difference between the stream of time at one period and another.

Whoever looks upon the face of English law as it now is, grave

and sedate, with looks repelling rather than inviting acquaintance, can have little idea of the changes she has undergone since the times when—

> "A painted vest Prince Vortigern had on,
> Which from a naked Pict his grandsire won,"

nor of those quaint and fantastic features which she has worn at different periods since that somewhat Irish mode of reckoning; and yet it is the same law still, only in different stages of its existence. Some of these changes I propose to bring before you this evening; and treated as it is capable of being, the subject may be rendered pleasant by the contemplation of those circumstances of the past which antiquity has made picturesque, and profitable from the evidence of progress which that contemplation will afford us. You must not expect, however, that on such a subject I shall be able to bring before you anything which is new, or which is not to be found in those amusing volumes which form the lawyers' library.

In the year 1807, when Mr. Duckenfield Astley served the office of High Sheriff of Cheshire, and came as usual to conduct the judges into the city, he made his entrance into Chester in much state. Colonel Hanson's corps of Manchester rifle volunteers, in uniforms of green and silver, with their band playing military airs, lined the streets. Between their ranks first came a number of the High Sheriff's friends, either mounted on horseback or in showy equipages. To these succeeded his mounted tenantry, in looped hats and frocks of green and gold, such as might have been worn by Robin Hood and his greenwood followers, and with javelins of antique shape. The tenantry were headed by six trumpeters in gay uniforms, with clarions, from which depended silken banners, embroidered and richly blazoned with the sheriff's arms and ancestral honours. The music of the clarions regulated the march of the procession. Next to the tenantry, in apparel meant for speed, like Malise in the *Lady of the Lake*, of whom we read that

> "The dun deer's hide
> On fleeter foot was never tied,"

came the High Sheriff's running footman, in a dress of the olden time, fantastic and picturesque.

Before we go on, a word or two about running footmen may not be out of place. According to old authorities, they were dieted and trained for their work like the Oxford and Cambridge crews; took eggs and ate hare to make them fleet of foot, and drank white wine from a ball screwed to the top of the *hasta pura* which they carried. In Queen Elizabeth's time, they kept festival on St. Patrick's Day; which might be because they were principally Irish. They could travel sixty miles a day, sometimes going at the rate of seven miles an hour. Either up hill or down hill, they could keep ahead of a coach and six; but on level ground they would sometimes make signs to the coachman to slacken speed. Lord Stamford, advertising for one of them in 1733, says, "he must be "of modest behaviour among the feminine gender;" and Chambers, in his *Book of Days* (p. 99), mentions the sign of the Running Footman, over a house in Berkeley Square, under which was written, "I am the only Running Footman." But the only one could not be the last, as the Cheshire example shews. He had on a silk vest of light blue, with white sleeves; a white kilt, fashioned like a Highlander's; and pumps, with rosettes. From the top of the crimson velvet skull cap which covered his head, threads of silver lace fell in a circle round the crown, and he carried in his hand a white wand, the badge of his office.

Immediately after this antiquated officer, seated in a splendid chariot, appeared the High Sheriff and his chaplain; the latter in his clerical robes, and the former in his cocked hat and sword, the hilt of which was of cut steel and sparkled brighter than silver. The sheriff's chariot was drawn by six beautiful chesnut horses, caparisoned with richly mounted harness; the two leaders guided by a youthful postillion, in a cap and rich livery; and the others driven four-in-hand by a portly coachman, in powdered wig, three-cornered hat, and full state dress. A bevy of lacqueys, in gay liveries, attended the sheriff's

carriage, and were followed by a stud of led horses, with holsters and gay saddles, and caparisoned in a variety of rich and fanciful housings; some of which were of polished leather, with plated ornaments, some of leopard's skin, and others of cloth or velvet, each of a different colour—crimson, green, and gold. Several of the horses were beautiful animals, and all of them had their own grooms, in picturesque dresses, walking at their head. The rear of the cavalcade was brought up and closed by a long array of the High Sheriff's official servants, the bailiffs of the county, mounted on horseback, and dressed in scarlet uniforms and black caps.

Comparatively recent as this entrance of a High Sheriff is, nothing but its spectre can be traced in what occurs at the entrance of the High Sheriff into an assize town now. The bailiffs have lost their uniforms and nearly all their functions; the led horses, vain of their finery and conscious of their importance in the procession, prance and caper no more. The six trumpeters have dwindled into two. The running footman, who was perhaps the last of his race, has passed into history; or only graces the roll of a modern High Sheriff's expenses, like the dead men on Falstaff's or Marlborough's muster rolls. "We have a "number of shadows to fill up the muster rolls," was Falstaff's confession (*Henry IV*, part 2).

Let me now take you into court, to witness the trial of a single prisoner, which took place at the assizes thus ceremoniously ushered in. The Court of Session, at Chester, had not then been abolished, and its two judges, who sat together, were Mr. Justice Dallas and Mr. Justice Burton—the latter of whom was blind. Their scarlet robes were edged only with velvet, instead of ermine, to distinguish them from the judges at Westminster. Those gay nosegays of sweet flowers lying on the desk before them, are not there merely to gratify the senses of sight and smell, but are meant to be of use; for it is believed that the odour of flowers and perfumes acts as a febrifuge, and keeps off the danger of infection. "The most "pernicious, next to the plague," says Bacon, "is the smell of

"the gaol where prisoners have been long and closely kept, "whereof we have had experience in our own day, when both "the judges that sat upon the gaol delivery, and numbers of "those who attended the business upon it, sickened and died;" and he adds, "it is well known that vegetable odours have been "deemed, in infected countries, sufficient preventives of the "plague; and it was imagined that the spread of gaol typhus "might be obviated in a similar manner." Instances of the deadly nature of this typhus have accumulated since Bacon's time. One of its victims was that Alexander Rigby, one of the besiegers of Lathom House, to whom the Countess of Derby sent her spirited reply to his summons to her to surrender. Rigby had practised at the bar before the civil war, and when it was over he doffed his red coat for a scarlet gown, and going the home circuit with Baron Gates, in 1650, they were both fatally struck with gaol fever, and died at Croydon. And still more lately, at the Old Bailey in 1750, the Lord Mayor, two of the judges, and many other eminent persons fell under the ravages of this same disease. Happily this is almost the last recorded instance of the outbreak of gaol fever, which is mainly owing to the improved state of our prisons, through the instrumentality of Howard, the philanthropist.

But we are now in the court, the prisoner is standing at the bar, and the crier having thrice given the usual "O yes," calls upon all persons who know of any treasons, felonies, and misdemeanours by him committed, to come forward and inform the court thereof; after which, the clerk of the Crown addresses him. "You, John Thompson, hold "up your hand." And on his raising it in obedience to this command, the clerk then says to him:—"You stand indicted, by "the name of John Thompson, for that you, at Tarvin, one "silver spoon, of the value of thirteen pence, of the goods and "chattels of one Job Smith, feloniously did steal: How say you? "Are you guilty or not guilty of this felony?" And upon the prisoner's pleading "not guilty," the clerk addressing him again, said, "Culprit, how will you be tried;" and the prisoner answered,

"By God and my country;" to which the clerk immediately rejoined, "May God send you a good deliverance." The clerk then taking up the panel said to him, "Prisoner at the bar, these "good men, whose names are about to be called, are the same "that the sheriff has returned to pass between our lord the King "and you. If you have any objection to make to them, or any "of them, you must make it as they come to the book to be "sworn, and before they are sworn, and you shall be heard." The names of twelve persons were then called, and no objection having been made to any of them, the clerk said to the crier, "Count these;" when the latter slowly counted the names after the clerk, so as to ascertain that they were exactly twelve. As soon as the jury was sworn, the clerk shortly stated the charge against the prisoner, and that he had pleaded not guilty, and had put himself upon God and his country: "which country," he added, "you are." The case against the prisoner was then temperately stated by the counsel for the Crown, who supported it by the evidence of his witnesses; after which the prisoner's witnesses were called and examined by his counsel. The case against the prisoner was simple, and admitted of easy proof; the jury therefore, without retiring from the box, found the prisoner guilty; upon which the clerk said to them, "Gentlemen of the "jury, hearken to your verdict, as the court has recorded it: "You say that the prisoner is guilty, and so you say all." And then turning to the bar, he said, "Prisoner at the bar, you have "been tried and found guilty of the crime of grand larceny, with "which you stood charged. Have you or know you anything "why sentence should not now be passed upon you, according "to law?" Lord Campbell tells us that once, when such a question was put to a prisoner, he replied, that "he had a great "objection to make, since he had not been tried by the *judge*, but "only by the serjeant, sitting as his *journeyman*." But John Thompson, now on his trial, had something to say more to the purpose; for, falling on his knees, and holding up his hands, he prayed to be allowed the benefit of clergy. And here, while the prisoner is on his knees, let us pass in review some of the stages

of his trial, enquire into their reasons, and, in pursuance of our object, remark how many of them have become obsolete since this trial took place.

And first, what meant that triple "O yes" of the crier before the trial? Our German ancestors were enamoured of this number three, and traces of their affection for it remain in many of our customs. They thought scorn of the freeman who obeyed a summons until it had been three times repeated. We have borrowed from their habit the usage of three days' grace to a bill. There are often three heats to a race. The song tells us that King, Lords, and Commons must concur in making a law; that the bride cake must pass three times through the ring before it can gain its magical efficacy; and that the banns must be published three times before the wedding can take place. But if the three "yeses" are a Saxon relic, they come to us in a dress which marks our subjection. We boast of our French conquests in the days of our Edwards and our Henries, but we forget all the while that these have passed away, and left us nothing but rancour and jealousy: the earlier conquest of England by William the Norman remains indelibly impressed upon our national character and in our national language. The conquest has given a long line of monarchs to the English throne, while it has enriched our language and softened our manners. Such consequences may well reconcile us to hearing the French *oyez*, "hear," transformed into the plain but unmeaning English "O yes."

But what means the command uttered to the prisoner to hold up his hand? And why is he so ready to obey it, probably without exactly knowing the reason? When a similar command was given to the celebrated Earl of Essex, at his trial in Westminster Hall, in 1600, we are told that he did hold it up of a great height, saying that he was sorry he did it not to a better purpose. Had the object been to procure an admission of his identity, *that* had been better attained by asking the prisoner to answer to his name. But by thus holding up his hand the prisoner was supposed at once to admit his identity and to shew the court that he had never been burnt in the hand. What this burning

was and why inflicted we shall understand better by and by. The offence for which the prisoner was indicted was that of grand larceny, or the stealing of goods above the value of twelve pence, an offence which down to our own times remained a capital offence, and was punishable with death. In the days of Athelstan, or before, when this law began, money was scarce, and twelve pence was a considerable sum. In the reign of our Henry I it was still sufficient to purchase a well-fed ox. But in the Saxon era offences might be redeemed by the payment of a pecuniary fine—a beneficial law, which, however, fell into disuse in subsequent times.

The strange inconsistency of attaching the same punishment to murder and to the crime of stealing a shilling was adverted to by Sir Thomas More; and Sir Henry Spelman, in his day, very justly complained that, while the nominal value of everything else had risen and become dearer, human life, the most valuable of all, had grown continually cheaper. This inconsistency no longer disgraces the statute book; and we owe its removal to the late Sir Robert Peel, who in the year 1827 obtained an act by which the distinction between grand larceny and petty larceny, which was stealing anything of less value than a shilling, was abolished.

In asking John Thompson how he would be tried, the clerk, as you may remember, addressed him as "culprit," which seems a strange term to apply to a man not yet tried, and who must therefore be presumed to be innocent, But as "O yes" is a corruption from the French, so "culprit" springs from an alliance of that language with the Latin, another language formerly much used in the law. The first syllable is a contraction from *culpabilis*, or guilty, and the second is from an old French word *prit*, signifying ready, and as used by the Clerk of the Crown, the whole word signifies that he meant to prove him guilty. Perhaps you think it remarkable that when he was asked how he would be tried, the prisoner should have answered as he did, "By God and "my country." In law language the jury are the prisoner's peers or equals; and so the clerk, in charging the jury with the prisoner,

told them that they were his country. This sufficiently explains the latter portion of the prisoner's answer, but what did the former part mean? Are not the two inconsistent, if not contradictory? And is there no irreverence in thus coupling them together? God is not only the author of justice but the source of mercy. In this sense he is everywhere present, and he can clear the innocent or confound the guilty in every or in any mode of trial. But to raise his creature man, he has given him reason to be his guide, and in dealing with him he is pleased to work not by miracles but by means. The jury, though an excellent, is not a perfect mode of trial. It partakes of the imperfection which clings to everything human.

In old times a prisoner standing at the bar had the choice offered him of several modes of trial. He might have chosen to be tried by the ordeal which was called "the judgment of God," as a jury was called a trial by the country. This trial by ordeal prevailed in other countries besides our own. The emperor Lascaris being sick, and thinking his sickness was the effect of magic, directed all whom he suspected to prove their innocence by the ordeal—"thus joining," says the author of the story, "the "most dubious crime with the most dubious proof of innocence." Is it not probable that the seeming conflict in the prisoner's answer arose from confounding the two modes of trial, and that the prisoner's answer, when asked to name his mode of trial, might have originally been, not by God *and* my country, but by God *or* my country?—for the ordeal was called *judicium Dei*.

But what was this trial by ordeal, which was formerly in the prisoner's choice? It was of two kinds—the fire ordeal for persons of higher rank, and the water ordeal for ordinary offenders. The fire ordeal was performed either by holding a large piece of hot iron without receiving injury from the touch, or else by walking safe, with the eyes bandaged and the feet naked, over nine heated ploughshares disposed at irregular distances. In the water ordeal the suspected person either plunged his arm bare to the elbow into boiling water, in which case his innocence was established if he escaped unhurt; or he

was thrown, with his arms and feet pinioned, into a river or a pond, when, if he floated, he was adjudged to be guilty, but if he sank, he was acquitted. Which of these modes, I ask, would any of us prefer to the trial by jury? But this mode of trial by ordeal was condemned by act of parliament so long ago as 45 Henry III (1261).

But what would have been the consequence if, when the prisoner was asked how he would be tried, instead of putting himself upon the country, he had either wilfully remained silent, or persisted in answering nothing to the purpose? What course would have been taken under such circumstances? When a prisoner says nothing to the purpose, or makes no answer at all, he is said to stand mute, and his offence was formerly punished by the punishment called *peine forte et dure.* By this he was ordered back to the place from whence he came, and there to be placed in a low, dark chamber. He was there to be laid naked on his back upon the bare floor, and upon him was to be heaped the greatest weight of iron which his body would bear. No sustenance was to be given him, save only on the first day three morsels of the worst bread, and on the second three draughts of standing water that should be found nearest to the prison door; and this was to be his daily diet until he died, or, as it ran in the words of the judgment, "until he answered." He who died under the *peine forte et dure* was held not to have been convicted of felony, and consequently incurrred neither escheat nor forfeiture of his lands, both which would have followed from a conviction. Savage as this punishment was, there have not been wanting those who were willing to brave it rather than incur the consequences of a conviction for felony.

A memorable instance of this occurs in the annals of a great family in the north. One of them, it is said, having in a fit of jealousy killed his wife and all their children who were at home by throwing them from the battlements of his castle, set out to a neighbouring grange, where his only surviving child was at nurse, with the intention of murdering it also; but a dreadful storm of thunder and lightning, which overtook him on the way, arrested

his progress, and gave conscience time to speak. Forthwith abandoning his purpose, he gave himself up to justice; but in order to preserve his estates for the solitary little one, who had so narrowly escaped a different fate, he refused to plead to the indictment, and died by the punishment of *peine forte et dure.*

This punishment of a silent tongue bespeaks the barbarity of the times in which it arose, but it long outlived those times, and remained a part of the law of England until the year 1772, when it was enacted that, whoever being arraigned for any felony or perjury, should stand mute, should be held to have been thereby actually convicted. This law for ever put an end to the punishment of the *peine forte et dure;* but it has been well suggested that, if instead of being *ipso facto* convicted, a prisoner standing mute had been held to have pleaded not guilty, and put upon his trial accordingly, it had been better; for since the statute, at least two persons have been found guilty and executed under the statute, who had obstinately refused to plead. But this is now altered by 7 and 8 George IV., and a prisoner now standing mute is held to plead that he is not guilty. It will be recollected that before calling the jury the clerk of the crown invited the prisoner to listen to their names, and to challenge such as he objected to as they came to the book to be sworn. In condescension to human infirmity, the law allows every prisoner to set aside a certain number of the jury without any cause assigned, and these are called his peremptory challenges. It also allows him to set aside any others, for good cause shewn; but, formerly, if a prisoner persisted in making more than thirty-five peremptory challenges, he incurred the penalties of the *peine forte et dure,* and he would now be treated as if he had pleaded not guilty.

After the jury had been called over and sworn, we heard the clerk of the crown say to the crier, "Count these;" an expression which, like the word "O yes," is nothing more than the Norman *conntez* done into English. The case for the crown was, as we have seen, conducted by counsel, and counsel also appeared for the prisoner, John Thompson. But there was this difference

between them; that, while the counsel for the crown stated the case to the jury, and afterwards commented upon it, and addressed them upon the evidence, the prisoner's counsel was not allowed to do more than ask a question or raise a point of law on his behalf. On one side was power, and on the other weakness, and many apologies were offered for this state of things. By one of them it was said that prisoners were special objects for the court's protection, and that the bench was their counsel, who would not suffer them either to be unjustly oppressed or convicted. By another it was said that prisoners had no need of counsel, for that in England the evidence of guilt ought to be so clear, that no man ought to be convicted while there remained the smallest chance of his innocence. But none of these, or any other reasons proved sufficient to satisfy those who thought deeply on the subject, and much less the class whom it more immediately concerned. When the law was in this unequal state, it is said that a poor woman, who was on her trial at the Knutsford sessions, and had engaged counsel to defend her, having listened for some time to the prosecuting counsel stating the case against her, with all its aggravations, leaned over the dock and begged him to sit down and let her counsel talk a bit, for she had paid him a guinea and never heard him open his mouth yet. But this anomaly was at length remedied; and by the statute of 6 and 7 William IV, c. 114, prisoners are to have the same benefit of counsel as the crown; and since that statute the advantage, so far as counsel is concerned, is rather on the prisoner's side.

But we left the prisoner on his knees, praying to be allowed the benefit of clergy. Let us now enquire what that benefit meant. The respect paid to religion and learning in the dark ages was not only the occasion of converting places of supposed sanctity into places of safety for offenders, when it was called sanctuary, but it also gave immunity to the persons of such as officiated in them, which came to be called benefit of clergy. The privilege of sanctuary, where offenders, fleeing to escape justice, might find safety, was enjoyed by many places in ancient

time. At Ripon, by the grant of King Athelstan, there was safety

> "On ilka side the kirke a mile,
> For ilka deede and ilka guile."

But in this, as in other cases, the privilege continued after the reason of it was forgotten; and then it became an abuse. We are all, no doubt, familiar with the privilege of this sort, and the ill use which was made of it at Whitefriars, as described in the *Fortunes of Nigel*, which, although a novel, is in this respect history. But that other plant, sprung from the same stem—the immunity of clerks and persons of learning from punishment for their crimes, which came at last to be called benefit of clergy, is what we have now more immediately to do with.

In a rude and uncivilised age, religion and learning were the antagonistic elements which were to civilise society, and teach it to submit to purer influences than the law of brute force; and it was in the nature of man that they who exercised the offices of religion should claim for themselves some peculiar exemptions and privileges. Upon the continent the clergy very early claimed exemption from all secular jurisdiction. But in England their immunity was less extensive, and they were only exempt from the secular jurisdiction in certain capital cases; while, as to all others, they remained liable to punishment in the king's courts, like his other subjects. At first, this exemption was strictly confined to those persons who were either actually in orders, or had received the ecclesiastical tonsure; but afterwards it was understood to include also all such laymen as were able to read, and who could prove such capacity by reading a passage from Holy Scripture at the bar. And from this time actual clerks and learned laymen stood exactly upon the same footing, until the reign of Henry VII; when, it being thought that though laymen who could read might be accounted clerks, yet that they ought not in all respects to be put on the same footing as actual ecclesiastics; and it was enacted that no person once admitted to the benefit of clergy should be allowed it a second time, unless he produced his orders; and that in order to

identify their persons, all laymen to whom this privilege was granted, should be burnt in the brawn of the left hand, murderers with the letter "M," and thieves with the letter "T." And this, I apprehend, was the reason why the prisoner, whose trial we have been witnessing, was required to hold up his hand. When Cade, the rebel, boasted that he feared neither sword nor fire, his aide-de-camp slyly whispered aside, that "he need fear no sword, "for his coat was of proof;" and Dick, another aide-de-camp, whispered as slyly, "but methinks he should stand in fear, "having been burned in the hand for sheep-stealing."* A living witness informs me that he himself saw a prisoner, who had been convicted of manslaughter, burnt in the hand in a crowded court, who all heard the fizzing noise which the branding iron caused. The clasp, for holding the prisoner's hands, was kept in the dock at Chester until the last few years; and in the days of Queen Anne, a supply of new branding irons was always sent with the judges on circuit (Doran's *Monarchs Retired from Business*, I, 138).

As it gives us a curious trait of ancient manners, and an insight into the state of education at the time, I stop here to notice a statute of Edward VI, which enacts that all peers having a voice in parliament, shall have the benefit of their peerage equivalent to that of clergy for the first offence, although they cannot read, and without being burnt in the hand in all offences clergyable to commoners, and, which is still more worthy of remark,—and I pray you to mark it,—for the crimes of housebreaking, highway robbery, horse stealing, and robbery of churches. If these were the crimes which the nobles were expected to commit, what might not be expected from commoners? After this burning the laity, and before it the clergy, were discharged from being further punished in the king's courts, and were delivered over to the ordinary, to be dealt with according to the ecclesiastical canons; whereupon the ordinary proceeded to make a purgation of the offender by his own oath and the oaths of twelve compurgators,

* Shakespeare committed here an intentional anachronism. Burning in the hand was not known till after Cade's time.

notwithstanding that he had previously been convicted by a jury, or perhaps by his own confession. It is said of a Welsh jury who had acquitted a prisoner after hearing his confession read to them, and who on being remonstrated with on their finding so strange a verdict, told the judge that they had known the prisoner to be a notorious liar all his life, and that they could not believe he spoke the truth when it made against him. But the conduct of this Welsh jury was reasonable in comparison with the purgation of offenders by the ecclesiastical judge, which came at last to be attended with such notorious perjury that a statute was passed in the reign of Queen Elizabeth, by which it was enacted that after the offender had been allowed his clergy, he should no longer be delivered to the ordinary, but, after being first burnt in the hand, if a layman, he should forthwith be discharged, except that the judge, if he thought fit, might continue him in gaol for any term not exceeding one year; and that all offenders who had once been allowed their clergy, as well as all other offenders who could not read, should be hanged. Not unreasonably did Jack Cade reproach the law with this absurdity, when, addressing Lord Say, he said—"Monsieur, thou hast put men in prison, and "because they could not read thou hast hanged them, when "indeed only for this cause they had been worthy to live." A part of the 51st Psalm, "Miserere," was used as the trial verse, in allusion to which the poet makes William of Deloraine exclaim—

> "Letter or line know I never a one,
> Wer't my neck-verse at Haribee."
>
> *Lay of the Last Minstrel*, Canto I.

At a time when the law was thus bloody, the story which is told of Lord Holt becomes probable enough. Before he engaged heartily in the law, he had led a somewhat irregular life; and some time afterwards, when he had been made a judge, he recognised in the person who stood before him one of his old acquaintances of the Poins and Falstaff school. His lordship, after the trial, went to see him in the gaol, and enquired after some of his old companions, to which the prisoner replied—"Oh, sir, they are all hanged but me and your lordship!"

In the reign of Queen Anne the legislature extended the benefit of clergy a step further, and enacted that it should be granted to all who were entitled to claim it, without actually requiring them to read; and thus was abolished the necessity of the neck-verse, which was so called because by reading it the prisoner saved his neck. This was followed by two statutes: one in the reign of George I, which enacted that when any person should be convicted either of grand or petty larceny, and should be entitled to benefit of clergy and liable only to burning in the hand, the court might direct the offender to be transported; and the other in the reign of George III, which empowered the court to substitute a pecuniary fine in lieu of burning in the hand; and thus another relic of the benefit of clergy was substantially abolished. Benefit of clergy was not allowed in petty larceny, or stealing under the value of twelve pence, because such thefts were not capital: and it was expressly taken away in murder, arson or the burning of houses, in burglary or the breaking into houses at night, and perhaps in some other atrocious crimes, but, generally speaking, it was to be allowed in all other cases.

But we left the prisoner on his knees, praying to be allowed the benefit of clergy; and having now explained what this meant, let us return to the court and see the trial concluded.

The court, you will have seen, could not but grant the prisoner's prayer; and having granted it, although in strictness his offence was capital, they at once sentenced him to be imprisoned twelve calendar months, and thus ended the trial. It was reserved for our own day to render all this learning obsolete; and an act passed in 1827 abolished the distinction between grand and petty larceny, which had existed for 1000 years or more, annihilated altogether the benefit of clergy, repealed a great number of statutes relating to this and other branches of the criminal law, and established in their stead a much improved mode of proceeding against and punishing offenders. For all this we should remember that we are indebted to the skill, energy, and ability of the late Sir Robert Peel, who conceived and carried out the change.

TRIAL BY BATTEL.

Having given on the testimony of an eyewitness a trial in which, although comparatively modern, a great part of the proceedings have already become obsolete, I will now take you to one which occurred a long time ago, in which both the mode of trial and everything connected with it, although formerly common, have fallen into complete desuetude, and are only preserved to us in the pages of Dugdale, and in a jargon not less uncouth than the story itself is strange.

At a session before the Justices in Eyre at Northampton, in the year 1330, Thomas Fitz Hugh de Stanton demanded against the prior of Our Lady at Lenton the advowson of the chapel of Herleton, as heir to his ancestor William, who had presented his clerk William de Grendon to the living in the time of the king's grandfather, and thereupon he offered to defend his right—(how, do my hearers think?) by the force of argument and facts? no; but by the argument of force, and the body of his freeman William Fitz John.

But the demandant and the tenant had each a serjeant-at-law, a barrister of some standing, to assist him. At a later time, when wigs became part of the forensic costume, the wigs of the serjeants were distinguished by a black patch in the centre, which was supposed to represent the coif or black cap once worn by the priests to hide the tonsure, after the law had forbidden them to appear as advocates in the secular courts. But the canons of St. Peter's, at Rome, who wear dark wigs, have a white patch in the centre of the crown, to imitate the tonsure; thus reversing the serjeants' rule. A countryman, sitting in the gallery of the court and noticing the black patches on the serjeants' heads, said he supposed it was to hide some complaint they had there. But now, alas! since 1877, the degree of serjeant is abolished, and serjeants are no more. Let us, however, return to our story. Upon producing the champion for Thomas, his serjeant took him by the arm, and then the latter, ungirt, barefooted, and barelegged, with the sleeves of his tunic turned back and his arms bare, held up a gauntlet in his right hand, with five pennies between his fingers.

The prior then denied the demandant's right and his ancestor's seisin, and offered to defend his own right by his freeman, William Fitz Thomas, then present, and ready to defend it by his body; and then the demandant's serjeant-at-law, who was his counsel, took his champion's arm as he stood at the bar, and did with it in like case as had been done with the other champion's arm. Afterwards, both the champions were ordered to come within the bar, and to approach the bench, and to stand one at one end of the table and the other at the opposite end, while the justices examined their feet to see that they were without shoes. (If this scene had been in Lancashire, the precaution might have been taken to avoid the suspicion of feet fighting.) The Chief Justice, who was probably Henry le Scrope, now demanded of the parties whether they knew of any misprision on the part of either champion, or if they had any objection to make to the person of either of them; and they answered "No." And then the Chief Justice, addressing the tenant's champion, said to him, "Give me the gauntlet"; whereupon the champion knelt down and gave it him, and the same was done with the other champion and his gauntlet. Then he shook the pennies out of the two gauntlets, and put those of the demandant into the tenant's gauntlet, and those of the tenant into the demandant's gauntlet. Afterwards, he demanded of the champions whether they were ready to do battle according as the parties had offered for them, and they answered that they were. We may suppose each of them adopting the language of Harry Bolingbroke on a similar but yet more solemn occasion—

> "For what I speak
> My body shall make good upon this earth,
> Or my divine soul answer it in heaven."

The Chief Justice then commanded each champion to offer the other his gauntlet, and each of them took the other's gauntlet. After which he bade them deliver the gauntlets to him, and then he restored to each champion his own. This we may suppose was done not only that the court but that each champion might be satisfied that the gauntlets were fair and lawful. It was also,

I suppose, a sort of symbolical throwing down of the gauntlet by one champion and its taking up by the other. The Chief Justice then demanded of the parties whether they knew any reason why the court should not make an award of battel, and upon their answering "no," he informed them that they must find pledges to abide the battel, and each party then found two. The Chief Justice then said, "The court hath heard how you have waged "battel on one side and the other, and how you have declared that "you know no reason why the battel should not be awarded, and "the court doth therefore award it. Be you therefore before us "on the second Monday in Lent, and have you at the same day "your champions arrayed for war ready to do battel according as "you have offered it." It was then ordered that no man of either party should have access to either of the champions in the meantime; and he charged each party to watch over his own champion, and to see that no one had access to him, on pain of such punishment as belongs thereto. All this, I suppose, was to prevent the champions being tampered with. The Chief Justice then ordered the tenant to lead his champion to some church, and the demandant to lead his to some other church, and that each in his respective church should offer the five pennies which were in the gauntlets in honour of the five wounds of Christ, in order that God might give the victory to him who had the right. The parties were then commanded to come at the appointed day, prepared to take an oath at the bar and another in the lists. Does not this carry the mind back to Ashby de la Zouch, and suggest to the memory its great tournament recorded in *Ivanhoe*? Upon the Saturday preceding the appointed Monday, the Chief Justice commanded the parties to bring their champions separately into a private place to shew their apparel; and first he caused the prior to come before him with his champion, and finding, on examination, that his apparel was of leather, he ordered it to be removed. This seems to be like the coat of proof which Cade was accused of wearing. Then he measured the baton and found it five quarters long, and pronounced it to be of the right length, though five quarters sounds rather like an odd mode of

measurement. He then examined the shield, which he found was an ell long and three quarters broad, which he held to be not more than the assise, though a man might, if he wished it, use a shield of less dimensions; and having afterwards examined the demandant's champion's in the like manner, he commanded both the tenant and the demandant to have their champions present on the appointed day. And upon such day the parties and their champions came to the bar with their shields borne before them, which were placed between them as they stood at the bar. Their two batons, which in like manner had been borne before them, were delivered to the court, and then the tenant by his counsel Shareskull thus spoke :—"My masters, you "have here the prior of Lenton with his man William Fitz Thomas "by name, arrayed for battle, and ready by heaven's grace to do "and perform all that the court of our lord the king doth or shall "award, and that he proffers against Thomas Fitz Hugh de "Stanton with his man William Fitz John;" and the demandant did the like, repeating the same words *mutatis mutandis*. Then the Chief Justice made the tenant's champion stand towards the north and the demandant's towards the south, and commanded the former to take the right hand of the latter in his left, and grasping it gently, without hurting or straining it, to place his own right hand upon the book, and to say as follows :— "Hear this, O man, whom I hold by the hand, William by name "of baptism, that Thomas de Stanton hath not any right to the "advowson of the church of Herleston, and that his ancestor "never was seised thereof, but the same was and is the right "of the prior, and hereto I swear." After which the demandant's champion took the same oath in the same form. The demandant's champion was then commanded to take the right hand of the tenant's champion in his left, and to put his own right hand on the book, and to say as follows :—"Hear this, O man, "whom I hold by the hand, William by name of baptism, thou "art perjured, and this is thy perjury: that the advowson of "Herleston is the right of Thomas Fitz Hugh de Stanton, and "was the right of his ancestor, so help me God and his saints."

The court now having chosen one of the batons delivered it to the tenant's champion and the other to the demandant's. Afterwards the Chief Justice demanded of the prior whom he wished to bear his champion's shield to the field, to which he answered, "He who bears it now." In like manner he asked him who should bear the baton, and the prior named for that purpose Sir Richard Maundeville, knight, who undertook to bear it, and to him it was forthwith delivered. Afterwards he asked in whose ward he wished the champion to be while they proceeded to the place, and he named a knight who undertook it, and the champion was given into his charge; and the like form, in all respects, was observed towards the demandant and his champion. Then the Chief Justice charged the champions that if, after they had entered into the battel, one of them should strike the other down, and have it in his power to slay him at the next blow, and then either tenant or demandant was minded to speak of peace, and should elevate his wand, and the court should thereupon order the champion to stay, he would at once stay and proceed no further without leave of the court, upon pain to forfeit life and members; and then straightway the knights who had charge of the champions had orders to conduct them safely to the place of combat.

But when they were come to the field, the tenant and the demandant came to an agreement; and coming before the justices, prayed for leave to be allowed to end the cause, and the prior paid a fine to the king, and thereupon leave was granted as prayed. Whereupon the Chief Justice, addressing the demandant, said,—"Thomas Fitz Hugh de Stanton, the court of our lord "the king having laboured very much this cause of yours, now "asks as a right that the champions do make display of their "powers with shields and batons;" "but without dealing real "blows," said Justice Croke, interposing. And "that they do "afterwards entertain us with a few falls of wrestling." The tenant's champion being placed towards the north, and the demandant's towards the south, they made an onset with shields

and batons, until the court cried out, "enough." After which they had two bouts of wrestling, and then they parted and took their leave, carrying with them the batons delivered to them by the court. After which the justices rose, the court broke up, and the business ended.

But if we imagine that the two champions who engaged in this quarrel agreed to wage mortal combat either out of loyalty or affection to the parties, or from an abstract love either of justice or of fighting, we shall be very much mistaken. They were hired like some foreign mercenaries and were to fight for pay. In or about 1260, John Coldingham gave three acres of land with a toft and a croft, which he himself had received for being a champion in one of these trials by battel. (*Athenæum*, Nov. 10, 1866, p. 609.)

### SCROPE AND GROSVENOR.

From proceedings which took place in the open air, upon a carpet of greensward, with a circle of nobles and others looking on as silent spectators, let us turn to a scene of a very different kind, which took place in-doors. Those who have had any experience know in which kind of court the air is purest. I was once present in an Irish court when counsel asked a medical witness what was the best way to cure a headache caught in a crowded court, and his ready answer was, "Why, to get out of it "as soon as you can."

In September, 1386, not more than half a century after the case we have just been considering, we find ourselves, after passing the portals of an Early English gateway, suddenly within the walls of a lofty church, with the light of an autumn sun streaming in mellow lustre through its storied windows of stained glass. Two rows of Early English piers, four-sided and moulded, on which rest a series of pointed arches, dividing the nave from the side aisles and enabling it to sustain its groined and vaulted roof, the joinings and intersections of which glow with the shields of arms of the Beauchamps, the Botelers, the Radcliffes, the Hollands,

the Fittons, and other ancient houses. Here and there upon the floor are carved effigies in wood or incised slabs of marble, representing warriors in plate and mail, and ecclesiastics in cope and chasuble. Passing into the chancel through its carved screen, we find ourselves before a tribunal with four seats erected on it. Where this tribunal was and who were to occupy it we shall see presently. In the above-named year, a trial between two knights was the occasion of great excitement all over England, but more especially in this and the adjoining county of Chester. In the three years during which it hung in strife, nearly everybody was arrayed on one side or the other, and in the halls and dwellings of the nobles, gentlemen, and yeomen it struck up as much heat as an important political or party question would do in our own day. More witnesses, and witnesses of more varied ranks and ages, were perhaps never examined in any other ancient case on record. One sovereign prince, one duke, three earls, three barons, three abbots, two priors, eleven bannerets, and nearly one hundred and fifty knights, esquires, gentlemen, and others were examined for one or other of the contending parties, and amongst these were Chaucer the poet and the celebrated Owen Glendower. A score or more of manors, one thinks, must have been disposed of to bear the expense of the witnesses and hearings, while evidence was given of events which happened in the fiery east, in the time of the crusades; on the plains of Gascony or Poictou, in the host of the Black Prince; or in other more quiet scenes at home or abroad. In such a cause, you are ready to exclaim, the subject matter in dispute must surely have been very great to justify such an expenditure of time and money and energy. The parties thought it of more value than the worth of half a province. And now we ask what you think it was? No longer laugh at the historian of Liliput and his war of the Big and Little Endians. This great cause was no less than to settle whether Sir Richard Scrope,—who, besides having been Lord Chancellor, had fought at Cresсy and other fields of arms, besides this fight before the Earl Marshall,—or Sir Robert Grosvenor had the best right to bear a

*shield azure* with a *bend or;* or, to put it in plainer English, had the best right to paint his shield *blue*, and to gild with gold the band going across it diagonally from right to left, to strengthen it.

In the times of which we are speaking, infringements of the law of arms were jealously watched, and gave rise to frequent controversies. Some of these were more easily settled than the great case with which we have to do. Among the Genoese, whom the French king hired to aid him in his war against England, was a gentleman who bore an ox head on his shield, for which he was challenged by a French nobleman, and they strove so long about it, that at length they must fight upon it. The French gallant came into the field armed at all points. The Genoese, all unarmed, also came and said, "Wherefore shall we this day fight." "Marry," said the Frenchman, "I will this day make good with "my body, that these arms were my ancestors' before thine." "What were your ancestors'?" quoth the Genoese. "An ox "head," said the Frenchman. "Then," said the Genoese, "we "need not fight, for this that I bear is a cow's head (Lower's *Surnames*, p. 50). When Robert de Morley's arms were challenged by Burnel at Calais, in 1346, he contented himself with bearing them for his life by permission, after judgment against him, and he surrendered his folded banner, by transmitting it on his death bed; which was certainly a most pathetic and picturesque conclusion.

The judges in this great cause were answerable to its importance, being no less than the lord high constable and earl marshal; with others especially commissioned by the king for that purpose. But now let us return to the court, with its tribunal of four seats, before which there are now a crowd of persons, drawn thither either by business, or interest, or curiosity; the effect of whose varied costumes of caps and cloaks and pointed shoes, heightened by the light falling upon them from the stained windows, which were of lancet shape, and filled with the emblazoned arms of Warren, De Montfort, Clare, De Burgh and Mortimer, the especial patrons of the Austin friars, in whose

house at Warrington we are, and where the assembled crowd is now waiting for the arrival of the judges.

These four persons having taken their seats, the pursuivant read aloud the commission, empowering Sir John le Boteler, baron of Warrington; Sir Nicholas le Vernon, Sir Thomas Gerard, knights; and Sir William Bromborough, rector of Aldford, near Chester, to take evidence in the great Scrope and Grosvenor cause. Proclamation was then made, calling on the parties to come forth and produce their witnesses; upon which Sir Robert Grosvenor came forward, but the plaintiff neither attended nor answered. The witnesses now examined were John de Massey, Nicholas de Rixton, Roger, the prior of Birkenhead, William de Rixton and Thomas le Vernoun; only one of whom, John de Massey, gave evidence of any material value. He swore that for twenty-six years he remembered the challenged shield being painted in its proper colours as the Grosvenor arms upon Bradley cross, which stood in the highway, between Knutsford and Warrington. The evidence of the several witnesses having been given, and having been taken down as they gave it, the further hearing of the cause was then adjourned to Lancaster castle. After being protracted for three years, sentence was at length given that Sir Richard le Scrope should bear the original arms, the shield *azure* with the *bend or*; and that Sir Robert le Grosvenor should bear the same arms with a *bordure argent*. This sentence not pleasing Sir Robert le Grosvenor, (as what sentence ever does please the losing party?) he appealed against it to the king; who, by his commissioners, reviewed the proceedings, and at length decided that the appellant should either use the said arms with a *bordure*, as in the sentence, or else, instead of the *bend or*, might bear a *garb or* from the arms of the ancient Earls of Chester, to whom, during the trial he had fully proved his consanguinity; and these latter arms, then adopted by Sir Robert le Grosvenor, have ever since been borne by the noble family at Eaton. In Richard the Second's time, when heraldry was in its zenith, these contests were common. Mascy, of Tatton,

and Mascy, of Puddington, had each such a contest. (*Hist. Ches.*, 308.)

APPEAL.

The Grosvenor incident in our local history may well serve to call our attention to another branch of ancient law known as the law of appeal, which has only become extinct in our own days. On the happening of the Bewsey tragedy, a story which has come down to us in the Harleian manuscripts, we learn that Lady Boteler pursued those that slew her husband, and indicted them; but being married to the Lord Grey, he made her suit void. In this passage, if we read appealed instead of indicted, the statement becomes intelligible; for a wife's second marriage, while it had no effect upon an indictment, would certainly make void her appeal against her husband's murderers. In the sense in which we are now to speak of it, an appeal does not mean a resort to a higher tribunal from the decision of a lower, in order to obtain a reversal of the judgment, which is the ordinary acceptation of the term, but it signifies a criminal prosecution by one private person against another, on account of some particular injury he has suffered, rather than for the offence against the public. The thing itself no doubt arose out of the Saxon practice of the weregild, in which an offender was allowed or held bound to make compensation to the party injured for any grievous offence committed. In the east, where the government is little concerned in the prosecution of offenders, it is for the next of kin to avenge the slaughter of his kinsman; and if they choose to compromise the matter, little more is said about it.

In England appeals were formerly permitted in treason, murder, rape, robbery, mayhem, and arson. In robbery, mayhem, and arson, the parties injured must be the appellants. In rape it might be brought either by the husband or the next of kin. In murder the appeal is given to the wife, on account of the loss of her husband; and therefore, if she marries again before or pending her appeal, the appeal is gone. But if there be no wife,

or she herself be implicated or suspected, the appeal devolves upon the next heir male of the murdered ancestor. In the case of murder it would seem as if the law of England made an exception to its well-known rule, that no man shall be tried or put in jeopardy twice for the same offence; for a man who had been tried and acquitted upon an indictment for murder, might certainly afterwards be appealed and tried upon an appeal for the same offence, and could not plead in bar that he had been acquitted on the indictment. Anciently it was permitted to any subject to appeal another of treason; for in the eye of the law, the king was supposed to be the father of his country, and every subject was supposed to have a filial interest in protecting and preserving him from treason and treasonable attempts.

We are all familiar with the beautiful opening scene of the play of Richard II, which turns upon such an appeal brought by Henry Bolingbroke against the Duke of Norfolk. The king is heard speaking thus :—

> "Old John of Gaunt, time-honoured Lancaster,
> Hast thou, according to thy oath and bond,
> Brought hither Henry Hereford, thy bold son,
> Here to make good the boisterous late appeal
> Against the Duke of Norfolk, Thomas Mowbray?"

To which John of Gaunt replies—"I have, my liege." And the king proceeds—

> "Tell me, moreover, has thou sounded him
> If he appeals the duke on ancient malice,
> Or worthily, as a good subject should,
> On some known ground of treachery in him?"

And afterwards the accuser and the accused are brought in to make the appeal in form; and a day is fixed for the trial to take place before the earl marshal, when those fatal consequences ensued which ended in displacing the monarch from his throne, and seating his once zealous champion there in his place. Remembering this, does it not seem a little singular that amongst the first acts of the usurper, after he was seated on the throne,

was that to obtain a statute professing to abolish, and which virtually did abolish, all appeals for treason?

In the trial of an appeal, instead of leaving the matter to be decided by a jury, the appellee, except against a widow bringing appeal for the murder of her husband and a few others, might demand a trial by battel, duel, or single combat. This sort of trial was carried on with great solemnity, and in it the appellant and the appellee were required to fight in their own persons, and not by such hired champions as we saw in the case of the prior of Lenton. The form and manner of an appeal in felony are very solemn; for the appellee or party accused, when he pleads "not guilty," throws down his glove, and declares that he will defend his innocence with his body. The appellant or accuser, taking up the glove which has been so thrown down, replies that he accepts the gage, and is ready to make good his appeal body for body. The appellee thereupon taking the gospels in his right hand, and with his left holding the right hand of his antagonist, swears aloud the following oath:—"Hear this, thou man whom "I hold by the hand, by name of baptism John, that I, who call "myself by name of baptism Thomas, did not feloniously murder "thy father William by name, nor am I any way guilty of the "said felony, so help me God and his saints, and this I will "defend against thee by my body as this court shall award." To which the appellant, holding the gospels in his right, and in his left his adversary's right hand, replies as follows:—"Hear this, "O man whom I hold by the hand, who callest thyself Thomas "by name of baptism, that thou art falsely perjured, because "that thou feloniously didst murder my father William by name, "so help me God and his saints, and this I will prove against "thee by my body, as the court shall award."

The battle is then to be fought with the same weapons, the same solemnities, and the same oaths that we heard of in the case of the prior of Lenton. And if the appellee be so far vanquished that he cannot or will not fight any longer, he shall be judged to be hanged immediately, by which, as well as if he

were killed in the battle, Providence was deemed to have decided in favour of the truth, and the appellee's blood is, *ipso facto*, attainted. But if he kill the appellant, or can maintain the fight from sun rising until the stars appear in the evening, he shall be acquitted. So also, if the appellant become recreant, and pronounces the horrible word *craven*, he shall lose his title to be a liegeman and shall become infamous, while at the same time the appellee shall recover his damages and be for ever quit, not only of the appeal, but likewise of all indictments for the same offence.

In 20 and 21 Richard II, John Burbacke and John Halywell appear by the *Cheshire Records* to have been engaged in such an appeal at Chester. *(Ches. Records.)*

Whoever looks back into the history of the law, will find that this doctrine of appeals for murder was not a mere theory resting in black letter, but that instances of a resort to it were of very frequent occurrence, and that in some of these instances, either as the accused or as counsel, some very exalted individuals have been concerned.

In the year 1690, Spencer Cowper, an eminent counsel in practice at the bar, after having been tried and acquitted upon an indictment for the murder of Sarah Stout, was again tried for such murder upon an appeal brought by her heir-at-law. He was innocent of the crime; but it took all his own skill, and all the skill and learning of his still greater brother, William Cowper, the future Lord Chancellor, to establish the informality of the proceedings and to succeed in quashing the appeal before it came to an actual combat. In 1728 another appeal, in which William Lee, the future Lord Chief Justice, was counsel for the appellant, gave rise to one of his celebrated sayings. The learned counsel having strenuously and somewhat unscrupulously exerted himself to procure a conviction in an appeal of murder against Bambridge and Corbett, and not having succeeded in his object, was heard to say that in future he would have nothing to do with facts, but would thenceforth stick wholly to law!

But methinks I hear you ask why I take so much pains to

recall a practice which died with our ancestors and became extinct long ago. But what if I was myself at the funeral of some of these revolting forms which you think were buried so long ago? It is within my own knowledge that some of the humane ornaments of the English bench a few years ago, instead of listening to a war of words, had nearly been called upon to witness an actual battle waged before them at their bar, where they were to sit umpires of the strife.

In the year 1817, Mary Ashford, a country girl of some place in Warwickshire, was found drowned in a pit, and it seemed highly probable that she had not drowned herself, but had met her death by some foul play. Suspicion fell upon Abraham Thornton, her lover, in whose company she had been last seen, and he was tried upon an indictment and acquitted of the murder. But some further circumstances having afterwards come to light, William Ashford, the deceased's brother and heir, appealed Thornton of the murder. The appellee waged his battle and offered to fight it out, according to the law of appeal; and the appellant, in order to oust him of that mode of defence, pleaded specially the violent circumstances of suspicion existing in the case, to which Thornton replied other facts and the fact of his previous acquittal; and ultimately the Court of King's Bench held the appellant's plea to be insufficient, and ordered Thornton to be discharged. The narrow escape, however, which the court and the age had had from an awkward dilemma, now drew the attention of the legislature to this branch of the law, and the Act of 59 Geo. III, c. 46, was consequently passed, by which all appeals of murder, treason, felony, and other offences were at once and for ever abolished.

### A FEW POPULAR LAWS.

Hanging up in the Warrington Museum may be seen the picture of a withered female face wearing the brank, or scold's bridle, an instrument, made as inflexible as iron and skill can make it, for

holding an unruly tongue quiet. Such an instrument hangs beside the picture; and almost within the time of living memory Cicely Pusill, an inmate of the Warrington workhouse and a notorious scold, was seen wearing this brank for half an hour in the public streets of the town. One can hardly conceive a punishment more degrading to the offender, or one less calculated to refine the spectators, and yet it seems to have been common in every part of England; and there are very few manors in which a brank is not kept, to shew the rude manner in which our fathers curbed an unruly tongue. Cicely Pusill's case still lingers in tradition as the last occasion of the application of the brank in this neighbourhood, and its application will soon pass into history. In the meantime, let us hope that a Lancashire scold may become as rare as a Lancashire witch, of that old type which our ancestors burnt for witchcraft, and for which the Lancashire witches have had ample revenge by setting our hearts on fire ever since.

But, notwithstanding the universal use of the brank, it would puzzle a lawyer to find any mention of it in his books, and it would puzzle him still further to discover who was to judge of the necessity for applying it, or when, or by whom, or on whose authority it was to be put upon the offender. In our fathers' days, there were evidently more popular punishments than are recognised either in the text books or the statutes. I think it very probable that the keeping of the brank in old times devolved upon the constable, who seems to have been the executive factotum in the administration and application of the criminal law throughout England. Wherever there was no other officer to perform a duty, it was thrown upon the constable; and yet there is no officer with whom our satirists so often make merry. Our great bard, though he lays the scene in Messina, in Sicily, no doubt drew his Dogberry from some original whom he had seen in his own country. But the old constable, within our own day, has been supplanted by the county police; a far more intelligent class, who are, or should be, influenced less by the desire to punish crime, than by their vigilance to prevent it.

JOHN DOE AND RICHARD ROE.

As I began this paper with a high sheriff's state procession, I now end it by commemorating the funeral of two of the most ancient characters in the law, John Doe and Richard Roe. In mediæval times, it seems to have been the practice to trust no man's word. Every man in the decennary was bail for every other. A member was not returned to parliament, nor a juryman summoned, but he was required to put in sureties; and even monarchs were subjected to the same rule. A great king of France, in borrowing a volume, was obliged to deposit a considerable quantity of plate, and to find one of his nobles to join him as his surety for its safe return; and our own Henry V, before his voyage to France, which led to the victory of Agincourt, only raised the necessary funds by borrowing money on other security than his word; and the hostages given or taken on concluding a treaty of peace in old times were only a part of the same rule.

In our English courts of law, this species of distrust was particularly observable. In every suit at law, sureties were required from each of the parties, on the ostensible ground that if the plaintiff failed in his action, or the defendant in his defence, the sureties might answer for the consequences. From being general, this practice came to be used in every case, as well where it was really necessary as where it was not, until its universality made it degenerate into mere form, and the sureties or pledges into fictitious persons, who figured under the names of John Doe and Richard Roe, on nearly every occasion; and it grew into a maxim that in a fiction of law there is equity.

How strange it seems, that the most prosaic of all professions should thus be the most fruitful in fictions. Did the plaintiff in his action require sureties to be invoked, John Doe and Richard Roe came at his call; and were equally ready to answer the call of his adversary. From being at first used only as sureties, these fictions or shadows came at length to be plaintiffs and defendants

themselves; especially in actions of ejectment for land, which always proceeded upon the fiction that either John Doe or Richard Roe was concerned in unlawfully evicting the rightful owner. In time, John Doe and Richard Roe became the parents of two fruitful families, among which were John a Nokes and Richard Stiles, Peter Puretitle and Paul Notitle, Henry Hart and Peter Pert; besides the Hugh Hunts, and I know not how many others. As was natural, some of these fictitious persons have found their way into the pages of our poets, and amongst others into *Hudibras*; where the editor, Dr. Gray, gives some notes upon them. (Vol. II, pp. 155-6.)

Born under our English Justinian, Edward I, after having survived all the changes in the law which have happened between the Plantagenet times and our own, these legal Methuselahs might have still lived on, had not a recent statute taken away the old action of ejectment; and then, being unable to bear the demolition of this last legal prop of their house, they died. From the purlieus of Westminster hall, so long their home, they were removed to the opposite abbey; where the Westminster boys celebrated their obsequies in one of their dramas, and wrote, or might have written, this pæan over their graves—

> "All hail John Doe and Richard Roe for ever,
> Whom law united, not the grave shall sever."

## CONCLUSION.

And now, in conclusion, though we have still much to learn, and though like the Alderman of Beetlebury, and perhaps with no better reason, we are all fond of looking back with a lingering preference for old times, there are none of us, I think, who would seriously wish to have back the Saxon or the Norman age, when Wamba the Jester and Gurth the Swineherd—he who contributed to his master's mirth, and he who supplied his table—were slaves; who wore collars, like his hounds, to indicate their serfdom, and to tell their own and their master's names; and might be punished for disobeying laws which gave rights to their master

but nothing but wrongs to them. That the law is not retrograding must be evident, I think, from the view which we have been enabled to take of it, but its progress, like the advance of the pointer in the figure with which we set out, is so slow that we can only note it by observing it at somewhat wide intervals. Heaven, which designed that the progress should be onward, designed also that it should be slow, in order that the legislator might not glory in it as alone his work. Paul may plant and Apollos water, but the increase comes from above. In this, as in every work, it is for man to labour in hope, and to trust in Providence for the issue. Progress is certain, that we may hope and not despair ; it is slow, that we may not presume.